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Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights

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Articles

AUTONOMY, SELF-GOVERNANCE, AND THE MARGIN OF APPRECIATION: DEVELOPING A JURISPRUDENCE OF DIVERSITY WITHIN UNIVERSAL HUMAN RIGHTS

Douglas Lee Donoho*

INTRODUCTION

Profound diversity is a persistent characteristic of the international community. The implications of this diversity, however, have increasingly generated controversy within the international human rights system, challenging its tendency toward universalism. Many human rights advocates, particularly Westerners, have uncritically assumed that the widespread adoption of international treaties has established human rights that are universal in scope and content. Yet the manifestations of many human rights are still nascent and their specific meanings unclear.¹ In practical terms, rights are contextual in many important respects.² For example, the degree to which free speech

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¹ See *infra* notes 102-10 and accompanying text. See also Michael Perry, *Normative Indeterminacy and the Problem of Judicial Role*, 19 HARV. J. L. & PUB. POL'Y 375, 382-83 (1996); Douglas Donoho, *The Role of Human Rights in Global Security Issues: A Normative and Institutional Critique*, 14 MICH. J. INT'L LAW 827, 837-43, 847-50 (1993); Henry Steiner, Book Review (International Human Rights In A Nutshell) 84 AM. J. INT'L L. 603, 604-05 (1990). The specific meaning of many human rights remains under-developed. Reasons for this include the relative newness of the norms and the international system's limited capacity for rendering authoritative interpretations of rights. See Donoho, *supra* at 866-68.

² See *infra* notes 4, 7-10, 29, 46-48, 76-77, 105-09 and accompanying text. See also Luan-Vu Tran, *The Canadian Charter of Rights and Freedoms: Justification, Methods, and Limits of a Multicultural Interpretation*, 28 COLUM. HUM. RTS. L. REV. 33, 39-45 (1996); Carol Weisbrod, *Universals and Particulars: A Comment on Women's Human Rights and Religious Marriage Contracts*, 9 S. CAL. REV. L. & WOMEN'S STUD. 77, 80-87 (1999) (discussing how cultural and religious orientations manifest widely divergent legal approaches to marriage rights).

protects sexually explicit expression from government censorship varies significantly among different societies and cultures.³ Rights appear to have different implications among different peoples depending upon their particular political, religious, social, and cultural orientations.⁴

The power of this empirical observation, coupled with a deep sensitivity to the ideals of self-determination,⁵

³ See, e.g., *Handyside v. United Kingdom*, 1 Eur. H.R. Rep. 737 paras. 47-49 (1976); *Muller v. Switzerland*, 13 Eur. H.R. Rep. 212 paras. 36-43 (1988); *Miller v. California*, 413 U.S. 15, 24-26 (1973). See also Andrew Jacobs, *Rome Wasn't Built in a Day: The Subtle Transformation in Judicial Arguments Over Gay Rights*, 1996 WISC. L. REV. 905 (1996); Scott Goodroad, Comment, *The Challenge of Free Speech: Asian Values v. Unfettered Free Speech, An Analysis of Singapore and Malaysia in the New Global Order*, 9 IND. INT'L & COMP. L. REV. 259, 259-62 (1996); Lawrence Solum, *The Value of Dissent*, 85 CORNELL L. REV. 859, 863 (2000) (describing the effects of culture and political life on the meaning of free speech within the United States); Abdullahi An-Na'im, *The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts*, 11 EMORY INT'L L. REV. 29 (1997); 1999 Human Rights Watch Report, *Freedom of Expression on the Internet*, at <http://www.hrw.org/hrw/worldreport99/special/internet.html> (last visited Sept. 9, 2001).

⁴ There is extensive literature exploring various cultural, political and social orientations regarding human rights. See, e.g., Symposium, *East Asian Approaches to Human Rights*, 2 BUFF. J. INT'L L. 193 (1996); HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS (Abdullahi An-Na'im ed., 1992) [hereinafter CROSS-CULTURAL PERSPECTIVES]; Abdullahi An-Na'im, *Problems of Universal Cultural Legitimacy for Human Rights*, in HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES 331-68 (Abdullahi An-Na'im & Francis Deng eds., 1990) [hereinafter HUMAN RIGHTS IN AFRICA]; HUMAN RIGHTS IN EAST ASIA: A CULTURAL PERSPECTIVE (James Hsiung ed., 1985); Laksham Marasinghe, *Traditional Conceptions of Human Rights in Africa*, in HUMAN RIGHTS AND DEVELOPMENT IN AFRICA, 32-45 (Claude E. Welch & Ronald Meznar eds., 1984); THE MORAL IMPERATIVES OF HUMAN RIGHTS: A WORLD SURVEY (Kenneth Thompson ed., 1980) [hereinafter MORAL IMPERATIVES]; HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES (Adamantia Pollis & Peter Schwab eds., 1979) [hereinafter HUMAN RIGHTS PERSPECTIVES]. See also *infra* notes 7, 8, 18, 29, and 32. Empirical evidence that different societies understand rights differently does not, of course, resolve the question of whether the international system should, or can as a legal matter, demand or promote universal, uniform meaning. See *infra* text accompanying notes 55-101.

⁵ Self-determination is a contested concept, subject to a wide variety of interpretations and meanings. See generally Ved P. Nanda, *Revisiting Self-Determination as an International Law Concept: A Major Challenge in the Post-Cold War Era*, 3 ILSA J. INT'L & COMP. L. 443, 443-45 (1997) [hereinafter Nanda, *Revisiting*]; Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT. L. 1, 1-57

democratic self-governance, autonomy,⁶ and cultural diversity, has posed significant and lingering dilemmas for

(1993); Joe Oloka-Onyango, *Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium*, 15 AM. U. INT'L L. REV. 151, 151-55, 166-68 (1999). One of its central manifestations concerns the potential for "internal" self-determination in which "peoples" are argued to possess the right to determine their own political and cultural identity. See Hannum, *supra*, at 57-63. The most extreme and controversial implication of this idea is that groups of "peoples" (however defined) may manifest their self-determination through secession. See *id.* at 40-57; Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257, 266 (1981). A second, fairly noncontroversial implication of internal self-determination, however, is simply that the populace of existing nation states have a right to determine their political, religious, economic and cultural identity free from outside interference. See, e.g., G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960) ("freely determine their political status and freely pursue their economic, social and cultural development"). Despite the potent controversy regarding the "secessionist" implications of internal self-determination, the impulse to recognize the autonomy of peoples to determine their own political, social and economic future remains a powerful force on the international scene. See, e.g., Fredric Kirgis, Jr., Comment, *The Degrees of Self-Determination in the United Nations' Era*, 88 AM. J. INT'L L. 304, 306-08 (1994); Nanda, *Revisiting*, *supra* at 445-46, 450-51. See generally Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, 16 MICH. J. INT'L L. 733 (1995) (book review). Most recently, the Final Declaration of the 1993 U.N. World Conference on Human Rights carefully disavowed the secessionist implications of self-determination, while adding the important proviso that government must be representative of all people within its jurisdiction without discrimination:

[the right of self-determination] shall not be construed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/24 (Part I) (1993), at para. 2, *reprinted in* 32 I.L.M. 1661 (1993) [hereinafter Vienna Declaration] (emphasis added). See also James Wilets, *The Demise of the Nation-State: Towards a New Theory of the State Under International Law*, 17 BERKELEY J. INT'L L. 193 (1999).

⁶ As used here, autonomy refers to the idea that individuals, specific groups of people, or even political entities such as nation states, should be allowed to manifest and develop their social, cultural, political and economic preferences with a degree of independence from the prevailing legal order. In international law and human rights, the value of autonomy is clearly reflected in the liberal, individualistic orientation of most human rights treaties. See *infra* note 59. More critical for

the international human rights system. How can human rights be sufficiently universal to make them appropriate subjects for meaningful international regulation and yet consistent with, and appropriate to, the world's diversity? Can international organizations effectively promote and protect universal rights and yet respect and accommodate local preferences reflecting genuine cultural, political, religious, and moral diversity? Should they?

These questions are not abstract. The potential for divergent interpretations of rights is enormous and will ultimately affect the lives of millions. Practices such as veiling, female genital surgeries, and gender segregation are attacked as barbaric anachronisms and violations of human rights⁷ while simultaneously defended as cultural or

present purposes, autonomy values are also reflected in the discourse over "internal" self-determination. See *supra* note 5. Both the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR), for example, contain an apparent endorsement of an "autonomy" version of self-determination through a common Article One: "All peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development." International Covenant on Civil and Political Rights, *adopted by the General Assembly* Dec. 16, 1966, art. 1, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights, *adopted by the General Assembly* Dec. 16, 1966, art. 1, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]. See also Hannum, *supra* note 5, at 44-45, 57-63. In this regard, autonomy regimes are often proposed as an alternative to secession in the context of self-determination claims by ethnic or indigenous populations. See, e.g., S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 75 IOWA L. REV. 837 (1990); see *infra* notes 20-21. Because autonomy implies self-governance, it is also an obvious feature of the developing right to democratic governance. See Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 53-56 (1992). Even the concept of democratic governance is, however, subject to significant interpretive variations that depend on each society's expressions of political and social preferences. See, e.g., Reginald Ezetah, *The Right to Democracy: A Qualitative Inquiry*, 22 BROOK. J. INT'L L. 495, 502-03, 513-14 (1997).

⁷ See, e.g., A.M. Rosenthal, *Female Genital Torture*, N.Y. TIMES, December 29, 1992, at A15; HUMAN RIGHTS WATCH REPORT ON SAUDI ARABIA, at <http://www.hrw.org/wr2k/Mena-08.htm> (last visited Sept. 9, 2001); Note, *What's Culture Got to Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1950-53 (1993); John Okwubanego, Comment, *Female Circumcision and the Girl Child in Africa and the Middle East: The Eyes of the*

religious imperatives.⁸ Similarly, governments and social majorities frequently invoke the "cultural card" to justify such things as unequal inheritance, denial of same sex marriage, and expulsion of homosexuals from the military.⁹

World Are Blind to the Conquered, 33 INT'L LAW. 159, 165, 173-79 (1999); Kristin Miller, Comment, *Human Rights of Women in Iran: The Universalist Approach and the Relativist Response*, 10 EMORY INT'L L. REV. 779, 791-800 (1996); Riane Eisler, *Human Rights: Toward an Integrated Theory for Action*, 9 HUM. RTS. Q. 287, 295-96 (1987); Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 MICH. J. INT'L L. 307, 390-93 (1994) (discussing the use of dress restrictions including the chador); Donna Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT'L L. & POL. 795, 795, 824-30 (discussing gender segregation and veiling); Mohammed Ghasemi, *Islam, International Rights & Women's Equality; Afghan Women Under Taliban Rule*, 8 S. CAL. REV. L. & WOMEN'S STUD. 445, 459-64 (1999).

⁸ For general discussions regarding religious and cultural justifications for such social practices, see Sullivan, *supra* note 7, at 795, 810-14, 824-46; Urtan Kahliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in the Shari'ah*, 2 BUFF. J. INT'L L. 1, 3-5, 18-42 (1995); Okwubanego, *supra* note 7, at 168-69, 175-79; Bassam Tibi, *Islamic Law/Shari'a Human Rights, Universal Morality and International Relations*, 16 HUM. RTS. Q. 277, 278 (1994); Reza Afshari, *An Essay on Islamic Cultural Relativism in the Discourse of Human Rights*, 16 HUM. RTS. Q. 235, 252-60, 263-66 (1994). See also Benji Anosike, *Claims of "Genital Mutilation" A New Ploy for Gaining United States Asylum*, N.Y. BEACON, May 20, 1996, at 11, available in 1996 WL 15800335 (rejecting the factual premises of asylum claims alleging fear of circumcision and lamenting negative stereotyping of African cultures); Maynard Merwine, *Letter to the Editor*, N.Y. TIMES, Nov. 24, 1993, at A24 (condemning the ethnocentrism of A. M. Rosenthal's attack, see *supra* note 7, on female circumcision); Zainab Chaudhry, *The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law*, 61 ALB. L. REV. 511 (1997) (refuting "misconception" that Islamic law disfavors women); Richard Shweder, *What About "Female Genital Mutilation"?*, 129 DAEDALUS 209 (Vol. 4, Sept. 2000) (critiquing the empirical basis for Western "anti-FGM" literature and reviewing alternative cultural viewpoints regarding the practice). These perspectives on religious or cultural imperatives have caused some Islamic states and politicians to suggest partial rejection of the current catalogue of western-based international human rights norms. The 1990 Cairo Declaration on Human Rights in Islam, for example, has been proposed as an alternative, Islamic vision of human rights. See Heiner Bielefeldt, *Muslim Voices in the Human Rights Debate*, 17 HUM. RTS. Q. 587, 596-97, 601-05 (1995); Mayer, *supra* note 7, at 327-50, 374-77.

⁹ See, e.g., 1999 HUMAN RIGHTS WATCH REPORT ON DISCRIMINATION AGAINST WOMEN, available at <http://www.hrw.org/hrw/worldreport99/women/women3.html#top> (last visited Sept. 9, 2001); HUMAN RIGHTS WATCH, GAY AND LESBIAN RIGHTS, available at <http://www.hrw.org/jre/worldreport99/special/gay.html> (last visited Sept. 9, 2001). See also Jack Anderson, *Iranian Homosexuals Fear for Their*

Laws preventing divorce, abortion, consensual sodomy, or assisted suicide may reflect genuine and deeply ingrained local values and yet be manifestly inconsistent with international human rights standards.¹⁰ The crux of such controversies concerns the complex and subtle interplay between the desire for universal international standards and the need to accommodate the diverse views found throughout the world.

These fundamental conflicts are complicated by repressive governments, bent on deflecting the heat of international scrutiny, that have feigned concern over cultural diversity and autonomy to serve their political purposes.¹¹ Such disingenuous claims of diversity, often under the guise of cultural relativism,¹² have left most

Lives, S.F. CHRON., Jan. 22, 1990, at A17 (public beheading of three homosexual men and stoning of two accused lesbians); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (denying right to same sex marriage under the Hawaiian state constitution). But see Robert Morris, *Configuring The Bo(u)nds of Marriage: The Implications of Hawaiian Culture & Values for the Debate About Homogamy*, 8 YALE J.L. & HUMAN. 105 (1996) (arguing that Hawaiian culture traditionally recognized same sex relationships).

¹⁰ Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986), with *Toonen v. Australia*, Comm., No. 488/1992, U.N. Doc. CCPR/c/50/D/488/1992 (1994) (holding that Tasmanian sodomy law violates the ICCPR). See also *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981) (holding that sodomy laws violate the European Convention on Human Rights); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988); *Modinos v. Cyprus*, App. No. 15070/89, 67 Eur. Comm. H.R. Dec. & Rep. 295 (1991); James Wilets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989, 1024-30 (1997) (reviewing the divergent cultural and legal views of consensual homosexual relationships). Compare *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (upholding ban on gays in the U.S. military), with *Lustig-Prean & Beckett v. The United Kingdom*, 29 Eur. H.R. Rep. 548 (Sept 27, 1999) and *Smith & Grady v. The United Kingdom*, 29 Eur. H.R. Rep. 493 (Sept 27, 1999) (concluding that the expulsion of gays from military service violates the European Convention).

¹¹ See Mayer, *supra* note 7, at 327-50, 371-77; Anne Bayefsky, *Cultural Sovereignty, Relativism and International Human Rights: New Excuses for Old Strategies*, 9 *RATIO JURIS* 42, 44-47, 52-53 (1996); *infra* text accompanying notes 47-63. Even those writers most sensitive to diversity in human rights acknowledge the enormous potential for abuse that the relativist insight provides. See, e.g., Adamantia Pollis, *Cultural Relativism Revisited: Through a State Prism*, 18 *HUM. RTS. Q.* 316 (1996).

¹² See *infra* text accompanying footnotes 25-31. See generally Douglas Donoho,

international human rights bodies largely preferring to ignore the issues posed by diversity rather than develop a coherent jurisprudence to account for them.

To a significant degree, the political rhetoric surrounding the tired debate over cultural relativism¹³ has obscured the deeper issues that global diversity presents for the international human rights system. Relativism is neither synonymous with, nor necessary to, a pluralistic approach to human rights that acknowledges diversity, autonomy, and the value of self-governance. Indeed, the vast majority of states have long discredited the extreme relativist position of some repressive states, who claim that diversity delegitimizes international scrutiny or renders some human rights inapplicable. There remains, however, a genuine and persistent desire among some non-Western societies to manifest their cultural and social preferences—and avoid Western domination—in the development of human rights norms. Ultimately, acknowledgment of diversity and accommodation of self-governance and autonomy within the international human rights system seems inevitable, necessary, and appropriate.¹⁴ Whether for right or wrong, the political organizations of the United Nations have apparently endorsed this view, reflecting the international community's seemingly contradictory impulses toward universalism and diversity.¹⁵ Perhaps more importantly, by relying upon the primacy of state implementation and weak mechanisms for international supervision,¹⁶ the international system is already structured to allow for

Relativism Versus Universalism in Human Rights: The Search For Meaningful Standards, 27 STAN. J. INT'L LAW 345, 348-51, 368-69, 382-86 (1991).

¹³ See *infra* text accompanying footnotes 45-54.

¹⁴ See *infra* Part III-C.

¹⁵ See *infra* text accompanying notes 51-57, 78-84. See also Diana Ayton-Shenker, *The Challenge of Human Rights and Cultural Diversity*, at <http://www.un.org/rights/dpi1627e.htm> (last visited Sept. 10, 2001).

¹⁶ See *infra* text accompanying notes 92-99.

diverse interpretations of the system's generally abstract rights.¹⁷

The critical question addressed in this Article is how international institutions can develop a jurisprudence that strikes an appropriate balance between universal rights and the competing values of self-governance, autonomy, and diversity, while simultaneously providing effective international supervision of human rights standards. In particular, I focus upon parallels that exist between these competing forces and the accommodations that judicial institutions have traditionally made between individual rights, democratic majorities, and the public interest. Accordingly, I consider whether useful analogies may be drawn from European and North American jurisprudence that has, to some degree, developed judicial doctrines that balance similar competing concerns. I evaluate doctrines involving hierarchies of rights, levels of scrutiny, and the European Human Rights System's "margin of appreciation" doctrine, among others. I conclude that much of this jurisprudence, particularly to the extent that it addresses critical questions about appropriate standards of review and institutional competency, provides important insights regarding how international human rights institutions might successfully navigate the international communities' seemingly contradictory impulses toward universal rights and diversity.

Part I describes the background and context of the persistent debate over universal rights and diversity. Part II details how this debate rose to political prominence at the 1993 World Conference on Human Rights. Part III attempts to untangle the resulting political rhetoric of universal versus relative rights from a largely pragmatic legal perspective, taking into account the political and social realities in which the debate is currently being

¹⁷ See *infra* text accompanying notes 92-99, 111-32. See Donoho, *Relativism*, *supra* note 12, at 348-51.

waged. Part IV identifies the critical role of the decision-making process and the varying methods of interpretation. Part V describes various doctrines developed by the European Court of Human Rights and the United States Supreme Court to accommodate analogous concerns, and evaluates the appropriateness of such doctrines in the international human rights setting.

I. UNIVERSAL VERSUS RELATIVE RIGHTS: THE CURRENT DEBATE OVER DIVERSITY

The world is comprised of a rich tapestry of diverse religious, social, political, cultural, and moral communities. This richly textured diversity has manifested itself in a variety of ways in the evolution of the international human rights system. Even in the system's earliest stages, accusations of Western domination and cultural imperialism challenged the manifestly Western orientation of its founding norms.¹⁸ This challenge to the philosophical

¹⁸ See, e.g., American Anthropological Ass'n, *Statement on Human Rights*, 49 AM. ANTHROPOLOGIST 539 (1947); Chung-Shu Lo, *Human Rights in the Chinese Tradition*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS 186 (UNESCO ed., 1949). See also Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Application*, in HUMAN RIGHTS PERSPECTIVES, *supra* note 4; RAIMUNDO PANNIKAR, *IS THE NOTION OF HUMAN RIGHTS A WESTERN CONCEPT?* DIOGENES 120, 75-102 (1982). When the United Nations adopted the Universal Declaration in 1948, only 58 of the more than 190 current world states were members. G.A. Res. 217 A(3), U.N. GAOR, U.N. Doc. A/810, at 71. Western domination of the United Nations during its creation has lead some commentators to challenge the Declaration's status despite ubiquitous endorsements of its universality by U.N. institutions. See Pollis & Schwab, *supra*, at 8-10; Bihari Kausikan, *Asia's Different Standard*, 92 FOREIGN POL'Y 24, 34 (1993) ("The hard core of rights that are truly universal is smaller than many in the West are wont to pretend. Forty-five years after the Universal Declaration was adopted, many of its 30 articles are still subject to debate over interpretation and application . . ."). But see BARRY E. CARTER & PHILIP R. TRIMBLE, *INTERNATIONAL LAW* 898-900 (1995) (arguing that the Universal Declaration has become binding customary international law). See generally Hurst Hannum, *The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1996).

orientation of international human rights led to the creation of international norms protecting social, cultural, and economic values,¹⁹ and has prompted the development of group rights and special protections for minorities.²⁰ The desires of cultural, ethnic, or religious minorities for autonomy or self-determination have also found expression in such claims.²¹

As the system's normative framework developed, those resisting change and perceived "westernization" extended traditional "non-interference" and sovereignty defenses²² to include the preservation of cultural or religious preferences.²³ Although commonly phrased in terms of

¹⁹ E.g., ICESCR, *supra* note 6. See generally INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, AND MORALS, 256-64 (Henry Steiner & Philip Alston eds., 1996) [hereinafter LAW, POLITICS, & MORALS].

²⁰ See generally Raidza Torres, *The Rights Of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127 (1991) (discussing the interplay between culture, autonomy and indigenous rights); Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETH. INT'L L. REV. 307 (1982); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, or Linguistic Minorities, G.A. Res. 37/135, 18 December 1982; U.N. Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN. 4/Sub. 2/1994/2/Add. 1, Aug. 26 1994, reprinted in 34 I.L.M. 541 (1995). See also Henry Steiner, *Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539, 1547-51 (1991).

²¹ *Id.* See Anaya, *supra* note 6, at 841-42 nn.20-26; Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Inter-Ethnic Claims*, 21 CARDOZO L. REV. 1095, 1101-03 (2000) (discussing relativism, rights and the claims of cultural minorities in multi-cultural societies); Raidza Torres, *Revisiting the Emerging International Norm on Indigenous Rights: Autonomy as an Option*, 25 YALE J. INT'L L. 291, 292-97 (2000).

²² See, e.g., GRIGORII IVANOVICH TUNKIN, *THEORY OF INTERNATIONAL LAW* 79 (1974); LOUIS HENKIN, *Human Rights and "Domestic Jurisdiction,"* in INTERNATIONAL BILL OF RIGHTS (Louis Henkin ed., 1981). Such sovereignty-based defenses are still commonly espoused by countries such as the People's Republic of China. At the 1993 World Conference on Human Rights, China, India, Bangladesh, and Cuba, all stressed national sovereignty, non-interference, and domestic jurisdiction in formulating their positions. See Bayefsky *supra* note 11, at 47. See also Pollis, *supra* note 11, at 331-32; Mayer, *supra* note 7, at 371-77; Donoho, *Relativism*, *supra* note 12, at 348-54.

²³ See, e.g., Bihari Kausikan, *Asia's Different Standard*, 92 FOR. POL'Y 24, 39 (1993); Sharon Hom, *Commentary: Re-Positioning Human Rights Discourse on "Asian" Perspectives*, 3 BUFF. J. INT'L L. 209, 209-10 (1996); Mayer, *supra* note 7, at

religion and culture, these arguments also clearly cover economic, social, and political preferences as well.²⁴ These challenges to the universality of rights eventually found a powerful rhetorical ally in the philosophical doctrines of cultural and ethical relativism.²⁵ Although relativism has manifested many variants from its modern origins in anthropology and moral philosophy,²⁶ a relativistic viewpoint in human rights essentially posits that values are only valid contextually. This viewpoint is largely based on the empirical observation that moral practices and values vary among societies depending on circumstance, tradition, history and social context.²⁷ Since values are social

313-20, 373-75 (detailing the promotion of this position by China and other states at the 1993 World Conference on Human Rights); Bayefsky, *supra* note 11, at 43, 47-50 (same).

²⁴ See Ghai, *supra* note 21, at 1097; Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT'L & POL. 291 (2000). For ease of expression, I sometimes use the term "diversity" to encompass the gambit of such concerns. Much of the early literature regarding "non-Western" orientations about human rights focused on social, economic and political preferences regarding the role of individuals in society and the individual's relationship to government. This literature emphasizes, for example, socialistic economic relations, the importance of duties, society's collective interests, "group" oriented social relations, and a rejection of traditional liberal notions of rights, dominated by individual autonomy. See, e.g., JOHN F. COPPER ET AL., HUMAN RIGHTS IN POST-MAO CHINA 67-71 (1985); TOM CAMPBELL, THE LEFT AND RIGHTS: A CONCEPTUAL ANALYSIS OF THE IDEA OF SOCIALIST RIGHTS 2-11, 103-22 (1983); Asmarom Legesse, *Human Rights in African Political Culture*, in THE MORAL IMPERATIVES OF HUMAN RIGHTS: A WORLD SURVEY 123-24, 128-30 (Kenneth Thompson ed., 1980).

²⁵ See generally Donoho, *Relativism*, *supra* note 12.

²⁶ See, e.g., RELATIVISM: COGNITIVE AND MORAL (Jack Meiland & Michael Krausz eds., 1982) (reviewing variations in relativist positions); ALISON RENTELN, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM 63-65 (1990); Donoho, *Relativism*, *supra* note 12, at 351-52; Michael Perry, *Are Human Rights Universal? The Relativist Challenge and Related Matters*, 19 HUM. RTS. Q. 461, 498-509 (1997). See also Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEX. L. REV. 523 (1996) (reviewing and critiquing postmodern "perspectivism" in American jurisprudence including "neopragmatism" and "cultural relativism" in the context of human rights).

²⁷ See, e.g., MELVILLE HERSKOVITS, CULTURAL RELATIVISM: PERSPECTIVES IN CULTURAL PLURALISM 14-15, 56 (1972); ELVIN HATCH, CULTURE AND MORALITY: THE RELATIVITY OF VALUES IN ANTHROPOLOGY 3-5, 63-81 (1983); Melford Spiro, *Cultural Relativism and the Future of Anthropology*, 1 CULTURAL ANTHROPOLOGY 259, 259-73 (1986) (critiquing various forms of "descriptive relativism").

constructs dependent on context, the moral validity of any particular practice, one could argue, should be judged solely by those internal norms.²⁸

This relativist viewpoint has potential implications for international human rights ranging from the trivial to the profound.²⁹ Taken to its extreme, relativism appears to

²⁸ See HATCH, *supra* note 27, at 96-101; Spiro, *supra* note 27, at 260-61; RENTELN, *supra* note 26, at 71-72. See also Joan Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, 1992 WIS. L. REV. 131, 134-43 (1992). This proposition, which might be described as "normative relativism," is the most significant and critiqued implication of relativist thinking. One common theoretical critique of normative relativism is that it confuses the "is" with the "ought" in reaching its position of moral agnosticism. It is often also argued that relativism is internally incoherent in that its purported agnosticism is itself premised on the acceptance of a certain moral position; that of toleration of varying moral positions. See Donoho, *Relativism*, *supra* note 12, at 351 n.21. See also Blumenson, *supra* note 26, at 548-53.

²⁹ The relativist perspective may lend support to government justifications for a variety of practices that implicate international human rights standards. See, e.g., *supra* notes 7-10. In the area of free speech, for example, alleged social, cultural, or religious preferences might be used to justify prior restraints, prohibitions against pornography or liberal rules on libel actions brought by government officials. See, e.g., *Open Door Counseling, Ltd. & Dublin Well Woman Centre, Ltd. v. Ireland*, 246 Eur. Ct. H.R. Rep. (ser. A), at 8 (1992) [hereinafter *Open Door*]; *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) (1979); *Miller v. California*, 413 U.S. 15, 24-26 (1973). See also Bihari Kausikan, *An East Asian Approach to Human Rights*, 2 BUFF. J. INT'L L. 263, 269-72 (1995); Goodroad, *supra* note 3, at 259-65. Gender relations and discrimination have provided even more fertile ground for cultural and religious based defenses of government endorsed practices. See Sullivan, *supra* note 7, at 815-54; M. Ghasemi, *Islam, International Human Rights & Women's Equality: Afghan Women Under Taliban Rule*, 8 S. CAL. REV. L. & WOMEN'S STUD. 445, 453-60 (1999); J. Entelis, *International Human Rights: Islam's Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women's Equality and Islamic Law*, 20 FORDHAM INT'L L. J. 1251, 1251-55 (1997); Abdullahi An-Na'im, *Religious Minorities Under Islamic Law and the Limits of Cultural Relativism*, 9 HUM. RTS. Q. 1, 3-4 (1987); Abdullahi An-Na'im, *Human Rights in the Muslim World*, 3 HARV. HUM. RTS. J. 13 (1990). See also *Bhinder v. Canadian National Railway Co.* [1985] 2 S.C.R. 561 (Can. S.Ct.) (Sikh refusal to wear hard-hat instead of traditional turban); *Almost 400 Girls Defy French Headscarf Ban*, Reuters World Service, Jan. 24, 1995, LEXIS, News Library (refusal of French Muslim schoolgirls to remove headscarves); *infra* notes 32, 35. May states maintain inheritance laws that explicitly prefer males based on customary tribal law or social practices patterned upon economic relations favoring male providers? Do the religious and cultural preferences of male-dominated Islamic societies justify gender segregation, unequal educational opportunities and denial of social liberties such as

challenge the very foundation of the international human rights system. In essence, an absolute relativist viewpoint denies the existence of universal values that transcend contextual and national boundaries.³⁰ The existence of such transcendent, universal values, which all individuals are entitled to solely by virtue of their status as human beings, is a primary justification for the internationalization of rights.³¹

It is not surprising that the rise of relativism in human rights discourse has generated enormous political controversy and a substantial body of academic literature.³²

driving? The answers to these questions have profound implications for both individuals and societies worldwide.

³⁰ See, e.g., A. Bozeman, *Law, Human Rights, and Culture*, in *MORAL IMPERATIVES*, *supra* note 4, at 25-29. Nearly everyone, it seems, agrees that there are some universally shared values and prohibitions. See *infra* note 81 and accompanying text.

³¹ See, e.g., Catherine Powell, Symposium, *Celebration of the Fiftieth Anniversary of the Universal Declaration of Human Rights*, 30 COLUM. HUM. RTS. L. REV. 201, 202-03 (1999); Donoho, *Relativism*, *supra* note 12, at 356-60; Rhoda Howard, *Dignity, Community, and Human Rights*, in *HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES*, *supra* note 4, at 81. See also Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848 (1983).

³² Some of this literature continues to focus on the theoretical un-soundness of relativism. See, e.g., Blumenson, *supra* note 26; Perry, *supra* note 26; John J. Tilley, *Cultural Relativism*, 22 HUM. RTS. Q. 501 (2000). See also Fernando Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869 (1985); RENTELN, *supra* note 26, at 62-87. There is also a significant body of legal literature that examines relativist claims in light of specific issues such as women's rights and Islamic doctrine. See *supra* notes 7, 8, 29; Lama Abu-Odeh, *Post-Colonial Feminism and the Veil: Considering the Differences*, 26 NEW ENG. L. REV. 1527 (1992); Leila Sayeh & Adriaen Morse, *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 TEX. INT'L L.J. 311 (1995). In this context, feminist writers have produced some of the most thoughtful discourse on the issues raised by the so-called "relativist challenge." See, e.g., Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509 (1992); Eva Brems, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse*, 19 HUM. RTS. Q. 136 (1997); Tracy Higgins, *Anti-Essentialism, Relativism and Human Rights*, 19 HARV. WOMEN'S L. J. 89 (1996); Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995); Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49 (1993); Isabelle R. Gunning, *Arrogant Perception*,

Most western human rights scholars are hostile to the relativist perspective and many have rejected it outright.³³ Conversely, many non-Western academics have embraced seemingly relativist positions, often from the largely functionalist perspective that international human rights norms will be respected only when interpreted in ways consistent with local sensibilities.³⁴ Some feminist scholars, sensitive to pluralism but wary of the ways in which culture often oppresses women, have looked for common ground between the relativist insight and feminist anti-essentialism.³⁵ Other scholars have expressly rejected the

World-Traveling and Multicultural Feminism: The Case of Female Genital Surgeries, 23 COLUM. HUM. RTS. L. REV. 189 (1992).

³³ See e.g., Perry, *supra* note 26, at 471-75, 481-87 (rejecting relativism as it applies to human rights but suggesting that the argument for pluralism is often confused with relativism); Blumenson, *supra* note 26, at 523, 547-66, 574-76 (critiquing the relativist implications of Richard Rorty's pragmatic anti-foundationalism); Bayefsky, *supra* note 11, at 55-58; Johan van der Vyver, *Universality and the Relativity of Human Rights: American Relativism*, 4 BUFF. HUM. RTS. L. REV. 43 (1998). The debate over relativism in international human rights is reflective of, and similar to, the continuing philosophical debate over the implications of post-modern thinking, including anti-foundationalism, pragmatism, anti-essentialism and the aftermath of legal realism. In this sense, the work of philosophers such as Richard Rorty, Martha Nussbaum, Stanley Fish, Michel Foucault and Joan Williams provide useful insights on the role of cultural diversity in development of legal norms, including human rights. See generally, Blumenson, *supra* note 26.

³⁴ See, e.g., Abdullahi An-Na'im, *What do We Mean by Universal?*, 23 CENSORSHIP INDEX 120 (1994); A. al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 3-4 (1997) (emphasizing the importance of an internal critique in the development of human rights norms in light of cultural imperatives); Daniel Bell, *The East Asian Challenge to Human Rights: Reflections on an East/West Dialogue*, 18 HUM. RTS. Q. 641, 656-60 (1996). See also Abu-Odeh, *supra* note 32, at 1530-38; RENTELN, *supra* note 26, at 68-87 (favoring the development of a relativistic framework for human rights based on empirically discovered cross-cultural values); Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 653-56 (1996) (arguing for the "multiculturalization" of rights and their need for "cultural legitimacy").

³⁵ See, e.g., Brems, *supra* note 32, at 136, 141, 154-59, 163-64; Kim, *supra* note 32, at 65-66, 87-96. See also Engle, *Female Subjects*, *supra* note 32, at 1520-28 (critiquing the failure of some feminists to failure to engage women from other cultures on their own terms); Frances Olsen, *Feminism in Central and Eastern Europe: Risks and Possibilities of American Engagement*, 106 YALE L. J. 2215, 2222-29 (1997) (discussing how the cultural premises of western feminists color their orientation toward perceived harmful cultural practices elsewhere).

"universal versus relative" rights framework, seeking alternative ways in which to examine the issues of diversity.³⁶ Still others have criticized the obvious "statist" orientation of the political debate over relativism and its failure to address the nuanced parameters of issues involving culture, diversity, and oppression.³⁷

Many academics have recognized, sometimes implicitly, that the debate over relativism and universal human rights need not be cast in "either/or" terms.³⁸ These writers believe that "universal" international human rights may vary at some level of understanding without undermining their basic purpose. For example, the core values underlying the right to free speech may be universally shared and preserved even though specific applications of the right vary among societies.³⁹ Internationally, unencumbered political expression might be preserved even

³⁶ See e.g., Diane Otto, *Rethinking the "Universality" of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1,17-18, 31-37, 39-40 (1997); Higgins, *supra* note 32, at 91-92, 97-98, 121-24 (suggesting "international feminist theory" as an alternative vision for accommodating diverse contextual understandings of rights with an emphasis on cross-cultural dialogue). See also Gunning, *supra* note 32, at 197-205; Lewis, *supra* note 32, at 43-55.

³⁷ See, e.g., Hom, *supra* note 23, at 209-14 (1996). See also Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1576-81, 1611-16 (1996); Abu-Odeh, *supra* note 32, at 1528-31; Otto, *supra* note 36, at 13-15 (suggesting that the debate over relativism reflects the continuing geopolitical struggle between competing economic and political interests); Engle, *Culture and Human Rights*, *supra* note 24, at 314-15, 331-32 (suggesting that role of economic and political interests underlying the "Asian values" debate has been overlooked).

³⁸ See authorities cited in *supra* note 34. See also Gunning, *supra* note 32, at 191-93, 198-205 (espousing a multi-cultural dialogue approach to cultural conflicts in human rights); Richard Falk, *Cultural Foundations for the International Protection of Human Rights*, in CROSS-CULTURAL PERSPECTIVES, *supra* note 4, at 44, 45-54; Donoho, *Relativism*, *supra* note 12, at 386-91; Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 407-09 (1984).

³⁹ This line of thinking would similarly define a category of uncontested human rights as universal and essential. Outside of this "core" of universals, where real consensus over meaning is lacking, rights would be subject to more extensive contextual variations. See *infra* notes 76-82, 187-96 and accompanying text. One might describe this latter variation as the "core/periphery" argument. See Brems, *supra* note 32, at 147.

if some societies chose to severely restrict pornography while others do not.⁴⁰

Upon close examination, most of this "middle ground" literature reveals endorsement of a relativist perspective, if at all, solely as a means to an end: the promotion of diversity, pluralism, self-governance, and autonomy.⁴¹ Some undoubtedly would promote diversity as a value in its own right, or simply to preserve cultural or religious traditions.⁴² For many others, the priority is to stave off the relentless and seemingly inevitable domination by Western liberal values.⁴³ Most writers stress the importance of local cultural expression and decisionmaking and argue that human rights must evolve contextually in order to be meaningful.⁴⁴

⁴⁰ See *supra* note 3; *infra* note 192. This approach is consistent with and complimented by the arguments presented by those advocating cross-cultural dialogue and the development of human rights standards from the perspective of local cultures. See An-Na'im, *What do We Mean*, *supra* note 34, at 121-22, 126; Gunning, *supra* note 32, at 197-205; RENTELN, *supra* note 26, at 61-62, 68-87. See also Panikkar, *supra* note 18, at 75-79, 93-94 (cross-cultural "homeomorphic equivalent").

⁴¹ See, e.g., Kausikan, *An East Asian Approach*, *supra* note 29, at 266 (making this observation regarding the so-called "Asian challenge" to international human rights).

⁴² Any nostalgic attempt to freeze cultural practices in the status quo seems largely at odds with the international human rights system's fundamental purpose of seeking progressive improvement in the human condition through change. It also fails to recognize that cultural traditions are not value- or impact-neutral but rather often oppress and thwart the development of full human dignity for some members of a society. See *infra* note 65; Higgins, *supra* note 32, at 91; Rhoda Howard, *Women's Rights in English Speaking Sub-Saharan Africa*, in HUMAN RIGHTS AND DEVELOPMENT IN AFRICA 58-61 (Claude Welch & Ronald Meznar eds., 1984). It also ignores the fact that cultures are not homogeneous or constant but rather contestable, fluid and evolutionary. See, e.g., *infra* note 77.

⁴³ Kausikan, *Asia's Different Standard*, *supra* note 18, at 26, 34-41; Mutua, *supra* note 34, at 589, 598, 653-55; Y. Ghai, *supra* note 21, at 1096 (noting the strong element of nationalism and resistance to western hegemony that underlies the "Asian values" movement in human rights). For a provocative perspective on this "clash" between Western and non-Western values and cultures, see Samuel Huntington, *The Clash of Civilizations*, FOREIGN AFFAIRS 22-41 (1993).

⁴⁴ In contrast to the political agenda of some ardently relativist states, see *infra* note 47, the primary thrust of most relativist leaning scholarship focuses on self-

What is clear, however, is that one need not endorse "relativism" per se or its implications in order to argue that *some* degree of diversity in our understanding, application, and appreciation of *certain* international human rights is necessary or good.⁴⁵ This is particularly true when the issues are viewed from a legal rather than purely philosophical perspective. Ultimately, the real issue is not legitimacy of relativism but rather the degree to which diversity, pluralism, self-governance, and autonomy values will be accounted for within the international human rights system.

II. THE RHETORIC OF RELATIVISM AND UNIVERSALISM AT THE WORLD CONFERENCE

The rhetorical power of the relativist position to ward off international critique has not been lost on repressive governments. Primarily an academic debate during its early stages, relativism has increasingly become a staple component of oppression's rhetorical arsenal. The debate over relativism came to the political forefront during the 1993 U.N. World Conference on Human Rights held in Vienna, Austria. Prior to the Conference, Asian governments raised the issue to prominence by declaring in a preparatory document:

[We] recognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds Human rights must take into account a nation's historical

governance, multiculturalism, and pluralism in the development of human rights standards. See *supra* notes 18, 24, 34, 40. See also Perry, *supra* note 26, at 471-75, 481-87 (distinguishing relativism from pluralism).

⁴⁵ See *infra* text accompanying notes 83-101.

background and culture. Western-based "international" human rights threatens Asia's right to sovereignty and right to development⁴⁶

During the World Conference itself, many non-Western nations (and a host of repressive governments)⁴⁷ pressed their view that the meaning of human rights is relative to the social and political context in which the rights are applied.⁴⁸ Western nations saw this as an attack on the validity of international human rights and mounted a vigorous defense of "universality."⁴⁹ The political rhetoric surrounding the debate reached its zenith in the hyperbole of U.S. Secretary of State Warren Christopher's sound bite:

⁴⁶ Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, Apr. 2, 1993, art. 8, U.N. Doc. A/CONF.157/ASRM/8-A/CONF.157/PC/59, [hereinafter Bangkok Declaration]. Other regional meetings were held for Africa and South America. The regional meeting for Africa was held in Tunis from November 2-6, 1992. This meeting adopted a declaration containing language similar to that endorsed in Bangkok. See U.N. Doc. A/CONF.157/AFRM/14-A/CONF.157/PC/57; Tunis Declaration Item 5 (1992)) ("... no ready-made model can be prescribed at the universal level since the historical and cultural realities of each nation and the traditions, standards and values of each people cannot be disregarded.").

⁴⁷ These states included Bangladesh, China, Colombia, Cuba, Indonesia, Iran, Iraq, Libya, Myanmar, Pakistan, Singapore, Syria, Sudan, and Yemen. See Mayer, *supra* note 7, at 372-73; Bayefsky, *supra* note 11, at 45-47. Support for incorporating considerations of culture and context in the implementation of human rights is, however, not limited to such states. See *supra* at 46-52. Indeed, 34 Asian states signed on to the Bangkok Declaration and 42 African states endorsed Tunis. See *supra* note 46; *infra* note 57.

⁴⁸ See Mayer, *supra* note 7, at 372-79 (describing how these arguments unfolded at the Vienna World Conference). Yang Xiyu, a member of China's delegation, clearly expressed the "relativist position" as follows: "Who can say which is the best? We should allow people to think about human rights in different ways . . . we should follow national conditions, situations and uniqueness." Melanne Civic, *A Comparative Analysis of International and Chinese Human Rights Law—Universality Versus Cultural Relativism*, 2 BUFF. J. INT'L L. 285, 320-21 (1996) (quoting Yang Xiyu).

⁴⁹ Elaine Sciolino, *U.S. Rejects Notion That Human Rights Vary With Culture*, N.Y. TIMES, June 15, 1993, at A1. See also Christian Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts*, 16 HUM. RTS. Q. 740, 741 (1994).

"We cannot let cultural relativism become the last refuge of repression."⁵⁰

The political posturing in Vienna ultimately resulted in endorsement of potentially conflicting positions in the Conference's Final Declaration. With ambiguity typical of diplomatic compromise, the Final Declaration endorses the universality of international human rights but suggests recognition of diverse social, political, and religious "particularities" in their interpretation:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁵¹

This language of compromise is couched in purposefully vague terminology that has allowed both Western universalists and non-Western relativist governments to claim victory even if no one really knows or agrees about its actual meaning. The ambiguity of the Declaration's language has met with similarly contrasting interpretations from the academic community. Depending upon the reader's perspective, the Declaration either conclusively establishes the universality of international human rights⁵²

⁵⁰ See Sciolino, *supra* note 49, at A1.

⁵¹ Vienna Declaration, *supra* note 5, at para. 5.

⁵² See Brems, *supra* note 32, at 151, 154; Jack Donnelly, *Post-Cold War Reflections on the Study of International Human Rights*, 8 ETHICS & INTERNATIONAL AFFAIRS 97, 113 (1994). See also Michael Davis, *Human Rights in Asia: China and the "Bangkok Declaration,"* 2 BUFF. J. INT'L L. 215, 226-28 (1996); Philip Alston, *The Best Interests Principle: Towards A Reconciliation of Culture and Human Rights*, 8 INT'L J. OF LAW & FAM. 1, 9 (1994) (arguing that Vienna unequivocally endorses

or represents a serious and troubling disintegration of that concept at the behest of repressive governments.⁵³ As discussed below, it is probably neither.⁵⁴

Although parsing diplomatic double-speak is perhaps a fool's errand, it is important to account for the overall implications of the Declaration's seemingly conflicting directives. In this regard, one must examine closely the impulses that prompted such language and its practical implications. The next section attempts to unpack the potential meaning of the Declaration's suggestion that rights may be simultaneously universal and diverse, by evaluating more closely the impulses that motivated its adoption. As discussed below, the Declaration's language reflects both divisions within the international community as well as potential directions for the future development of human rights law.

III. DECIPHERING VIENNA: SIMULTANEOUSLY UNIVERSAL AND DIVERSE

The Vienna Conference's Final Declaration emphatically declares that international human rights are universal.⁵⁵ Yet, it suggests at the same time that cultural and religious "particularities . . . must be borne in mind . . ."⁵⁶ On one

universality but only turns back the "crudest" relativist arguments).

⁵³ See Bayefsky, *supra* note 11, at 44-45, 53; Engle, *Culture and Human Rights*, *supra* note 24, at 321-24; Pollis, *supra* note 11, at 331-32. See also Civic, *supra* note 48, at 321 (concluding that the debate "rages on" unresolved after the Vienna World Conference).

⁵⁴ See *infra* text accompanying notes 70-83. The level of generality at which commentators and politicians alike usually make observations about the "universality" of rights often makes it difficult to assess the merits of their positions. See *infra* notes 103-10.

⁵⁵ Paragraph 1 of the Vienna Declaration asserts that the "Universal nature of these rights and freedoms is beyond question." Vienna Declaration, *supra* note 5, at para. 1. What this specifically means, particularly in light of competing language regarding national "particularities," remains an open question. See *infra* text accompanying notes 69-82.

⁵⁶ Vienna Declaration, *supra* note 5, at para. 5.

level, this language could be understood simply as a political compromise, sufficiently vague in its expression to allow both sides to pretend victory. It is probably a mistake, however, simply to dismiss it on those grounds. The use of this ambiguous compromise language, which has been frequently repeated,⁵⁷ reveals the parameters of a critical battle over the future shape of international human rights and the varied motivations of governments, human rights institutions and advocates.

⁵⁷ See, e.g., ASEAN, Kuala Lumpur Declaration on Human Rights, Sept. 1993, preamble, art. 7 (reiterating the Bangkok Declaration), reprinted in Arthur M. Weisburd, *The Significance and Determination of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 99 app., at 144 (1996). The Final Declaration of the Fourth World Conference on Women in Beijing repeated and expanded upon the ambiguous language of Vienna. UNITED NATIONS, FOURTH WORLD CONFERENCE ON WOMEN: ACTION FOR EQUALITY, DEVELOPMENT AND PEACE; BEIJING DECLARATION AND PLATFORM FOR ACTION, U.N. Doc. A/CONF.177/20 (1995) at 5, 108 (reiterating the language of Vienna and adding that "full respect for various religious and ethical values, cultural backgrounds and philosophical convictions of individuals and their communities should contribute to the full enjoyment by women of their human rights" while at the same time calling for the eradication of "harmful cultural practices" affecting women). A more recent example of how some States have chosen to deploy cultural diversity in arguments over international standards occurred during meetings of the Preparatory Commission on the International Criminal Court. During the third meeting of the Preparatory Committee, eleven member states of the Arab League sought to exclude certain crimes of sexual and gender violence from the definition of crimes against humanity when committed within family life. See WOMEN'S CAUCUS FOR GENDER JUSTICE ACTION ALERT, at <http://www.iccwomen.org/icc/pc199912/alert.htm> (Dec. 1, 1999) (resisting the exclusions sought by the Arab League). Commenting on their proposal, these states emphasized the need to account for cultural diversity in defining the elements of crimes. Fearing, for example, that women working at home could claim "enslavement" within Art. 7(1)(c)(iii) of the Rome Statute they sought to exclude, based on religious and cultural grounds, all crimes of sexual violence and persecution that are allegedly committed within the family. See Rome Statute of the International Criminal Court, opened for signature July 17, 1998, U.N. Doc. A/CONF.183/9*; Nizkor English Service Electronic Message, Feb. 8, 2000, on file with author; Lawyer's Committee for Human Rights, *Press Briefing of the NGO Coalition for an International Criminal Court* (Dec. 9, 1999), at <http://www.lchr.org/icc/icc1299.htm>. This effort resulted in proposed compromise language that would limit the Court's jurisdiction to sexual crimes in which "state or non-state entit[ies] 'actively promote or encourage' the crime." WOMEN'S CAUCUS REPORT, at <http://www.iccwomen.org/reports/marpaneleng.htm> (last visited Sept. 18, 2001).

From the perspective of Western states and most advocacy groups, the impulse to declare rights universal is easily understood. One of the philosophical premises underlying the international system is the presumed existence of shared universal values that transcend the nation-state.⁵⁸ Without such universal values, a comprehensive international human rights system involving monitoring and enforcement mechanisms makes little sense. Moreover, variability in the specific meaning of rights greatly complicates, if not compromises, advocacy of any particular position. Consequently, human rights advocates naturally contend that there is a universal, uniform meaning to the rights they defend. It is at least modestly troubling to some that this universal meaning inevitably turns out to correspond directly with the normative heritage of the West.⁵⁹ Although pervasively ethnocentric, this phenomenon stems from an understandable belief that our own rights values have enormous benefits for all human beings.⁶⁰ The widespread

⁵⁸ See, e.g., Donoho, *Relativism*, *supra* note 12, at 356-60; Abdullahi An-Na'im, *Human Rights and Islamic Identity in France and Uzbekistan: Mediation of the Local and Global*, 22 HUM. RTS. Q. 906, 907-08 (2000).

⁵⁹ The current catalogue of international human rights clearly reflects a Western ideological heritage. See generally Mutua, *supra* note 34, at 605-06; Pollis & Schwab, *supra* note 18, at 1-14. See also Kausikan, *Asia's Different Standard*, *supra* note 18, at 26, 34. Western governments are quite capable of using the banner of human rights for cynical purposes. See Aryeh Neier, *The New Double Standard*, 1996 FOREIGN POL'Y 91 (1996); Makau wa Mutua, *Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement*, 4 BUFF. HUM. RTS. L. REV. 211, 245-52 (1998) [hereinafter Mutua, *Looking Past*]. It seems indisputable, however, that on some level the existing framework of international norms reflects basic values in which Western governments and advocates believe deeply.

⁶⁰ The belief that one's own values are the only true values and are valid for everyone is described by anthropologists as ethnocentrism. The process by which this occurs is called "enculturation." See HATCH, *supra* note 27, at ch. 1. Confronting claims of ethnocentrism, some academics have unabashedly embraced the Western, liberal orientation of the existing international human rights system as a superior model for improving the human condition. See, e.g., Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, 76 AM. POL. SCI. REV. 303 (1982). This argument commonly suggests that Western rights notions are functionally required to protect people everywhere from the oppressive power of the modern, industrialized,

popular acceptance of many Western-oriented international human rights norms, at least as generally stated abstractions,⁶¹ demonstrates the merit of this belief.⁶²

On the other side of the debate, reliance on relativism by non-Western states and scholars reflects a mixture of contrasting motives. For some repressive regimes, the lure of relativism undoubtedly lies in its potential for deflecting international scrutiny. Universalists' deep suspicion regarding the motives of those who champion relativism seems well founded. Indeed, prominent among states promoting relativism at the World Conference in Vienna were those on the short list of the World's most egregious violators—measured on virtually any scale—of basic human dignity.⁶³ Only a true Pollyanna would fail to suspect that many of these government's espoused claims of cultural or

bureaucratic state. *Id.* at 311-12; Howard, *Dignity, Community and Human Rights*, in CROSS-CULTURAL PERSPECTIVES, *supra* note 31, at 81. See also Reza Afshari, *An Essay on Islamic Cultural Relativism in the Discourse of Human Rights*, 16 HUM. RTS. Q. 235, 248-52 (1994); Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 AM. J. INT'L L. 593, 624-27 (1997). But see Samuel Huntington, *The West: Unique, Not Universal*, 75 FOREIGN AFF., Nov.-Dec. 1996, at 28, 29-35, 37 (responding to the idea that modernity requires the universalization of Western culture by pointing out that Western liberal ideology preceded the modern industrial state, and that cultural imperialism runs counter to Western moral values of self-determination, democracy, and pluralism).

⁶¹ Most international human rights are expressed in very general and abstract terms. See Donoho, *The Role of Human Rights*, *supra* note 1, at 839. This abstraction allows diverse states with divergent views on the specific meaning of rights to join international human rights treaties in the first instance. Agreement over such abstract and generally stated norms tells us very little about the actual depth of agreement regarding what those rights will mean to different societies in their concrete manifestations. Although most domestically created civil or constitutional rights norms are stated in similarly abstract terms, domestic legal systems typically are capable of developing the concrete meaning of such rights through processes of authoritative interpretation and application which the international system lacks. See *id.* at 843; *infra* notes 110-39 and accompanying text.

⁶² The acceptance of abstractly stated rights norms does not, however, answer critical questions regarding the existence or development of consensus over their more specific and concrete applications. See *infra* notes 71, 102-10 and accompanying text. See also Donoho, *Relativism*, *supra* note 12, at 368-69, 382-86.

⁶³ See *supra* note 47.

religious imperative are nothing more than cynical manipulations meant to undermine the effectiveness of rights.

Yet the appeal of relativism is hardly limited to repressive governments. Especially among non-Westerners, arguments about relativism are a reflection of something far more profound than the misleading, "either/or" dichotomy of universal versus relative rights. For many, the appeal of a seemingly relativist perspective is simply a means to advocate genuine concern over the cultural, social, and political domination of Western values.⁶⁴ It similarly reflects an understandable desire to preserve local traditions and values—a desire that on some level clearly conflicts with progressive human rights development and may serve as the unwitting ally of oppression.⁶⁵ Finally, the relativist perspective may be used to promote self-governance and autonomy—the prerogative to develop the specific meaning of human rights, in accordance with local terms of reference.⁶⁶ To a significant extent, genuine concerns for diversity, pluralism and local autonomy have been obscured by the West's legitimate fear that "relativism" could serve as the "last refuge for oppression."⁶⁷ The "relativist" label has thus become, in the

⁶⁴ See *supra* note 43. See also Kausikan, *Asia's Different Standard*, *supra* note 18, at 26, 31; Mutua, *supra* note 34, at 641-46.

⁶⁵ Cherished cultural traditions very often perpetuate oppressive conditions in society, sometimes in subtle ways not generally recognized by its members. See *supra* note 42. There is perhaps no greater example of this phenomenon than that of women. See, e.g., Arati Rao, *The Politics of Gender and Culture in International Human Rights Discourse*, in *WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 167, 169 (Julie Peters & Andrea Wolper eds. 1995); *infra* note 140 (describing provisions in CEDAW requiring states to eliminate harmful cultural practices). The Final Declaration of the Fourth World Conference on Women held in Beijing clearly reflects recognition of the potential harmful effects of cultural traditions on the lives of women and female children. See *supra* note 57.

⁶⁶ See, e.g., Kausikan, *An East Asian Approach*, *supra* note 29, at 264, 272.

⁶⁷ See *supra* note 50. Reliance on relativism to express these concerns for cultural diversity, self-governance, and autonomy in human rights is probably misplaced. Some might even suggest that relativism has now become a "boogey man," to which the West has dramatically overreacted to ensure the domination of

words of Makau Wa Mutua, a bit like "human rights name-calling."⁶⁸ In this sense, the fears and corresponding rhetoric of the West have created a misleading oppositional narrative that obscures the real and difficult issues that genuine diversity poses for the international human rights system.⁶⁹

As is often true in political debates, the competing motivations of universalist and relativist governments have been manifested in arguments imprecisely cast in "either/or" terms; that is, all rights are, in all of their manifestations, either universal or relative. Yet one plausible reading of the compromise language of the Vienna Declaration suggests that this is a false dichotomy. Rather, it may be that the Vienna Declaration reflects the notion that international human rights can be simultaneously universal and variant.

The meaning of this suggestion is not, however, self-evident. How is it possible that international human rights may acknowledge diverse cultural and social "particularities" and still be universal in any meaningful sense?⁷⁰ Does it mean that *some* rights are universal while

western values under the banner of universal rights. See Kausikan, *The Ideology*, *supra* note 29, at 267-68, 279 (describing Western "over-reaction" to the "simple description of reality" in the Bangkok Declaration as a reflection of insecurity over values and a reaction to Asian's failure to "become good [W]esterners . . .").

⁶⁸ See Mutua, *The Ideology*, *supra* note 34, at 598.

⁶⁹ Diane Otto has pointed out that the debate over relativism also reflects and obscures a deeper ideological, economic and political struggle between North and South over "Truth" and dominance in a post-cold war era. Otto, *supra* note 36, at 15-18. See also Kausikan, *An East Asian Approach*, *supra* note 29, at 279-83; Engle, *Culture and Human Rights*, *supra* note 24, at 314-15, 331-32.

⁷⁰ From a theoretical, philosophical perspective, a common answer from academics is that rights, as a manifestation of moral values, are either universal or relative to context, but not both. See, e.g., *supra* note 32. The detailed and exhaustive literature debating the theoretical and philosophical possibility of universal truths, long pre-dating the modern human rights system, perhaps reveals the pragmatic futility of such discourse. Equally cogent and exquisitely reasoned arguments have been presented on both sides of the issue of "universal truths" for literally hundreds of years. Such abstract expositions illuminate, but are incapable of resolving on theoretical terms alone, the practical political conflict that underlies

others are not? Does it mean that a variety of culturally specific interpretations of a given right may nevertheless satisfy a state's legal obligation to recognize and enforce it? These suggestions raise, in turn, other troubling questions. For example, does not acknowledgement of contextual variability in rights thwart their progressive development and potential for inducing dynamic change? Does it eliminate the transcendent quality of rights that renders them functionally meaningful? Does not such variability necessarily rest upon the untenable premise that some human beings are entitled to less or more protection based on the arbitrary circumstances of their birth? Is a woman born in Saudi Arabia less deserving of personal liberty, freedom of expression, and autonomy than a woman born in Western Europe? The mixture of motives underlying the debate, and the compromise language it produced in Vienna, provide useful insights about possible answers to such questions. It is essential in this regard to move beyond the highly generalized and abstract terms that have characterized the political debate.

A. *What is Meant By "Universal Rights"?*

There are, of course, different possible specific interpretations to the general position that rights are universal. For some this may undoubtedly mean that even the most specific applications of *all rights* are the same for *all people* under *all circumstances*. Under this view, rights must be *uniform* in meaning, content, and application in order to be "universal." For example, the international right to privacy either includes protection for homosexual relations within the privacy of the home, or it does not. The

the debate. Some legal academics, particularly feminist legal scholars, have been flexible and pragmatic in their treatment of the issues, often suggesting that an accommodation of cultural variation within "universal" rights is both possible as a legal matter, and functionally desirable. See authorities cited in *supra* notes 31, 32, 34.

answer to this question does not depend upon social, cultural, or religious preferences, or circumstances prevailing in the defendant state. The meaning of privacy is uniform even in its most specific manifestations.⁷¹

This absolutist position regarding universality appears largely untenable. First, if nothing else, the history of the debate and the compromises reflected in pronouncements, like the Vienna Declaration, make it abundantly clear that a great many people and governments simply do not share this view of universality.⁷² Second, an absolutist position appears highly impractical, if not counterproductive, to the promotion of effective and meaningful international human rights.⁷³ Finally, an absolutist approach tends to promote a widely unwelcome and undesirable homogenization of peoples and cultures. Given the enormous dominance and proselytizing nature of modern Western culture, it is, in this regard, implicitly ethnocentric. If rights are to have

⁷¹ A formalistic legal argument for this position could be developed based on the existence of state consent to human rights treaties. One could argue, for example, that treaty ratification obligates each state party to protect and implement the rights "as declared" in the treaty text. This view, however, simply begs the question about what the rights "as declared" actually mean and what the state parties have in fact consented to when ratifying the text. See Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77, 80-93 (1989); *infra* note 110. Treaty rights are typically stated as general abstractions and are, like all legal principles, essentially indeterminate in meaning. See Steiner, *supra*, at 77-86; Martti Koskenniemi, *The Future of Statehood*, 32 HARV. INT'L L.J. 397, 399-400, 405-06 (1991); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1371-82 (1984); Donoho, *The Role of Human Rights*, *supra* note 1, at 839-47. The mere existence of an agreement to "promote" or "render effective" free speech, tells us almost nothing about what that obligation actually entails since "free speech" is an entirely malleable concept that gains meaning only through interpretation and application. See *infra* text accompanying notes 103-11. One might reasonably argue, of course, that the obligations created by the treaty include a promise to abide by whatever interpretations the international community subsequently arrives at regarding the specific meaning of the rights. Although theoretically plausible, this view does not comport well with the existing structure of the international human rights system, the authority given to its institutions, or typical treaty text. It also seems at least doubtful that state parties actually intended this result. See *infra* note 109.

⁷² See *supra* notes 41-69 and accompanying text.

⁷³ See *infra* text accompanying notes 84-92.

singular meanings and uniform content across the wide spectrum of world cultures and political systems, then someone's view of that meaning and content must prevail.⁷⁴ There seems little doubt under current circumstances that any such "uniform content" is expected to follow Anglo-European traditions and not those of Islamic, Asian, or developing world societies.⁷⁵ Western sensibilities, disguised as universal human rights, are promoted at the cost of genuine diversity, pluralism, self-governance, and local autonomy.

Alternatively, non-absolutist conceptions of the term "universal" are both possible and less objectionable internationally. The drive toward universality rests, in its best light, on the premise that there are transcendent values that all human beings need, share, and are entitled to enjoy.⁷⁶ The universality of such values and their embodiment as abstract human rights norms does not itself imply uniformity in their specific manifestations in every context.⁷⁷ In essence, there may be various specific

⁷⁴ The more specific the call for uniformity becomes, the more likely it is to reflect ethnocentric dogma. If a particular application of a right preserves the core value of a human right, the position that another specific alternative application should be preferred may often reflect nothing more than ethnocentric bias favoring one's own way of doing business. See *supra* note 60.

⁷⁵ See, e.g., Mutua, *The Ideology*, *supra* note 34 (arguing that international human rights law and discourse is virtually tautological with Western liberal ideology). See also *supra* notes 4, 18, and 59-60.

⁷⁶ This is not to say, of course, that there are no rights that in fact have uniform specific content under all circumstances. Most alleged relativists readily acknowledge and embrace the notion that a "core" of universal and uniform rights already exists. See, e.g., Kausikan, *Asia's Different Standard*, *supra* note 18, at 34. Indeed, there may be many such rights (prohibition of torture, genocide, summary execution, among others) and recognition of others will undoubtedly develop over time. See *infra* note 81 and accompanying text.

⁷⁷ Thus, when read in conjunction with the reference to "particularities," the Vienna Declaration's admonition that "all States" have a duty to protect "all human rights," leaves open the question of how such rights may be manifested in divergent societies. See *supra* note 51 and accompanying text. In this regard, it is important to bear in mind that the specific meaning of most domestically protected rights within Western societies are continually contested and altered through social, legal, and political processes. Thus, the meaning and specific implications of the Constitutional right of privacy in the United States is not uniformly embraced

applications of a right that, while producing divergent outcomes, nevertheless preserves the core human rights value over which international consensus exists. In this sense, the Vienna Declaration's emphasis on universality might simply stand as a strong endorsement of the view that there exists consensus over a core of human rights *values* that must be universally protected by all governments that have promised to uphold them.⁷⁸ The competing reference to "particularities" correspondingly implies that divergent applications, interpretations, and outcomes may satisfy this core obligation. There is, if you will, more than one way to 'skin' the human rights 'cat.'

B. What is Meant by Bearing National "Particularities" in Mind?

Different understandings may also be given to the Vienna Declaration's directive that the diversity of human culture must be borne in mind. To some, this may imply that certain rights are not applicable in certain societies. Repressive governments may similarly suggest that it delegitimizes international scrutiny or external pressure to change existing social practices. Such extreme views are clearly inconsistent with the basic concept of international rights and the entire structure of the existing international

within American society. Groups of differing social, cultural and religious orientations continually press their view of that right in the political and legal arenas. See *infra* notes 87, 107. In this fashion, rights are often the vocabulary used to mediate social and cultural clashes within a pluralistic society. See *infra* text accompanying notes 144-52.

⁷⁸ The natural law oriented argument that such universal values apply to states that have not obligated themselves in a formal legal sense remains problematic. The international legal order remains state centric and largely positivist despite increasing inroads into traditional sovereignty and changes in our concepts of world order. See *infra* note 92. See generally Louis Henkin, *That "S" Word: Sovereignty, Globalization and Human Rights, Et Cetera*, 68 *FORDHAM L. REV.* 1 (1999); Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 *STAN. L. REV.* 959 (2000) (reviewing STEPHEN D. KRASNER, *Sovereignty: Organized Hypocrisy* (1999)).

human rights system.⁷⁹ They are also inconsistent with the universal rights language prominently emphasized in the Vienna Declaration and in over fifty years of human rights development.⁸⁰ If nothing else, the almost obsessive reiteration of the "universality" of human rights in international instruments lays to rest these extreme claims. Nearly all governments and societies appear to believe it indisputable that universal human rights values exist, have been identified as such, and may be developed and implemented through international efforts. What they disagree about is precisely how such rights may be manifested in diverse contexts.

C. *Reconciling The Language of Vienna*

It is probable, therefore, that the elements of relativist language in the Vienna Declaration reflect no more than a widespread desire among non-Western states to manifest local preferences, preserve a degree of autonomy in the implementation of rights, and promote diversity values. Thus, in its best light, such language is motivated by the idea that the manifestation of human rights must somehow accommodate communal preferences and recognize diversity and self-governance *wherever possible without violating underlying universal values*.⁸¹

This position suggests an undefined balance between universal values and local preferences. At a minimum, the international community's continued emphasis on universality demands that culturally based variations in

⁷⁹ See *supra* note 31 and accompanying text.

⁸⁰ In this sense, the recognition of universality in Vienna puts to rest the extreme relativist position that some rights have *no applicability whatsoever* in certain societies. Some claim that even the most prominent proponent of this "non-interference" version of relativism, the People's Republic of China, has begun to concede that a core of universal rights exists on some level and are appropriate subjects of international concern. See Davis, *supra* note 52, at 222-29.

⁸¹ See *supra* notes 38-44 and text accompanying *infra* notes 82-100.

rights must be compatible with, and preserve, core universal values. It similarly requires that diversity and autonomy concerns not undermine the progressive development of human rights or serve as an excuse for oppression or uncritical preservation of the status quo.

The Vienna Declaration may be seen, therefore, as a practical compromise among competing motivations. It essentially directs international institutions to accomplish a difficult and delicate task—interpret the specific meaning of rights in ways that allow diversity, self-governance, and autonomy, while maintaining core, universal human rights values. In the case of select rights, such as those relating to the physical integrity of the individual, there may be little or no room for variation.⁸² For other rights, there may be little actual consensus over their specific meaning and significant potential for variations that nevertheless preserve core universal values.⁸³ For still others, it may turn out that consensus is lacking even over the supposed core value represented in the abstract normative standard. In such cases, the level of shared understanding over specific meaning may be so shallow as to cast doubt on the existence of the right itself as a meaningful international standard.

⁸² See *supra* note 76; Donoho, *Relativism*, *supra* note 12, at 377, 387. There are a variety of ways to identify those rights for which universal consensus over specific meaning may exist. There are, for example, a number of rights that virtually all states have endorsed and for which culturally based variations are empirically implausible. Donoho, *supra* note 12, at 382 n.141. See also *supra* note 77. Other rights have been given some specific content in the treaty text itself (e.g., secret ballots, segregation of minors from adult criminal defendants, etc.) or subsequent international declarations. See, e.g., United Nations Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/1034 (1975). Ultimately, a process of dialogue and debate among governments, advocates, scholars, and international institutions should progressively develop and expand consensus over the specific, concrete meaning of rights.

⁸³ See *supra* notes 3, 39-40 and accompanying text; *infra* notes 180-95 and accompanying text.

While the potential for abuse of this approach leaves most human rights advocates enormously uncomfortable,⁸⁴ it reflects practical realities and avoids the alternative dilemma of a homogenizing, Western-dominated, and absolutist universal position. First, from a primarily functional perspective, there is reason to believe that the effectiveness of human rights ultimately depends, at some level, on their consistency with the prevailing social, cultural, and religious traditions of the society in which they are to be applied.⁸⁵

This does not mean, of course, that individual rights should be generally defined by popular sentiments. The very notion of individual rights that has driven the current system refutes this idea. Protection of individuals from majoritarian abuse is undoubtedly an important, if not fundamental, function of many human rights standards.⁸⁶ The application of human rights to protect individuals from state action will, however, frequently be unpopular, at least in functional democracies where the government's actions are presumably prompted by majoritarian will.

At least within democratic legal systems, rulings that go against the will of the majority are accepted as binding

⁸⁴ See *supra* note 11. Apart from potential abuse by those in power, this approach may also be criticized for its tendency to undermine progressive development of rights or reduce rights to their lowest common denominators.

⁸⁵ See *supra* notes 34, 40.

⁸⁶ This view is itself, of course, subject to an accusation of western bias since it stresses the autonomy of the individual and a liberal democratic view of government and society. See, e.g., Mutua, *The Ideology*, *supra* note 34, at 640-46, 653-57. See also *supra* note 24; Huntington, *The West*, *supra* note 60, at 33-34, 37; Franck, *Is Personal Freedom*, *supra* note 60, at 624-27 (arguing that freedom of conscience and individual autonomy are part of an emerging civilization of modernity rather than a domination of Western preferences). It is also, however, implicit in the entire structure and orientation of the current international system. See Donnelly, *Human Rights*, *supra* note 60, at 304-05, 311-14; Franck, *supra* note 60, at 594, 626-27. The prominence of an individualistic conception of rights in the international human rights system does not, in any case, imply agreement over the appropriate balance between individual and societal interests. This balance is a critical point of tension that often serves to mediate claims and defenses based on cultural diversity and self-governance. See *infra* text accompanying notes 145-52, 167-70, 198-209.

despite their unpopularity.⁸⁷ Among other important reasons, this is at least partly because the protections given minorities are consistent, on some level, with the social and moral traditions of that society⁸⁸ and are reached through a process perceived as legitimate.⁸⁹ In contrast, the acceptance of rulings issued by international bodies among local populations and governments is currently weak at best.⁹⁰ Moreover, the human rights obligations upon which such decisions rest are not based directly on a domestically generated source such as a constitution, but rather are derived from a treaty obligation commonly perceived as "external" to the body politic. Hostile government officials will find it easy to resist unpopular interpretations of rights that are at odds with prevailing social and moral traditions. Under these circumstances, some level of cultural consistency will probably be a critical element in the effective and progressive development of international

⁸⁷ That unpopular rights (or lack of rights) are accepted as legally binding does not imply lack of continued political and social contestation. The persistent debates over abortion rights, sexual orientation, and the death penalty in the United States are clear examples. See *supra* note 77; *infra* note 106.

⁸⁸ An important condition in Western societies supporting the acceptance of unpopular individual liberties is the existence of a "rights consciousness." At least in liberal democracies, the general acceptance of the notion of individual rights protections seems to be an important factor both in the creation of effective institutions and in the acceptance of unpopular individual liberties. See, e.g., *infra* notes 214-48 and accompanying text.

⁸⁹ See generally Alan Hyde, *The Concept of Legitimization in the Sociology of Law*, 1983 WIS. L. REV. 379, 387-89, 392-93, 397, 423 (1983) (reviewing and critiquing theories concerning the role of "legitimacy" in fostering compliance with domestic legal norms). See also THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 19-22, 25-26, 91-96 (1990); Oscar Schacter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L L. 300, 311-12, 314 (1968).

⁹⁰ See Mutua, *Looking Past*, *supra* note 59, at 234-36, 239; Donoho, *The Role of Human Rights*, *supra* note 1, at 861-62. Australian reactions to the Toonen decision, *supra* note 10, present an interesting reflection of this dynamic. After the U.N. Human Rights Committee (HRC) declared that a Tasmanian anti-sodomy statute was contrary to privacy rights under the ICCPR, the Australian popular press castigated the Australian federal government for "abdicating" sovereignty to an unaccountable international body rather than for its support of the HRC's substantive position. See LAW, POLITICS, & MORALS, *supra* note 19, at 739-41 (providing excerpts).

human rights standards within domestic legal systems.⁹¹ Unless dominant public opinion perceives an international interpretation of a right to be appropriate (legitimate) within its own terms of reference, it is unlikely to be accepted in practice.⁹²

Second, the existing system is already structured, whether by design or default, to produce significantly diverse interpretations of rights. The existence or nonexistence of a legal obligation to protect rights is itself a function of popular preferences and governmental prerogative. Most rights obligations are based on the positive law of treaties. States are either free to consent to these obligations or not.⁹³ Even when treaty rights are consented to, many states' obligations are significantly tempered by extensive reservations, declarations, and understandings.⁹⁴ The unfortunate reality is that such

⁹¹ See *supra* note 34. Cultural consistency, or at least sensitivity, will ultimately also improve the perceived legitimacy of the international decision-maker.

⁹² See *supra* notes 34, 40 and accompanying text. This factor most clearly plays itself out in terms of individual liberties, which currently still dominate international human rights law. Even within the context of purely domestic civil liberties, an accommodation has always been necessary between the interests of the individual and society at large. Prevailing social and cultural preferences are inevitably considered by legal decisionmakers and balanced against the claimed interests of the individual right holder. See *infra* text accompanying notes 145-52, 167-70, 197-203.

⁹³ The requirement of state consent to treaty obligations is a fundamental and persistent precept of international law doctrine. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 604-05, 619-20 (3d ed. 1979); Vienna Convention on the Law of Treaties, adopted May 22, 1969, art. 34, U.N. Doc. A/CONF.39/27, reprinted in 8 I.L.M. 679, 693 (1969). See also *supra* note 78. Customary international law obligations are not generally thought to be based strictly on consent, however. It is also clear that neither states nor international institutions have felt constrained in their scrutiny of human rights situations by the positivist orientation of international law. See Donoho, *Relativism*, *supra* note 12, at 364-67. See also Paul Kahn, *American Hegemony and International Law, Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1, 11-12 (2000).

⁹⁴ Although the number of state parties to international human rights treaties has grown enormously over the last ten years, so has the widespread use of sweeping reservations that attempt to significantly curtail the specific obligations accepted. See Henkin, *That "S" Word*, *supra* note 78, at 4, 12; Engle, *Culture and*

reservations are inevitably designed to eliminate potential interpretations of rights seen as inconsistent with municipal law and popular sensibilities.⁹⁵

Two other important features of the current international human rights system tend, as a practical matter, to produce variability in the meaning of rights. First, the international system is, on nearly all levels, premised on the primacy of the national implementation of rights.⁹⁶ The central obligation created by the major human rights treaties is one of result. State parties are obligated to "give effect" to the rights recognized in the treaty through their domestic legal systems.⁹⁷ Since rights are inevitably expressed in the most

Human Rights, *supra* note 24, at 295 (reviewing reservations made by Islamic states to key provisions of the Convention on the Elimination of Discrimination Against Women); William Schabas, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child*, 3 WM. & MARY J. WOMEN & LAW 79, 91-107 (1997).

⁹⁵ See, e.g., Engle, *Culture and Human Rights*, *supra* note 24, at 295-96; Donoho, *Relativism*, *supra* note 12, at 364 n.79. The reservations made by Brunei Darussalam, Afghanistan, and Djibouti to the Children's Convention are emblematic of the tendency of states to use reservations to gut their substantive obligations, as exemplified below:

The Government of Brunei Darussalam expresses its reservations on the provisions of the said Convention which may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the State religion, and without prejudice to the generality of the said reservations, in particular expresses its reservation on articles 14, 20 and 21 of the Convention.

United Nations, *Treaty Body Database*, at <http://www.unhchr.ch/tbs/doc.nsf> (last visited Dec. 21, 2001); United Nations, *The U.N. Treaty Collection*, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/chapterIV.asp> (last visited Aug. 31, 2001) (providing the text of reservations made by 74 of the state parties to the Children's Convention). See Convention on the Rights of the Child, G.A. Res. 25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc A/RES/44/25, adopted by the U.N. General Assembly Nov. 20, 1989, reprinted in 28 I.L.M. 1448 (1989) [hereinafter Children's Convention]. See also *infra* note 110.

⁹⁶ See, e.g., Christina M. Cerna, *East Asian Approaches To Human Rights*, 2 BUFF. J. INT'L L. 201, 210 (1996); Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT'L ORG. 599, 613-15 (1986). See also Certain Aspects of the Laws on the Use of Languages in Education in Belgium, 1 Eur. H.R. Rep. 252, 284 (A/6) (1968) (Convention mechanisms are subsidiary to national implementation of rights); *infra* note 167.

⁹⁷ E.g., ICCPR, *supra* note 6, art. 2; ICESCR, *supra* note 6, art. 2. See also Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under*

general and indeterminate terms, each state party enjoys significant interpretive discretion in their initial implementation of the rights.

Second, international human rights institutions have, with some important exceptions,⁹⁸ been created with their wings carefully clipped so as to ensure a limited role, largely confined to toothless supervision, monitoring and promotional activities.⁹⁹ Even where adjudicative-type functions are allowed, exhaustion of remedies is a ubiquitous requirement and powers of enforcement are virtually nonexistent.¹⁰⁰ When the primacy of national

the International Covenant on Economic, Social and Cultural Rights, 9 HUM. RTS. Q. 156, 164-77 (1987); Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in *THE INTERNATIONAL BILL OF RIGHTS* 311 (Lois Henkin ed., 1981).

⁹⁸ The institutions of the European human rights system have developed into an important exception to the usual pattern of limited institutional authority and effectiveness. See *infra* notes 216-20 and accompanying text. See generally Laurence Helfer & Anne-Marie Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997) (promoting the European system as a model of effective international adjudication of human rights). The institutions recently created by the international community to prosecute crimes against humanity in the former Yugoslavia and Rwanda might also be cited as possible exceptions to this pattern. See, e.g., Panel, *War Crimes Tribunals: The Record and Prospects*, 13 AM. U. INT'L REV. 1383 (1998).

⁹⁹ See Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERKELEY J. INT'L L. 277, 279-82 (1999); Donnelly, *International Human Rights*, *supra* note 96, at 613-15; Donoho, *The Role of Human Rights*, *supra* note 1, at 855-68; Mutua, *Looking Past*, *supra* note 59, at 216-19, 233-37; Allyn L. Taylor, *Globalization and Biotechnology: UNESCO and an International Strategy to Advance Human Rights and Public Health*, 25 AM. J. L. & MED. 479, 514-18 (1999).

¹⁰⁰ See, e.g., Mutua, *Looking Past*, *supra* note 59, at 235, 239. The decisions of the European Court for Human Rights and the Inter-American Court of Human Rights are both technically "binding." Nevertheless, actual enforcement of the Inter-American Court's judgments has continued to prove problematic. See, e.g., Holly Dawn Jarmul, *The Effect of Decisions of Regional Human Rights Tribunals on National Courts*, 28 N.Y.U. J. INT'L L. & POL'Y 311, 317-18 (1997). States have similarly tended to ignore the recommendations of treaty-based monitoring bodies. See, e.g., Dana D. Fischer, *International Reporting Procedures*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 188 (Hurst Hannum ed., 1994); Helfer & Slaughter, *supra* note 98, at 345 (noting that the HRC's follow-up process regarding Optional Protocol decisions received state responses on only 81 out of 154 cases finding violations and that in only 30 percent of these 81 cases did the state express a willingness to comply).

implementation is coupled with this very weak system of international supervision by institutions without binding authority, widely diverse interpretations of rights are inevitable, if not contemplated.

In short, the international system is currently characterized by a structure that practically ensures wide diversity in the interpretations of rights. Indeed, it seems probable that many states, both in negotiating the original text of treaties and in subsequent ratifications, fully intended this result in order to preserve sovereign prerogatives. Taken together, these factors give practical support to the notion, implicitly expressed in the Vienna Conference's Final Declaration, that specific applications of rights may vary by culture and context, so long as core universal values are preserved.

But what does it mean to say that the specific manifestations of human rights may sometimes vary by context and culture so long as universal core values are protected? A useful answer to this question is not possible in the abstract. For some rights, like freedom from torture or summary execution, there is little room for interpretive variation due to nearly universal consensus over specific contextual meaning. Some rights are simply not susceptible to significant cultural, social, or political variations. In contrast, there are rights on the opposite end of the spectrum for which there may be disagreement even over the presumed universal core value. Agreement over the definition of "core values" may itself ultimately determine what specific variations are allowable without destroying the right. Free speech, for example, may be defined as narrowly as free political expression relating to governance, or as broadly as protection for all facets of human expression, including blasphemous pornography. Whether pornography, commercial speech, hate speech, or other inflammatory opinions are protected internationally, and under what circumstances, depends on one's initial

view of the "core value" protected by the right to free speech.¹⁰¹

Answers regarding permissible variations in the application of rights must, therefore, be worked out through a process of case-by-case decisionmaking and interpretation, much as it is within domestic legal systems.¹⁰² In the human rights context, this process will inevitably raise delicate questions about international supervision and the allocation of authority. Tracing out how and where the task of accommodating diversity, self-governance and autonomy may be best accomplished, is the subject of the next section.

IV. GIVING MEANING TO RIGHTS: MEDIATING CLAIMS OF DIVERSITY THROUGH CASE-BY-CASE DECISION MAKING AND INTERPRETATION

Even a casual observer of the international human rights system will discover a plethora of generally stated, abstract norms covering most aspects of human behavior.¹⁰³ For

¹⁰¹ See, e.g., Kausikan, *An East Asian Approach*, *supra* note 29, at 269-72. See also *supra* note 3.

¹⁰² See *infra* notes 136-57 and accompanying text.

¹⁰³ Among the hundreds of international human rights instruments promulgated under U.N. authority since 1945, there are at least seven major multilateral treaties with more than one hundred state parties each. As of August 31, 2001, the ICESCR and ICCPR, *supra* note 6, and the Conventions on Genocide, Racial Discrimination, Women, Torture, and Children had 142, 144, 130, 156, 165, 119, and 191 state parties, respectively. See Convention on the Prevention and Punishment of the Crime of Genocide, *adopted by the U.N. General Assembly* Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; International Convention on the Elimination of All Forms of Racial Discrimination, *adopted by the U.N. General Assembly* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD]; Convention on the Elimination of All Forms of Discrimination Against Women, *adopted by the U.N. General Assembly* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted by the U.N. General Assembly* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Torture Convention]; Children's Convention, *supra* note 95; MILLENNIUM SUMMIT MULTILATERAL TREATY FRAMEWORK, Sept. 6-8, 2000, U.N.

some governments and human rights advocates, the existence of this catalogue of generally stated, abstract norms is frequently the end of the inquiry rather than the beginning. This simplified view, much like vague assertions about "universality,"¹⁰⁴ fails to account for a more complex legal reality. Standing alone, generally stated abstract norms such as equal protection, privacy, free speech, or family life are even more indeterminate internationally than they are within domestic legal orders.¹⁰⁵ The specific meaning and potential application of such elastic concepts is simply not self-evident within the enormously diverse settings of the international community. Indeed, vagueness and abstraction are the foundations that support widespread adoption of human rights treaties by widely divergent states in the first instance, often concealing an underlying lack of consensus over specific meaning.¹⁰⁶

Thus, widespread state agreement to a treaty regime protecting "privacy"¹⁰⁷ or respect for "the best interests of

Doc. DPI/2130; U.N. Treaty Collection, *supra* note 95 (providing the texts of multilateral human rights treaties promoted under the United Nations). There are also three comprehensive regional human rights treaties covering a wide variety of human rights concerns. *See infra* note 116. *See also* Richard B. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 4-8 (Hurst Hannum ed., 3d ed., 1999).

¹⁰⁴ *See supra* notes 54, 61-62, 71.

¹⁰⁵ *See supra* notes 1, 61-62, 71. *See also* Koskeniemi, *supra* note 71, at 399-400, 405-06; Alston, *supra* note 52, at 18. Although the textual indeterminacy of rights stated solely in abstract terms is manifest, some measure of concrete meaning may be added through the process of interpretation and application. *See infra* notes 135-38 and accompanying text. There is, however, a deeper level of indeterminacy that surrounds all legal concepts, even after generations of exegesis by sophisticated legal processes. Thus, rights discourse in the United States has included a significant challenge to liberalism's reliance on rights as an instrument of constructive social change based, at least in part, on their inherent indeterminacy. *See, e.g.*, Tushnet, *supra* note 71, at 1363-94. *See generally* Anthony Chase, *The Left on Rights: An Introduction*, 62 TEX. L. REV. 1541, 1553-61 (1984) (summarizing distinct critiques of rights).

¹⁰⁶ *See, e.g.*, Abdullahi An-Na'im, *Conclusion*, in CROSS-CULTURAL PERSPECTIVES, *supra* note 4, at 431-32; DAVID P. FORSYTHE, HUMAN RIGHTS AND WORLD POLITICS 32-34, 39, 180 (1983).

¹⁰⁷ The right of privacy is recognized in many of the major human rights treaties.

the child"¹⁰⁸ does not by itself imply consensus over whether such rights protect certain specific behavior.¹⁰⁹ As in domestic legal systems, the specific meaning of such abstractions must be developed over time through a process of interpretation and application. Internationally, such questions of interpretation involve a complex matrix of legal and practical considerations including state intent, institutional mandate, context, and the nuanced interplay between national implementation and international supervision.¹¹⁰ In this regard, choices regarding

It is abundantly clear, however, that substantial disagreement exists among (and within) societies and governments regarding the precise meaning and content of the right. See *supra* notes 77, 86. The potential interplay between privacy and sexual orientation issues provides just one of many examples. See Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 726-27 (1999) (discussing competing visions of the specific implications of privacy and private choice within the American polity); Jean L. Cohen, *Is There A Duty Of Privacy? Law, Sexual Orientation, And The Construction Of Identity*, 6 TEX. J. OF WOMEN & L. 47, 88-93 (1996); Andrew Koppelman, *Why Gay Legal History Matters*, 113 HARV. L. REV. 2035, 2057-58 (2000) (book review) (noting the indeterminacy of the term "privacy," as well as the likelihood of divergent applications of the concept among U.S. states); Brenda Sue Thornton, *The New International Jurisprudence on the Right to Privacy: A Head-On Collision With Bowers v. Hardwick*, 58 ALB. L. REV. 725, 758-74 (1995); .

¹⁰⁸ See, e.g., Alston, *supra* note 52, at 4-5, 11-15, 17-18; Donoho, *The Role of Human Rights*, *supra* note 1, at 839-47.

¹⁰⁹ See *supra* notes 61-62, 71, 103 and 104. Compare Toonen v. Australia, Comm., No. 488/1992, U.N. Doc. CCPR/c/50/D/488/1992 (1994); Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981); Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) (1988); and Modinos v. Cyprus, App. No. 15070/89, 67 Eur. Comm. H.R. Dec. & Rep. 295 (1991) with Bowers v. Hardwick, 478 U.S. 186 (1986). See generally Thornton, *supra* note 107, at 758-74; Clarice B. Rabinowitz, *Proposals for Progress: Sodomy Laws and the European Convention on Human Rights*, 21 BROOK. J. INT'L L. 425 (1995); Jennifer C. Lukoff, *South Africa Takes the Initial Step Towards a Brilliant Twenty-First Century: A Comparative Study of State v. Kampher & Bowers v. Hardwick*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 459 (1999).

¹¹⁰ See *infra* notes 162-211 and accompanying text. The degree to which states have obligated themselves to follow decisions by international monitoring bodies regarding the meaning of rights is subject to continuing debate. Although such decisions (e.g., responses to state reports, general comments, and committee views on individual petitions) are not technically binding, the treaty committees have been given supervisory functions that would imply some authority to interpret treaty text. It is clear, however, that many states have not acted as though they consider such interpretive work authoritative. See *supra* note 100. In 1994, the HRC boldly declared in General Comment 24(52) that it had the authority to determine the validity of state reservations. See Schabas, *supra* note 94, at 90-95, 109; Robert

institutional authority and the appropriate methods and goals of interpretation are critical to the development of the specific parameters of human rights obligations and ultimately essential to the debate over their universal versus variable character.¹¹¹

International Mechanisms for Interpreting the Meaning of Rights

The process of interpretation and application of international human rights norms may take place in a variety of forums and on different levels. Within the existing international human rights system most of these opportunities for interpretation are somewhat underdeveloped. Given the primacy of national implementation,¹¹² the first layer of interpretation will theoretically be made by national authorities. Like the proverbial fox in the human rights henhouse, state parties

Rosenstock, *Current Development: The Forty-Ninth Session of the International Law Commission*, 92 AM. J. INT'L L. 107, 110 (1998). The HRC also announced that reservations found invalid, such as the U.S. reservations on the death penalty, were legally "severable" such that the reserving state was a full party to the treaty as if no reservation had been entered. Human Rights Comm., General Comment No. 24, Nov. 2, 1994, para. 18, U.N. Doc. CCPR/C/21/Rev/Add.6. The International Law Commission has suggested that this approach is contrary to prevailing international law. Rosenstock, *supra*, at 110. ILC legal counsel issued a similar opinion regarding reservations under CEDAW. Rosenstock at *id.* (citing 1976 U.N. Jurid. Y.B. 219, 221, U.N. Doc. ST/LEG/SER.C/14). The United States, United Kingdom, and France strongly objected to the HRC's position and have indicated that they do not consider the HRC position binding. See Observations on General Comment No. 24 (52), U.N. GAOR, 50th Sess., Supp. No. 40, Vol. I, Annex V, at 126-27, U.N. Doc. A/50/40 (1995); Rosenstock, *supra*, at 130-133 (observations on General Comment No. 24 (52) by United Kingdom and Northern Ireland); REPORT OF THE HUMAN RIGHTS COMMITTEE, U.N. GAOR, 51st Sess., Annex VI, U.N. Doc. A/51/40 (1996) (observations of France to Article 40). See also Fischer, *supra* note 100, at 188 ("countries routinely fail to implement committee recommendations."). In a similar vein, the HRC announced in 1997 that North Korea's attempt to withdraw from the ICCPR was impermissible. Human Rights Comm., General Comment No. 26, 1997, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1997) (on continuity of obligations under the Covenant).

¹¹¹ See *infra* notes 163-72, 204-11 and accompanying text.

¹¹² See *supra* notes 96-97 and accompanying text. See also Bilder, *supra* note 103, at 3, 9, 12.

themselves get the first crack at giving rights specific meaning.¹¹³ In practice, however, most states treat their human rights obligations as mere paper promises, often relying on the hollow pretext that their existing domestic legal system already fully satisfies their international obligations.¹¹⁴ The unfortunate reality is that most states simply ignore their international obligations altogether until pressed to respond through international scrutiny. Ultimately, however, interpretations of rights by states, especially during the deliberations of international organizations, may eventually prove to be a critical element in the evolving meaning of international human rights standards.¹¹⁵

A second and more obvious source of interpretation occurs in the work of international human rights institutions. A poorly rationalized mixture of ill-defined mandates, circumscribed powers, cumbersome mechanisms, and often overlapping substantive norms generally clouds the potential role of these institutions in developing the

¹¹³ The primary mode for states to give international rights interpretive content should theoretically occur in the context of domestic implementation. *See supra* notes 96-97. To some extent, states also express interpretive positions in their conduct of international relations and before international forums such as the 1993 World Conference. *See supra* notes 45-54 and accompanying text. Finally, states take positions regarding the meaning of rights during the deliberations of international monitoring institutions. *See infra* notes 116-39 and accompanying text.

¹¹⁴ *See, e.g.,* Mutua, *Looking Past*, *supra* note 59, at 224-29; Dominic McGoldrick, THE HUMAN RIGHTS COMMITTEE (1991) paras. 3.4, 3.12. *See also* Donnelly, *International Human Rights*, *supra* note 96, at 610. One could accuse the United States of essentially taking this approach both in invoking reservations to its treaty obligations and in submitting its periodic reports. *See* Elisa Massimino, *Moving From Commitment to Compliance: Human Right Treaties in U.S. Law*, 5 GEO. J. ON POVERTY L. & POL'Y 262 (1998).

¹¹⁵ *See supra* notes 93-100, 109, and accompanying text; *infra* notes 128, 131. Apart from issues of intent, state cooperation is an essential and practical prerequisite to effective implementation of rights. Perhaps more importantly, a democratic State's interpretive position on the meaning of rights presumably reflects an expression of majoritarian choice that must be accounted for when resolving specific rights claims in concrete situations. *See infra* notes 141-64, 178-205 and accompanying text.

meaning of rights.¹¹⁶ Unfortunately, the international human rights system is generally characterized by a multiplicity of nonauthoritative interpretative sources.

A useful analytical framework for describing the opportunities for interpretation by international human rights institutions might divide these institutions into three groups: regional systems such as the African, European, and Inter-American institutions,¹¹⁷ U.N. Charter-based institutions,¹¹⁸ and treaty-based institutions such as the Human Rights Committee created by the ICCPR.¹¹⁹ The institutions within each of these groupings tend to operate

¹¹⁶ See Donoho, *The Role of Human Rights*, *supra* note 1, at 847-50, 859-62, 866-68. See also Mutua, *Looking Past*, *supra* note 59, at 224-237, 242-45; Dinah PoKempner, *Making Treaty Bodies Work: An Activist Perspective*, 91 A.S.I.L. PROC. 460, 480-81 (1997); Klaus Samson, *Human Rights Coordination Within the U.N. System*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 620, 621, 653-58, 666-75 (Philip Alston ed., 1992).

¹¹⁷ See generally GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, *supra* note 103, at chs. 7-9; Victor Rodriguez Rescia & Marc Seitles, *The Development of the Inter-American Human Rights System: A Historical Perspective and A Modern-Day Critique*, 16 N.Y.L. SCH. J. HUM. RTS. 593 (2000); Mark Janis, *The Efficacy of Strasbourg Law*, 15 CONN. J. INT'L L. 39 (2000). See also Seth Harris, *Asian Human Rights: Forming a Regional Covenant*, ASIAN-PAC. L. & POL'Y J. 17 (2000).

¹¹⁸ The most prominent Charter-based institution is the Commission on Human Rights (CHR). See generally Micheal Dennis, *Current Developments: The Fifty-Third Session of the U.N. Commission on Human Rights*, 92 AM. J. INT'L L. 112 (1998). The "Sub-commission" on human rights is a second prominent Charter-based institution. Because of alleged duplication of the CHR's efforts (or perhaps because of its independence) the Sub-commission has come under increasing scrutiny of late. See generally David Weissbrodt et al., *An Analysis of the Forty-ninth Session of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 11 HARV. HUM. RTS. J. 221 (1998). The U.N. recently created the high profile office of the High Commissioner for Human Rights, whose practical importance has yet to develop clearly.

¹¹⁹ There are currently six major treaty-based monitoring institutions operating in cooperation with the United Nations system. Each of these "committees" is entrusted with monitoring state compliance with the rights recognized in their respective treaty texts. For further discussion, see ICCPR, *supra* note 6 (civil and political rights); ICESCR, *supra* note 6 (economic and social rights); CERD, *supra* note 103 (racial discrimination); CEDAW, *supra* note 103 (gender discrimination); Torture Convention, *supra* note 103; and, Children's Convention, *supra* note 95 (children's rights).

in largely similar ways with similar mandates and mechanisms for applying and interpreting rights.

A rough but accurate description of the U.N. Charter-based institutions would characterize them as overtly political, policy-making bodies whose primary purpose is general oversight and public scrutiny of human rights "situations."¹²⁰ These institutions study, debate, and politic over human rights on a largely generalized macro-level.¹²¹ As a matter of practical politics, the opprobrium of U.N. Charter-based institutions tends to focus on weak, friendless, or "pariah" states.¹²² They serve no recognizable adjudicatory function and provide no direct redress for alleged violations of human rights.¹²³

The overtly political dialogue that takes place before U.N. Charter-based institutions and, in general, between states in the conduct of their international relations, provide only vague and inevitably ambiguous insights into the meaning of international standards. At best, this process provides some evidence regarding the existence of consensus among states over the generalized meaning of some non-controversial rights.¹²⁴ For example, the work of the U.N.

¹²⁰ See E.S.C. Res. 36, U.N. ESCOR, 1979 Sess., Supp. No. 1, at 26, U.N. Doc. E/1979/79 (1979); E.S.C. Res. 1235, U.N. ESCOR, 42d Sess., Supp. No. 1, at 17, U.N. Doc. E/4393 (1967). See also Donnelly, *International Human Rights*, *supra* note 96, at 612-13; Mutua, *Looking Past*, *supra* note 59, at 242-45.

¹²¹ Although the CHR has increasingly focused its attention on specific "thematic" human rights issues, its most public agenda continues to concern country situations. See, e.g., Dennis, *supra* note 118, at 112-19.

¹²² See, e.g., Nigel Rodley, *United Nations Non-Treaty Procedures for Dealing with Human Rights Violations*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, *supra* note 103, at 62. See also Dennis, *supra* note 118, at 121-23 (providing an overview of those countries subjected to the Commission's scrutiny and condemnation); Philip Alston, *The Commission on Human Rights*, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL, *supra* note 116, at 163-66.

¹²³ See, e.g., Rodley, *supra* note 122, at 63-65.

¹²⁴ There are exceptions to this pattern, of course. In recent sessions, the CHR voted in favor of an international moratorium on the death penalty over the objection of the United States. See Micheal Dennis, *The Fifty-Fifth Session of the U.N. Commission on Human Rights*, 94 AM. J. INT'L L. 189, 191-92 (2000) (citing C.H.R. Res. 1999/61 (Apr. 28, 1999)). The Commission also approved a resolution

Commission on Human Rights (CHR) demonstrates that all member states condemn overt violations of physical integrity such as torture, disappearance or summary execution.¹²⁵ Similar consensus has emerged over egregious practices involving physical violence against civilians during armed conflict, including ethnic cleansing, genocide, and other war crimes.¹²⁶ Apart from such "physical integrity" rights, the degree of shared understanding and meaningful dialogue about the specific meaning and content of international human rights standards on this level is not impressive. Rather, the work of these organizations is largely clouded by political rhetoric, obfuscation by recalcitrant and repressive governments, and meaningless platitudes and hyperbole that perhaps inevitably dominate a political process.

The activities of the less political, more supervisory bodies created by various human rights treaties promoted by the United Nations provide promising opportunities to mediate the tension between universality and diversity. Institutions such as the Human Rights Committee (HRC) necessarily engage in a significant amount of interpretive activity while pursuing their mandate to monitor the implementation of rights by state parties. Typically called "committees" and composed of experts selected by the state parties, these institutions are limited in their powers and

endorsing an international right to democracy. *See id.* (citing C.H.R. Res. 1999/57). Both of these resolutions, however, reflect the CHR's primary function as a general policy making body rather than a front line force in the interpretation and implementation of human rights.

¹²⁵ The Commission's important work in developing thematic mechanisms has focused on violations involving such things as disappearances, summary executions, torture, violence against women, child prostitution, and the death penalty. This focus on physical violations has broadened somewhat in the 1990s with rapporteurs or working groups created for religious intolerance, freedom of expression, racism, and the independence of the judiciary. *See* Rodley, *supra* note 122, at 70-71. In 1999, the CHR considered the work of thirteen rapporteurs, two working groups, four independent experts, and two special representatives. *See* Dennis, *Current Developments*, *supra* note 118, at 193-94.

¹²⁶ *See* C.H.R. Res. 1999/2 (Apr. 13, 1999); C.H.R. Res. 1999/18 (Apr. 23, 1999); Dennis, *supra* note 118, at 190.

mandate.¹²⁷ In general, a committee's monitoring work is conducted by reviewing state parties' own self-serving reports regarding implementation and releasing "general comments."¹²⁸ Three of the committees, most notably the HRC, also engage in quasi-judicial activities that are described further below.¹²⁹

The state reporting process has some clear potential for progressively developing state consensus over the specific meaning of rights. For example, a committee's dialogue with state party representatives often reflects the committee's understanding of the specific content of rights, as states are pressed to explain practices and the committee makes specific suggestions for improvement. In this sense, review of state reports should provide a forum for the expression and consideration of diversity in the development of universal rights. The reporting process, however, is currently too general and amorphous in nature to provide much meaningful interpretive guidance. Moreover, such work is clearly not authoritative or binding. Indeed, there is ample evidence that governments have yet to take the preparation, presentation, and dialogue regarding state reports very seriously.¹³⁰

¹²⁷ See Donoho, *The Role of Human Rights*, *supra* note 1, at 859-62.

¹²⁸ See Donoho, *The Role of Human Rights*, *supra* note 1; Fischer, *supra* note 100, at 177-201 (summarizing reporting procedures under each of the six major multilateral treaties); Mutua, *Looking Past*, *supra* note 59, at 224-31; Helfer & Slaughter, *supra* note 98, at 338-45; Andre Byrnes, *The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women*, 14 YALE J. INT'L L. 1, 42-51 (1989) (describing the use of general comments by various treaty bodies). The major multilateral treaties also provide moribund inter-state complaint procedures that have never been invoked.

¹²⁹ See *infra* note 135 and accompanying text.

¹³⁰ See Fischer, *supra* note 100, at 188; Mutua, *Looking Past*, *supra* note 59, at 228-29. See also *supra* note 110. Apparent disrespect for the reporting process is reflected in the extremely poor performance of states in preparing and on time submitting reports. See A.S.I.L. PROC., *supra* note 116, at 467. But see Michael O'Flaherty, *The Reporting Obligation Under Article 40 of the International Covenant on Civil and Political Rights: Lessons to be Learned from Consideration by the Human Rights Committee of Ireland's First Report*, 16 HUM. RTS. Q. 515 (1994) (suggesting that under "favorable conditions," the reporting process can be

The HRC's General Comments also have some potential for mediating between the competing goals of universality and diversity. Although generally modest in scope to date, General Comments have provided direction regarding committee views on the meaning of certain important provisions.¹³¹ The abstract nature of General Comments, however, limits their potential for working through the delicate balance between universal rights and diversity implicit in the language of the Vienna Declaration.¹³² Indeed, by definition "General" Comments would not normally address the contextual "particularities" presented by various diverse states. More significantly, there is also little evidence that states currently perceive General Comments, which are nonbinding, as authoritative.¹³³

"productive").

¹³¹ The HRC, for example, has expressed general views on the substance of provisions of the ICCPR ranging from non-controversial expositions on the rights against torture to more delicate subjects such as family, free speech and self-determination. See, e.g., Torkel Opsahl, *The Human Rights Committee*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL*, *supra* note 116, at 412-14. In the more politically sensitive areas, the Committee's early general comments produced minimal guidance, sometimes only mimicking the language of the treaty itself. See Human Rights Comm., General Comment No. 12(21), 1984 (self-determination); Human Rights Comm., General Comment No. 10(19), 1983 (freedom of expression). The Committee increasingly has added normative content to its interpretations of rights during the 1990s. See, e.g., Human Rights Comm., General Comment No. 22(48), 1993, art. 18, annex VI, at 208, U.N. Doc. A/48/40 (pt. I) (freedom of conscience); Human Rights Comm., General Comment No. 18, 1992, at para. 10, *quoted in* U.N. Doc. HRI/GEN/1, at 27 (1992) (affirmative action programs required in certain circumstances). A listing of general comments may be found at <http://www.unhchr.ch/tbs/doc.nsf>.

¹³² See *supra* note 110 and accompanying text. See also Opsahl, *supra* note 131, at 415 (former member of the HRC noting that general comments are "neither scholarly studies nor secondary legislative acts" and that their generality may cause "problems of application to specific cases"). General Comments, like the review of state periodic reports, do not address specific individual violations of rights. See Fischer, *supra* note 100; Opsahl, *supra* note 131, at 412-15. In some senses, the very concept of a "General Comment" may be seen as presuming a uniform meaning for rights, since the purpose of such comments are to give guidance applicable generally to all state parties.

¹³³ See *supra* notes 100, 110.

At best, the state reporting process and the general comments allow the expression of various interpretations of rights that may slowly inch the international community toward some common understandings. In this sense, they serve an important promotional function that arguably should be less concerned with accommodations of diversity than the quasi-judicial processes described below. These mechanisms have, however, primarily been designed by the state parties to provide essentially toothless monitoring and supervision of national implementation of the treaties that created them. Overall, the potential that such mechanisms will generate significant interpretive work designed to accommodate concerns for diversity and autonomy appears limited.

The most significant opportunity to mediate the competing claims of universality and diversity in the meaning of rights occurs in those forums that have been authorized to serve quasi-judicial, adjudicatory functions. The individual complaint procedures available under the Inter-American and European regional human rights systems provide the most important examples.¹³⁴ There are also three treaty-based committees, including most prominently the HRC, that have been authorized to hear individual petitions brought against those states that consent to the process.¹³⁵

¹³⁴ See *supra* note 117; *infra* notes 163-205 and accompanying text. Domestic courts and administrative bodies could conceivably play an enormously important role in developing international human rights standards. As more states directly incorporate international treaty obligations into municipal law, domestic institutions will be required to interpret and apply such standards. These institutions presumably are well situated to evaluate and take account of competing culturally based claims or defenses.

¹³⁵ Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 302-46; CERD, *supra* note 103, art. 14; Torture Convention, *supra* note 103, art. 22. Significant efforts have been made to create a similar petitioning system under CEDAW. See, e.g., Andrew Byrnes & Jane Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?*, 21 BROOK. J. INT'L L. 679 (1996). The General Assembly officially adopted the text of the Optional Protocol to CEDAW in October 1999. G.A. Res. 54/4, G.A. 54th Sess.,

The work of regional human rights organizations on individual complaints perhaps represents the international community's most significant opportunity to address diversity issues within the international human rights system. Although distinct from domestic judicial processes in many significant respects,¹³⁶ these international petitioning procedures often involve many of the same jurisprudential issues that face domestic courts. In each process, for example, an individual claims that some specific action or omission by government violates a right that is set out in an authoritative—albeit usually in general, abstract—text. The decisionmaker is called upon to give the abstract right a specific meaning that will resolve the concrete dispute between the government and claimant, while inevitably balancing a mixture of competing interests. Domestic judicial experience teaches us that such concrete cases have great potential for giving shape and specific content to the meaning of rights and for developing standards by which to evaluate critical competing interests.¹³⁷

The practical meaning of free speech only begins to take form when, for example, a tribunal is required to evaluate specific challenges to sedition laws, prohibitions on commercial speech, criminalization of pornography, or aggressive defamation laws. Every such challenge raises subtle and complex questions regarding the meaning of free speech that may only be adequately addressed when actual

Agenda Item 109, U.N. Doc. A/Res/54/4 (1999). As of June 2000, five states had ratified the Optional Protocol. See MILLENNIUM SUMMIT, *supra* note 103, at 28.

¹³⁶ See generally Helfer & Slaughter, *supra* note 98, at 282-87, 338-45, 349-51.

¹³⁷ The jurisprudence of the United States Supreme Court provides a clear example of how the meaning of rights is developed over time through resolution of concrete disputes. See *infra* text accompanying notes 145-60. The variability and seeming inconsistency of this jurisprudence is also an excellent example of the inherent indeterminacy of rights as legal concepts. See *supra* note 105. See also Stephen Feldman, *The Supreme Court in a Post-Modern World: A Flying Elephant*, 84 MINN. L. REV. 673 (2000). There is no better example of this process on the international level than the jurisprudence of the European Court of Human Rights, described in *infra* Part V-B.

circumstances (i.e., context, countervailing public interests, and actual consequences to the individual) are taken into account by the decisionmaker.¹³⁸ In essence, the concreteness of the dispute allows interpretive opportunities that are far more significant to the development of rights than those available through the other, more general, supervisory and monitoring functions of international organizations.¹³⁹

Thus, the tension between universal rights, self-governance, autonomy, and diversity may perhaps best be played out in the context of concrete dispute resolution. The critical question is how international institutions cast in this role may effectively accommodate diversity and yet preserve, promote, and develop universal human rights values.¹⁴⁰ It is imperative in this regard that international

¹³⁸ See *supra* notes 2-4; *infra* notes 147-60, 168-79 and accompanying text.

¹³⁹ See Byrnes & Connors, *supra* note 135, at 699-703.

¹⁴⁰ Thus far, international human rights institutions, with the exception of the E.C.H.R., have made no serious attempt to develop a jurisprudence to deal with the issues of diversity, multiculturalism and self-governance in the implementation of rights. The Inter-American Court of Human Rights has referred to, in a rather off-handed fashion, the European concept of a margin of appreciation but has yet to apply or develop the idea in practice. Advisory Opinion OC-4/84, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Inter-Am. C.H.R. ser. A, no. 4 (Jan. 19, 1984). There have been recent suggestions within the OAS about utilization of the concept. See Cecilia Medina, *Toward Effectiveness in the Protection of Human Rights in the Americas*, 8 TRANSNAT'L. L. & CONTEMP. PROBS. 337, 354-55 (1998). Similarly, the HRC has only taken tentative steps, simply recognizing the need to account for an element of national discretion in evaluating certain rights claims. See *Herzberg v Finland*, Comm. No. 14/61, U.N. GAOR Hum. Rts. Comm., 37th Sess., Supp. No. 40, at 161, 163-64, U.N. Doc. A/37/40 (1982). See also *Lansman et al. v. Finland*, No. 671/1995, Human Rights Committee, 58th Sess., U.N. Doc. CCPR/C/58/D/671/1995 (1996) at paras. 10.3-10.7 (giving implicit deference to national authorities' application of Article 27 cultural integrity rights). Perhaps the most interesting tension between culturally based defenses and international standards is posed by the Women's Convention, which by its express terms requires states to eradicate cultural and social practices harmful to women. See CEDAW, *supra* note 103, art. 5. The CEDAW Committee must, therefore, directly confront the tension between universalism and diversity concerns in its consideration of state periodic reports. Institutional constraints, such as limited resources and the lack of individual complaint procedures, have hampered the development of the Committee's jurisprudence. See Byrnes, *supra* note 128, at 6-7, 12, 43-51; Jennifer Ulrich, Note, *Confronting Gender-Based Violence With*

human rights institutions develop a coherent jurisprudence regarding the decisionmaking and interpretation processes that account for the tension between the international community's competing universalist and relativist impulses.

The remainder of this article turns to the question of what sorts of doctrines these international institutions might adopt to navigate appropriately such issues. It is important to keep several basic and related considerations in mind when addressing this question. First, the outcome of this process is highly dependent on the interpretive methodologies and orientation of the decisionmaker. Thus, choices regarding issues such as consideration of original state intent, textual fidelity and plain meaning, teleological orientation (e.g., treaty objects and purposes), and institutional mandate, are critical considerations.¹⁴¹ Second, it is important to note the strong similarity between the task of accommodating diversity and the balancing of individual versus public interests that inevitably accompanies domestic rights jurisprudence.¹⁴² Third, these issues are, in certain respects, a manifestation of one of the most basic concerns facing any decisionmaking body charged with evaluating the legality of governmental action: the development of appropriate standards of review.¹⁴³ The question ultimately posed is the degree of

International Instruments: Is a Solution To the Pandemic Within Reach?, 7 IND. J. GLOBAL LEGAL STUD. 629, 644-46 (2000).

¹⁴¹ See generally P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 71-95 (3d. ed. 1998) (reviewing various approaches and doctrines of interpretation as applied by the European Court of Human Rights); Francois Ost, *The Original Canons of Interpretation of the European Court of Human Rights*, in THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS 283 (Mirielle Delmas-Marty ed., 1992). See *infra* notes 172-73, 197-204 and accompanying text.

¹⁴² See *supra* notes 136-39 and accompanying text; *infra* notes 147-54, 169, 175-205.

¹⁴³ See *infra* notes 155-60, 204-11 and accompanying text. See also Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996).

deference, if any, that the decisionmaker should give national authorities, or more practically speaking, how much deference states will demand.¹⁴⁴ Standards of review in this regard serve the critical function of preserving a balance between the need for international supervision, recognition of the individual's needs and respect for self-governance and majoritarian preferences.

Most importantly, the choices made by international institutions in this regard will ultimately be shaped by the inherent tension between international supervision of human rights and national prerogatives. The debate over universality invokes fundamental issues regarding the proper role of international human rights institutions, the legitimacy of their decisionmaking and the allocation of political and legal authority. These issues are especially acute in the context of functional democracies whose domestic decisionmaking processes and autonomy should be strongly endorsed by international law.

The jurisprudence of both the European Court of Human Rights (ECHR) and the U.S. Supreme Court developed to balance the same and analogous concerns, provides important insights in this regard. Review of this jurisprudence reveals several potentially useful doctrines worthy of evaluation by international human rights institutions. Primary among these is the "margin of appreciation" doctrine utilized by the ECHR. Additional

¹⁴⁴ A variety of other issues come into play when evaluating the appropriate standard of review, including practical effectiveness, accountability, and the need to create mature institutions that are respected by their constituencies. International human rights institutions are still in the process of maturing, and have been given limited mandates by the states that created them. *See supra* text accompanying notes 98-100, 116-35. Consequently, these institutions will be best served by an incremental, cautious jurisprudence that establishes their credibility and legitimacy in the eyes of governments over time. *See, e.g.,* Helfer & Slaughter, *supra* note 98, at 315-17, 355-56, 367. Standard of review issues also involve questions of expertise, accountability, and the capacity of international decisionmakers to understand, appreciate, and relate to the context and circumstances in which the rights are to be applied.

insights may be drawn from the various standards of review utilized by courts to balance individual rights against public majoritarian interests, including the "levels of scrutiny" analysis employed by the United States Supreme Court. The following discussion describes this jurisprudence and evaluates the appropriateness of its application to the work of international human rights institutions.

V. DEVELOPING A JURISPRUDENCE OF DIVERSITY WITHIN UNIVERSAL HUMAN RIGHTS

A. Accommodations of Culture in U.S. Rights Jurisprudence

Although recently elevated in prominence internationally, issues concerning the relationship between individual rights, cultural traditions, and majoritarian preferences have long existed within domestic legal systems.¹⁴⁵ Thus, while the tension between universal rights and diversity has received no express consideration,¹⁴⁶ cultural and

¹⁴⁵ See *infra* notes 149-55 and accompanying text. Literature exploring the relationship between domestic law, liberalism, and multiculturalism is extensive. See, e.g., Shauna Van Praagh, *The Education of Religious Children: Families, Communities and Constitutions*, 47 BUFF. L. REV. 1343 (1999); Doriane Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093 (1996); Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1576-81, 1611-16 (1996); Tran, *supra* note 2.

¹⁴⁶ Domestic courts do not generally struggle with questions of sovereignty or institutional authority in the same fashion that these issues plague international institutions. There are, however, some important parallels. In the context of domestic legal systems, the resolution of rights claims are frequently tempered by concern over the appropriate allocation of power between the legislative and judicial branches. Thus, questions of institutional authority are important to the United States Supreme Court's rights jurisprudence, but tend to focus on the Court's role vis-à-vis other branches of the federal government and the states. Similarly, the Supreme Court is generally determining minimum federal constitutional standards that constrain majoritarian will, often as expressed through state or local legislation. One might say that the Court has a supervisory role that constrains the sovereignty of state governments, and that rights issues "percolate up" from the states much like

political heritage arguments have nevertheless played important roles in U.S. jurisprudence. In this regard, the United States Supreme Court's ("Court") approach to the inevitable balancing of individual rights against majoritarian and public interests, and its methods for evaluating government justifications, provide useful insights for this study. In a common scenario, an individual asks the Court to prevent or require governmental action based upon some transcendent right typically found in the U.S. Constitution (or, perhaps someday, in a ratified human rights treaty.) Such claims frequently challenge legal restrictions or penalties that manifest the prevailing moral, religious, or social preferences of the democratic majority. The government then defends its actions based on, among other things, the preservation or promotion of those majoritarian preferences.

In this context, diversity arguments may play out in a variety of ways. Perhaps most commonly, such arguments arise in the context of defining the existence, status, or specific content of the claimed right. For example, cultural, social, and religious traditions may be argued in support of, or in opposition to, claims for recognition of new or implicit protections derived from abstractions such as privacy or due process.¹⁴⁷ Thus, when a claimant urges recognition of an

they do in international human rights law via national implementation. In the international context, analogous tensions arise as international institutions attempt to strike a delicate balance between international supervision of human rights standards and the needs and interests of various state parties.

¹⁴⁷ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (right to assisted suicide). See also *Griswold v. Connecticut*, 381 U.S. 479 (1965) (access to contraception); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (access to contraception by unmarried couples); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to interracial marriage); *Bowers v. Hardwick*, 478 U.S. 186, 190-96 (1986) (criminalization of private consensual sodomy). In the context of finding implicit protections for fundamental rights under the U.S. Constitution, the Supreme Court has attempted to "reign itself in" by asking whether the alleged fundamental right is "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [the right] were sacrificed." *Glucksberg*, 521 U.S. at 720-21. This reliance on tradition, invoked as a check on the unelected judiciary, has an

implicit "right to die" or refuses medical treatment, the decisionmaker is required to consider social and cultural traditions regarding such practices.¹⁴⁸

In a somewhat different vein, rights arguments may also be used to defend a group's cultural or religious practices against majoritarian encroachment. For example, religious and cultural minorities have frequently argued that cherished practices such as taking peyote, making animal sacrifice, handling snakes or keeping multiple wives, are protected from government interference by individual liberties such as freedom of expression or religion.¹⁴⁹

Thus, in *Wisconsin v. Yoder*,¹⁵⁰ the Court recognized the religious and cultural claims of an Amish religious

inherent tendency to restrict the scope of individual liberties under the Constitution, particularly when the Court defines the liberty interest involved with a high level of specificity. See *Bowers*, 478 U.S. at 190-96; *Michael H. v. Gerald D.*, 491 U.S. 110, 127 (1989) (plurality opinion) (Justice Scalia suggests that an implicit right may only be found if there is a tradition of protection for the specific activity involved). The Court's approach in *Bowers*, *Glucksberg*, and *Michael H.* similarly may inhibit the progressive evolution of Constitutional liberties. One might argue, however, that the Constitution's authority is itself based on the moral consensus of American society over the appropriate meaning of Constitutional protections. See Erwin Chemerinsky, *History, Tradition, the Supreme Court and the First Amendment*, 44 HASTINGS L. J. 901, 908-09, 912-18 (1993); Larry Simon, *The Authority Of The Constitution And Its Meaning: A Preface To A Theory Of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 613-15, 618 (1985); Larry Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretations Be Justified?*, 73 CAL. L. REV. 1482, 1505-10 (1985).

¹⁴⁸ See *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278-79 (1990) (denying right to refuse medical treatment); *Glucksberg*, 521 U.S. at 720-21 (denying right to assisted suicide).

¹⁴⁹ See, e.g., *Employment Div. Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877-81, 890 (1990) (upholding challenge to criminalization of peyote); *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1216-17 (5th Cir. 1991) (rejecting an equal protection challenge regarding peyote restrictions); *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 523, 530-33 (1993) (striking down local prohibitions on animal sacrifice during Santeria religious rituals); *Reynolds v. United States*, 98 U.S. 145, 165-68 (1879) (upholding criminalization of polygamy practiced pursuant to tenets of Mormon religion). See also *Wisconsin v. Yoder*, 406 U.S. 205, 214-17 (1972) (deferring to religious justifications for exempting children from mandatory education requirements).

¹⁵⁰ 406 U.S. 205 (1972).

minority, holding that the State could not compel Amish teenaged children to attend school.¹⁵¹ In *Meyer v. Nebraska*,¹⁵² the Court similarly recognized the rights of parents to educate children in the language of their choice despite competing interests of society at large in use of the English language in public schools.¹⁵³

When deciding such claims, competing cultural and social preferences typically require a decisionmaker to balance general societal interests against the interests of the individual or group adversely affected by the state's action. Thus, the government often defends an action alleged to encroach on protected rights by asserting competing "public interests."¹⁵⁴ Such arguments may be cast simply in terms of health and safety, or "public order," but frequently also rely upon majoritarian expressions of moral, cultural, and social preferences.¹⁵⁵ Since few rights are absolute even in the most liberal democratic societies, this evaluation of competing public interest, often cast in the form of cultural, social, or political heritage is a critical determinant of the specific content of most rights.

Such cases are, of course, not completely analogous to the issues of diversity facing the international human rights

¹⁵¹ *Id.* at 214, 232-33. See also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that state law requiring attendance at public schools violates fundamental liberty interests of parents).

¹⁵² 262 U.S. 390 (1923).

¹⁵³ *Id.* at 402-03. See also *Prince v. Massachusetts*, 321 U.S. 158, 168-70 (1944) (state interest in children justifies lack of religious exemption from child labor laws).

¹⁵⁴ See, e.g., cases cited *supra* notes 147-53. See also *Braunfeld v. Brown*, 366 U.S. 599, 608-09, 621-22 (1961) (plurality opinion) (denial of religious exemption from Sunday closing laws); *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) (1979) (impartiality of judiciary); *Klass v. Federal Republic of Germany*, 2 Eur. H.R. Rep. 214, 230-31 (Sept. 6, 1978) (national security). In the context of human rights treaties, the recognition of competing public interest is frequently incorporated directly into the treaty text. See *infra* note 175.

¹⁵⁵ *Bowers*, 478 U.S. at 190-95; *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 282-84 (2000); *Williams v. Pryor*, 229 F.3d 1331 (11th Cir. 2000) (public morality as justification for criminalizing distribution of sexual devices).

system.¹⁵⁶ For example, the Court is not generally concerned with issues of sovereignty or institutional authority in the same way that these issues plague international institutions.¹⁵⁷ The Court's rights jurisprudence, however, mediates tensions similar to those posed by international human rights claims when it recognizes limitations on both rights and governmental action based upon culture and context. Indeed, the recognition of context in the interpretation of the meaning of rights and the inevitable balance between competing majoritarian and individual interests pervades the rights jurisprudence of the U.S. courts. Courts are essentially called upon in these cases to consider cultural, social, and political heritage in defining rights and their concrete applications, while striking a balance between the individual's interests and those of the majority and the government.

The Court approaches this balance in a variety of ways depending upon the right involved. Ultimately, the Court employs tests that serve as standards of review through which it evaluates the competing interests, including adherence to cultural or religious heritage. In the area of equal protection, for example, the Court employs the so-called "levels of scrutiny" analysis in which the standard of review depends upon the rights being implicated and the basis for the alleged discrimination.¹⁵⁸ If the right being burdened is fundamental, or the basis for distinction "suspect," the Court utilizes "strict scrutiny" to evaluate the

¹⁵⁶ See, e.g., *supra* notes 1-17, 55-101 and accompanying text.

¹⁵⁷ See *supra* note 110-16, 129-35, 146 and accompanying text; *infra* notes 165-92 and accompanying text. Another significant difference is that U.S. Supreme Court decisions do not generally result in multiple interpretations of the specific meaning of rights (although split opinions may sometimes leave this meaning somewhat ambiguous). There are, of course, issues involving federalism which may induce deference to state governments in ways similar to the deference afforded nations by international institutions. See *supra* note 146. The dynamics of the domestic federal and international contexts are, however, quite different.

¹⁵⁸ See generally ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 414-17, 526-32 (1997).

challenged government action. Under strict scrutiny, the Court imposes a heavy burden on the government to demonstrate that its restrictions are narrowly tailored to achieve a compelling state interest.¹⁵⁹ If the right is not fundamental, nor the distinction suspect or semi-suspect,¹⁶⁰ the Court instead requires the claimant to demonstrate that the government's actions are arbitrary and lacking a "rational basis."¹⁶¹ Under this lower level of scrutiny the government is given wide latitude to pursue perceived public interests so long as it does not act capriciously. Other constitutional rights, such as substantive due process and privacy interests, are subject to a similar analysis that allocates burdens and sets standards of review dependent on whether the right is considered "fundamental."¹⁶²

The primary lesson to be learned from this jurisprudence is not in its detail but rather in the Court's approach. In essence, the U.S. Supreme Court employs various

¹⁵⁹ *Id.* at 416-17. The Court has, to date, only categorized distinctions based on race, national origin and alienage as "suspect." *Id.* at 529, 545-56, 614-19. Discrimination burdening rights considered fundamental has also led to the application of the strict scrutiny standard. *See id.* at ch. 10.

¹⁶⁰ In the context of gender discrimination and illegitimacy, the Court has developed an "intermediate" level of scrutiny that requires the government to demonstrate that the classification serves an "important governmental objective" and is "substantially related to those objectives." *See Craig v. Boren*, 429 U.S. 190, 197 (1976); *Lalli v. Lalli*, 439 U.S. 259 (1978). The burden of demonstrating the existence of an "exceedingly persuasive justification . . . rests entirely on the State." *United States v. Virginia Military Inst.*, 518 U.S. 515, 533 (1996).

¹⁶¹ CHEMERINSKY, *supra* note 158, at 533-44.

¹⁶² CHEMERINSKY, *supra* note 158, at 638-44. If a right is considered fundamental, the court applies the strict scrutiny standard of review and, if not, the rational basis test. *Id.* For some rights, such as abortion, the Court has developed specific variations in the standards. *See Planned Parenthood v. Casey*, 510 U.S. 1309 (1994). The Court's jurisprudence, in this sense, takes an implicit "in or out" approach to individual liberties under which the decision as to whether a claimed activity is a protected fundamental liberty typically determines the outcome of the case. *See, e.g., Gerald Gunther, The Supreme Court, 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny for fundamental rights as "strict in theory, fatal in fact"). *But see* Cass Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 59-64 (1996) (describing recent cases striking down legislation under rational basis test).

standards of review that attempt to account for competing interests such as the importance of the right, cultural traditions, and the effect on individuals, majoritarian preferences, state interests, and its own institutional limitations. In this sense, the Court is attempting to navigate issues very similar to those presented to international human rights institutions by international diversity.

Attempts to accommodate cultural, religious, and social preferences within international human rights is, in this fashion, significantly similar to an endemic feature of domestic rights jurisprudence; for most rights, it is inevitably necessary to strike a balance between individual liberty and the public interest or majoritarian will. Thought of in this light, claims or defenses based on cultural, religious, and social "particularities" may be weighed, and thus accommodated or not, in much the same way as other competing interests are weighed in the typical rights equation. Thus, a challenge to government-sponsored segregation of sexes in Saudi Arabia, for example, may reasonably be thought of in terms similar to the familiar tension between individual rights and general societal "public" interests. As in most cases, the question ultimately becomes whether the Saudi Arabian government can sufficiently justify its alleged restrictions¹⁶³ based upon popular cultural and religious preferences, balanced against the liberty interests of female citizens.¹⁶⁴ A significant

¹⁶³ Allocation of the burden of proof is a critical component of the standard of review, which will often determine the outcome of a specific rights dispute. In the international context, the burden may be a function not only of the right involved but also the existence or not of international consensus over its meaning. *See infra* text accompanying notes 169, 187-96.

¹⁶⁴ This view of the problem arguably exposes much of the universalist versus relativist debate as a false dichotomy. Once the obligation to implement a human rights value is recognized, the issue becomes one of finding meaning in context. The question is not whether each state may determine solely for itself the meaning of the rights it has agreed to "recognize," but rather how the state and supervising international institutions should evaluate the inherent tension between the desires and needs of rights holders versus the interests of the state, society and popular

difference, discussed below, is that international institutions must also factor in the realities of national sovereignty and the potential limits of international supervision.

The most critical questions presented involve the standards of review utilized by the decisionmaker. Equally important, of course, are choices regarding methods of interpretation, burdens of proof and the nature and status of the rights claimed. In the international context, all of these issues must also be filtered through the dynamics of state sovereignty, self-governance, and international supervision. The experience of the European Court of Human Rights adds critical insights in this regard.

B. The Margin of Appreciation, Human Rights, and Diversity in Europe

Since the process of European unification began, nearly all of the issues described above have been played out before the supranational institutions of Europe.¹⁶⁵ Distinct

majorities.

¹⁶⁵ There are two primary international judicial institutions with jurisdiction over a significant number of European states. The ECHR is an institution created pursuant to the European Convention on Human Rights and is a constituent part of the Council of Europe, which was created in 1949 after World War II. See VAN DIJK & VAN HOOF, *supra* note 141, at 1-2. There are currently 39 European states within the Council of Europe, subject to the Human Rights Convention and its institutions. In 1998, Protocol 11 to the Convention revamped its institutional structure to phase out the European Commission of Human Rights, which previously reviewed all cases prior to their submission to the ECHR. See Protocol 11, Eur. T.S. No.155, reprinted in 33 I. L. M. 943 (1994). See generally Jonathon Black-Branch, *Observing and Enforcing Human Rights Under the Council of Europe: The Creation of a Permanent European Court of Human Rights*, 3 BUFF. J. INT'L L. 1 (1996). The European Court of Justice is the primary judicial organ of the European Union with a mandate and subject matter very different from that of the ECHR. Its function is to provide a uniform interpretation of the treaties and laws of the European Union. Although human rights are not an overt part of the European Union's mandate, the ECJ has been called upon to interpret and apply E.U. law consistently with the European Convention on Human Rights and the jurisprudence of the ECHR. See, e.g., *Society for the Protection of Unborn Children v. Grogan*, 1991 E.C.R. I-4685, 3 C.M.L.R. 849

from domestic judicial processes, European institutions have been forced to confront diversity issues in light of critical concerns over domestic sovereignty, democratic self-governance and institutional authority. In particular, the work of the European Court of Human Rights has involved dilemmas highly analogous to those raised by the international debate over the universal versus relative nature of human rights.

Perhaps the most relevant jurisprudence for present purposes is the ECHR's "margin of appreciation doctrine."¹⁶⁶ The ECHR originally articulated the doctrine in its earliest cases to address state derogations of rights under alleged exigent circumstances.¹⁶⁷ This doctrine has since evolved as one of the ECHR's primary tools for accommodating diversity, national sovereignty, and the will of domestic majorities, while enforcing effective implementation of rights under the European Convention.¹⁶⁸ Under this doctrine, national governments are given a certain degree of discretion regarding the specific manner in which they implement European Convention rights.¹⁶⁹ The rationale

(1991); *Grant v. South-West Trains*, [1998] 1 C.M.L.R. 993, 1012-14, paras. 43-48 (1998); *P. v. S. & Cornwall County Council*, (case C-13/94), [1996] 2 C.M.L.R. 247, paras. 22-25 (1996). See generally Jean Sera, Note, *The Case for Accession by the European Union to the European Convention for the Protection of Human Rights*, 14 B.U. INT'L L. J. 151 (1996).

¹⁶⁶ See generally H. YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996); VAN DIJK & VAN HOOF, *supra* note 141 at 82-95, 731-35; R. St. J. MacDonald, *The Margin of Appreciation*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* (MacDonald et al. eds., 1993).

¹⁶⁷ *Lawless v. U.K.*, 1 Eur. H.R. Rep. 15 (July 1, 1961, A/3) at paras. 36-38; *Ireland v. United Kingdom*, 2 Eur. H.R. Rep. 25 (Jan. 18, 1978, A/25) at para. 207; *Brannigan & McBride v. United Kingdom*, 17 Eur. H.R. Rep. 539, 569-70 (May 26, 1993).

¹⁶⁸ See YOUROW, *supra* note 166, at 6-9, 13, 49, 70-7; Ost, *supra* note 141, at 306-10; M. Delmas-Marty, *The Richness of Underlying Legal Reasoning*, in *THE EUROPEAN CONVENTION FOR PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS* 319, 331-34 (M. Delmas-Marty ed., 1992).

¹⁶⁹ See *Handyside v. United Kingdom*, 1 Eur. H.R. Rep. 737, 753 (1976); YOUROW, *supra* note 166, at 13; VAN DIJK & VAN HOOF, *supra* note 141, at 83.

for the "margin of appreciation" rests upon the primacy of national implementation of rights and the notion that state authorities are often better situated to judge local conditions and the various public interests that inevitably compete with the claims of individuals.¹⁷⁰ When a state's choices fall within a predictably amorphous range of acceptable alternatives, the ECHR will uphold the state's actions as being within its so-called "margin of appreciation."¹⁷¹

The margin of appreciation that the ECHR will provide depends upon a number of factors, most prominently whether a European consensus on the issues exists.¹⁷² The importance of the right and the consequences of the state's

¹⁷⁰ See, e.g., *Handyside*, 1 Eur. H.R. Rep. at 753-54; *Brannigan*, 17 Eur. H.R. Rep. at 569-70; *Otto-Preminger Institut v. Austria*, 19 Eur. H.R. Rep. 34, 56-59 (1994). See also *YOUROW*, *supra* note 166, at 6-9, 19-20, 32. A similar version of "subsidiary" has been expressly incorporated into the treaty regime that governs the European Union. See generally Daniel T. Murphy, *Subsidiarity And/Or Human Rights*, 29 UNIV. RICH. L. REV. 67 (1994). In the context of the European Union, the "subsidiary" principle limits the role of Union institutions over subjects for which they share jurisdictional competence with national governments. See *id.* at 69-71. The E.U. has, however, exclusive jurisdiction over some subjects and none at all over others that fall outside the scope of the E.U. treaty regime. *Id.* In contrast, the "subsidiary" that describes the work of the ECHR simply reflects an arrangement in which national governments have primary authority and competence to implement Convention norms, subject to the supervision of the Court. See *Handyside*, at 753-55; *The Observer & Guardian v. United Kingdom*, 14 Eur. H.R. Rep. 153, 178 (1992). See also *Akdivar v. Turkey*, 23 Eur. H.R. Rep. 143, 198-200 (1997) (Gölcüklu, J., dissenting).

¹⁷¹ See generally *YOUROW*, *supra* note 166; *VAN DIJK & VAN HOOF*, *supra* note 141, at 82-95; *Delmas-Marty*, *supra* note 168, at 330-39; authorities cited in *supra* note 170.

¹⁷² In his comprehensive study of the doctrine, Charles Yourow discerns a variable pattern in the degree of discretion allowed state parties. See *YOUROW*, *supra* note 166, at 31-33, 54-57, 115, 166, 169-71, 192-94. Yourow posits that the cases reveal a wide margin of state discretion over issues involving morality for which no clear European consensus has emerged (e.g., *Handyside*, 1 Eur. H.R. Rep. at 753-55) while allowing a much narrower margin for favored rights (e.g., *Socialist Party v. Turkey*, 27 Eur. H.R. Rep. 51, 86 (1999)) and for issues over which consensus is found (e.g., *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981)). *YOUROW*, *supra* note 166, at 31-33, 54-57, 115, 166, 169-71, 192-94. See also Lawrence Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L. J. 133, 141, 157-65 (1993).

conduct for the individual are also important factors in determining how wide the margin of appreciation should be in any particular case.¹⁷³

While recognizing the importance of national discretion, the ECHR has repeatedly emphasized that the margin is limited by, and must correspond to, the concept of "European supervision." Under this principle, the ECHR must assert its role as the final arbiter of European Convention rights and ultimately determine the consistency of state conduct with the European Convention and evolving European standards of human rights.¹⁷⁴ The ECHR's teleological orientation to interpretation, demanding scrutiny of state justifications and emphasis on the "effectiveness" of rights, also tends to restrict state discretion.¹⁷⁵

¹⁷³ YOUROW, *supra* note 166, at 106, 115, 188; Renee Koering-Joulin, *Public Morals, in THE EUROPEAN CONVENTION FOR PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTIONS VERSUS NATIONAL RESTRICTIONS*, *supra* note 165, at 83, 89-91; VAN DIJK & VAN HOOF, *supra* note 141, at 88-89. See *United Communist Party of Turkey v. Turkey*, 26 Eur. H.R. Rep. 121, 149 (1998) at para. 46 (1998-I Eur. Ct. H.R.1, no. 62) (states enjoy "only a limited margin of appreciation" in regulating political parties "which goes hand in hand with rigorous European supervision"); *Buckley v. United Kingdom*, 23 Eur. H.R. Rep. 101, 129-30 (1997) (wide margin for land use planning must be "balanced against the applicant's right to respect for her 'home' . . ."); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (scr. A) (1981) (wide margin for morals narrowed with respect to private intimate relations).

¹⁷⁴ See YOUROW, *supra* note 166, at 10, 20, 47, 70-71; Ost, *supra* note 141, at 309-10; VAN DIJK & VAN HOOF, *supra* note 141, at 92. Yourow argues that there is uncertainty in the Court's jurisprudence about the degree to which its role is to take the lead in developing a uniform European standard of human rights through autonomous interpretation of the Convention as opposed to simply responding to the evolution of consensus among Convention states. YOUROW, *supra* note 166, at 114, 135, 194-95. See also Ost, *supra* note 141, at 305-07 (describing the "dilemma" of autonomous interpretation but suggests that most members of the ECHR favor it); Helfer, *supra* note 172, at 134-35, 137, 142-43 (noting that the ECHR uses a teleological orientation in combination with evolving European consensus to develop progressively higher standards of protection).

¹⁷⁵ Ost, *supra* note 141, at 286, 290-94; YOUROW, *supra* note 166, at 55-59, 71. See also VAN DIJK & VAN HOOF, *supra* note 141, at 71-82, 92-93.

Although not strictly limited to such rights,¹⁷⁶ the doctrine is frequently invoked when the ECHR is evaluating the scope of personal liberties under Articles 8 through 11, which inevitably implicate the exception clauses of those provisions, requiring a balance of individual versus public interests. These articles, dealing with personal liberties, including freedom of speech, religion, family life, and privacy, expressly allow for limitations on those rights in order to protect certain categories of public interests where "necessary in a democratic society."¹⁷⁷ The ECHR has relied on this language to fashion tests for evaluating and limiting the exercise of discretion allowed national authorities in their implementation of rights. Thus, limitations on such rights must be designed to accomplish a "pressing social need"¹⁷⁸ and the means chosen must be "proportionate" to those ends.¹⁷⁹ In this regard, the ECHR has recognized a

¹⁷⁶ See VAN DIJK & VAN HOOF, *supra* note 141, at 85 (margin doctrine potentially applicable to any case requiring a "balancing of interests"). See also YUROW, *supra* note 166, at 15; Delmas-Marty, *supra* note 168, at 331 (doctrine only applies to Article 15 derogations, discrimination cases under Article 14 and Articles 8-11).

¹⁷⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended), arts. 8-11, 213 U.N.T.S. 221, E.T.S. 5 (entered into force Sept. 3, 1953) [hereinafter European Convention]. See Dudgeon, 45 Eur. Ct. H.R. at 162, 164-65. The language of Article 8 is nearly uniform among these provisions; it explicitly allows for restrictions "necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." European Convention, *supra*, art. 8.

¹⁷⁸ See, e.g., Dudgeon, 45 Eur. Ct. H.R. at 164-64; Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A). (1988), at 198-200 (requiring "particularly serious reasons" for interference with intimate private life); Smith & Grady v. United Kingdom, 29 Eur. H.R. Rep. 493, 529 (1999); Barthold v. Germany, 7 Eur. H.R. Rep. 383, 403 (1985).

¹⁷⁹ Van Dijk & van Hoof suggest that the "proportionality principle" has "acquired the status of general principle in the Convention system." VAN DIJK & VAN HOOF, *supra* note 141, at 81. The exact measure of proportionality will vary depending upon context and the rights involved. Thus, more exacting proportionality has been required when states have justified restrictions on personal freedoms, as opposed to state restrictions affecting property rights (requiring a "fair balance"). *Id.* The more exacting standard is also used in the context of discrimination under Article 14 of the Convention. *Id.* In this regard, as in many others, the Court's jurisprudence for balancing individual and state interests is strikingly similar to that utilized by the U.S. Supreme Court when faced with similar issues. See *supra* notes 136-39, 152-61 and accompanying text.

hierarchy of rights, deeming some so fundamental to democratic society that little discretion is allowed to national governments.¹⁸⁰ Similarly, some rights, such as criminal due process, are set out in detail in the European Convention and have not generally involved margin analysis, perhaps because they are less susceptible to legitimate variations among state parties.¹⁸¹

Review of the ECHR's application of the doctrine reveals its central function: the ECHR utilizes the "margin of appreciation" doctrine to accommodate variations among state parties in their implementation of rights, while at the same time preserving the core "European" values they reflect. In this regard, the ECHR's application of the doctrine has involved resolution of precisely the same kind of conflicts presented in the compromise language of the Vienna Declaration. European governments have frequently defended against alleged violations of the European Convention by asserting cultural, religious, and moral interests, presumably representative of majoritarian will.¹⁸² When a government defends its action or omission on such grounds, the ECHR is called upon to strike a balance between a European (international) human rights standard and the cultural, social, or religious preferences of

¹⁸⁰ See, e.g., *Incal v. Turkey*, 29 Eur. H.R. Rep. 449, 450, 480 (2000) (restrictions on political speech, an "essential foundation of democratic society," requires "closest scrutiny"); *United Communist Party of Turkey v. Turkey*, 26 Eur. H.R. Rep. 121, 149 (1998). Yourow summarizes the cases as demonstrating a wide margin for national security and socio-economic policy issues, a "certain" margin for most personal liberties and a "narrow" margin for restrictions on preferred rights such as political speech. See YOUROW, *supra* note 166, at 155, 188-91. See also VAN DIJK & VAN HOOF, *supra* note 141, at 87-91.

¹⁸¹ See VAN DIJK & VAN HOOF, *supra* note 141, at 86.

¹⁸² See, e.g., *Dudgeon*, 45 Eur. Ct. H.R., at 155; *Tyrer v. United Kingdom*, 2 Eur. H.R. Rep. 1, 10 (1979-80); *Handyside*, 1 Eur. H.R. Rep. at 753. See also *Open Door*, 246 Eur. Ct. H.R. Rep. (ser. A), at 8 (1992). A potentially important consideration in accounting for the genuineness of a state's assertion of cultural or moral traditions may be the existence (or lack thereof) of true democratic representation. In the context of non-democratic states, the same claims are made but their genuineness may be questioned in that governmental action in a totalitarian regime lacks the legitimacy or authenticity that democratically-enacted legislation provides.

the state and its democratic majority.¹⁸³ In a case challenging Irish legislation prohibiting divorce, for example, the ECHR was essentially asked to decide whether Ireland could follow a path different from the rest of Europe based on the Irish majority's deeply rooted religious and moral aversion to divorce.¹⁸⁴

Similar considerations have been raised in a variety of other cases brought before the ECHR, such as challenges to state policies involving the education of school children,¹⁸⁵ transexualism,¹⁸⁶ criminalization of sodomy,¹⁸⁷ abortion,¹⁸⁸ and free speech.¹⁸⁹ The underlying question is whether the specific meaning and application of rights, such as free speech, privacy, and family life, may vary from state to state within the European system based upon context, history, religion, or moral preferences. In this context, the ECHR must not only weigh competing interests that may be couched in terms of culture or tradition, but also balance the tension between national prerogatives and self-

¹⁸³ VAN DIJK & VAN HOOF, *supra* note 141, at 92; YOUROW, *supra* note 166, at 70-71, 62-63, 196; Ost, *supra* note 141, at 306-10; Delmas-Marty, *supra* note 168, at 331-33.

¹⁸⁴ See, e.g., *Johnston v. Ireland*, 9 Eur. H.R. Rep. 203, 218-19 (1987). In this case, the Court ultimately skirted the issue of majoritarian morality versus individual liberty when it decided, based on a rather technical reading of the Convention text, that divorce was omitted from the text relating to marriage rights and thus not protected. *Id.*

¹⁸⁵ See, e.g., *Kjeldsen v. Denmark*, 1 Eur. H.R. Rep. 711 (1979-80). See also *Valsamis v. Greece*, 24 Eur. H.R. Rep. 294 (1997) (participation of Jehovah's Witness in school parade); *Handyside*, 1 Eur. H.R. Rep. at 753-55.

¹⁸⁶ *Cossey v. United Kingdom*, 13 Eur. H.R. Rep. 622 (1991); *B. v. France*, 16 Eur. H.R. Rep. 1 (1993). See also *X v. United Kingdom*, 24 Eur. H.R. Rep. 143, 169 (1997) (state refusal to register transsexual as father of child conceived through artificial insemination).

¹⁸⁷ *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981). See also *Smith*, 29 Eur. H.R. Rep. at 493.

¹⁸⁸ See *Bruggemann v. Germany*, App. No. 6959/75, 3 Eur. H.R. Rep. 244, 253-58 (1981) (commission report); *Patton v. United Kingdom*, App. No. 8416/78) 3 Eur. H.R. Rep. 408 (1981) (commission report).

¹⁸⁹ *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) (1979); *Müller v. Switzerland*, 13 Eur. H.R. Rep. 212 (1988); *Open Door*, 246 Eur. Ct. H.R. Rep., at 8.

governance, and the development of uniform European standards.

The ECHR's application of the margin of appreciation doctrine clearly recognizes that variations in the implementation of rights may be acceptable, particularly regarding questions of public morality or other issues for which no strong European consensus exists.¹⁹⁰ In *Handyside v. United Kingdom*, for example, the ECHR found the lack of European consensus on issues of public morality required that the United Kingdom be given a wide margin of appreciation concerning its decision to ban a sexually explicit book designed for the education of children.¹⁹¹ In *Müller v. Switzerland*, the ECHR employed similar reasoning to uphold the decision of local Austrian authorities to close a sexually provocative art showing that was open to the public without restriction.¹⁹² By allowing such discretion, the ECHR has, in effect, endorsed variations in the implementation of rights reflective of European diversity.¹⁹³

¹⁹⁰ See *supra* note 170; Koering-Joulin, *supra* note 173, at 84-87; Delmas-Marty, *supra* note 168, at 332-33; YOUROW, *supra* note 166, at 3-9; VAN DIJK & VAN HOOFF, *supra* note 141, at 92-94.

¹⁹¹ *Handyside v. United Kingdom*, 1 Eur. H.R. Rep. 737, 753-54 (1976). See also *Kroon v. Netherlands*, 19 Eur. H.R. Rep. 263, 289-90 (1995) (Morenilla J., dissenting). Although similar restrictions on free expression were at issue in the *Sunday Times* case, the government's justification centered on protection of judicial integrity rather than morals. Since the Court found a "fairly substantial measure of common ground" regarding judicial integrity and free speech, it distinguished *Handyside* and reasoned that "a more extensive European supervision corresponds to a less discretionary power of appreciation" over that issue. See *Sunday Times*, 30 Eur. Ct. H.R. at 274.

¹⁹² *Müller*, 13 Eur. H.R. Rep. at 227-32. See also *Wingrove v. United Kingdom*, 24 Eur. H.R. Rep. 1, 6-17, 19-21 (1997) (upholding government refusal to license video based on blasphemous content). It is noteworthy that *Müller* actually involved the exercise of discretion by local rather than national authorities, reminiscent of the problematic U.S. community standards approach to obscenity endorsed by the U.S. Supreme Court. *Miller v. California*, 413 U.S. 15, 24-26 (1973).

¹⁹³ The obvious cost of this approach is that it tends to inhibit the development of a common European standard for human rights derived from the Convention. See Helfer, *supra* note 170, at 142-43. See also Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 850-53

As a result, the ECHR has tempered national discretion, and thus the degree of variation among states, where a European consensus on the issue exists, or the importance of the right demands it.¹⁹⁴ Thus, when presented with a challenge to Ireland's anti-sodomy laws, the ECHR was forced to evaluate the competing claims of the Irish majority, which had exerted its moral and cultural preferences in criminal statutes, and individual claimants who were adversely affected by that legislation.¹⁹⁵ The Irish Government defended the legislation by, among other things, relying on the prevailing moral sensibilities of its population.¹⁹⁶ The ECHR explicitly acknowledged the significance of this dominant cultural position in Irish society but found that the existence of a contrary consensus among other parties to the European Convention should prevail.¹⁹⁷

In essence, that consensus helped the ECHR determine what the core value of the right of privacy included and how to use that consensus as a baseline upon which to evaluate the Irish legislation. In contrast, the ECHR has in other cases used the lack of European consensus to extend a wide margin of appreciation to national authorities.¹⁹⁸

(1999) (arguing that the margin, particularly in its reliance on consensus, undermines universal rights and international protections for minorities).

¹⁹⁴ See *supra* notes 172, 177-81, 190.

¹⁹⁵ See generally *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988).

¹⁹⁶ See *Dudgeon*, 45 Eur. Ct. H.R. at 162-66.

¹⁹⁷ *Id.* at 165-68. See Lawrence Helfer, *Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention on Human Rights*, 65 N.Y.U. L. REV. 1044, 1046-47, 1057, 1072-77 (1990) (critiquing the ECHR approach to finding consensus, particularly regarding the age of consent).

¹⁹⁸ See *Handyside*, 1 Eur. H.R. Rep. at 753-54; *Muller*, 13 Eur. H.R. Rep. at 229-32; *Cossey*, 13 Eur. H.R. Rep. at 641; *Wingrove*, 24 Eur. H.R. Rep. at 19-21; *X v. United Kingdom*, 24 Eur. H.R. Rep. at 169. As noted below, in European states these preferences are associated with democratic majorities. See *infra* notes 215-17 and accompanying text. In this sense, the discretion allowed national authorities arguably reflects a degree of appropriate respect for democratic self-governance. Correspondingly, one could also argue that a lack of democracy requires greater scrutiny of government's cultural justifications and little deference. See *supra* note 6.

Significantly, the ECHR has recognized that consensus over rights, and acceptable state restrictions on them, is evolutionary as opposed to static.¹⁹⁹ Presumably, the interpretation of a right's specific content will evolve along with European society, ensuring the progressive development of "European" standards.

The ECHR's view of the appropriate margin is also influenced by the nature of the right involved and the consequences to the individual claimant caused by its restriction. Private sexual conduct in *Dudgeon v. United Kingdom*, for example, involved the "most intimate aspects of private life" requiring significant justifications for state interference.²⁰⁰ In essence, the ECHR has recognized a hierarchy among rights protected by the European Convention.²⁰¹ Thus, alleged infringements or restrictions on rights such as free press and speech²⁰² and political participation²⁰³ have been subjected to a narrower margin of state discretion than less favored rights such as the use of property.²⁰⁴ One manifestation of this approach is the ECHR's frequent reference to—and reliance on—its perception of modern, liberal, and democratic society and its foundation based in "pluralism, tolerance and broad-mindedness without which there is no democratic society".²⁰⁵ State interference with those rights that are

¹⁹⁹ See VAN DIJK & VAN HOOF, *supra* note 141, at 77-80; Ost, *supra* note 141, at 290.

²⁰⁰ *Dudgeon*, 45 Eur. Ct. H.R. at 164.

²⁰¹ See *supra* note 180. YORROW, *supra* note 166, at 87, 115, 155, 188-91.

²⁰² *Castells v. Spain*, 14 Eur. H.R. Rep. 445 (1992); *Incal*, 29 Eur. H.R. Rep. at 450; *Sunday Times*, 30 Eur. Ct. H.R. at 246-48; *Lingens v. Austria*, 8 Eur. H.R. Rep. 407, 418 (1986).

²⁰³ See, e.g., *Socialist Party*, 27 Eur. H.R. Rep. at 86; *United Communist Party of Turkey*, 26 Eur. H.R. Rep. at 149.

²⁰⁴ See *Immobiliare Saffi v. Italy*, 30 Eur. H.R. Rep. 756, 779 (2000) (wide margin in housing regulation); *James v. United Kingdom*, 8 Eur. H.R. Rep. 123, 145 (1986); *Jacobsson v. Sweden*, App. No. 19438/92, 74 Eur. Comm'n H.R. Dec. & Rep. 220, 223-24 (1993); *Buckley v. United Kingdom*, 23 Eur. H.R. Rep. at 129-30 (1997); VAN DIJK & VAN HOOF, *supra* note 141, at 628, 640-41.

²⁰⁵ *Handyside*, 1 Eur. H.R. Rep. at 754-55; *Smith*, 29 Eur. H.R. Rep. at 529; *Otto-Preminger Institut*, 19 Eur. H.R. Rep. at 56-59; *Dudgeon v. United Kingdom*, 45 Eur.

deeply associated with these ideals requires a high level of justification.²⁰⁶

For present purposes, the significance of the ECHR's use of the margin of appreciation doctrine does not rest on the complex nuances of that jurisprudence. Indeed, as discussed below, there are a number of obvious and significant differences in circumstances that counsel against wholesale adoption of the margin of appreciation doctrine in the global context. Rather, its potential significance lies in its most salient features. First, the ECHR uses the margin of appreciation doctrine to recognize a variable degree of state discretion in the implementation of rights based on, among other things, cultural, religious and social preferences.²⁰⁷ The acknowledgment of such preferences in the interpretation of human rights, as seemingly demanded by the language of the Vienna Declaration, probably requires the allowance of some such discretion. Second, the ECHR attempts to constrain that discretion by reliance on a number of relevant factors, among the most important of which is the existence of consensus over meaning, the importance of the right, and the consequences for the individual.²⁰⁸ Such factors, particularly reliance on evolving international consensus, reflect the benefits of international supervision and allow the progressive development of rights standards. The selection of appropriate criteria by which to limit state discretion is, of course, critical for avoiding abuse and preserving core human rights values.²⁰⁹ Third, the ECHR

Ct. H.R. (ser. A) (1981). *See Ost, supra* note 141, at 294; Delmas-Marty, *supra* note 168, at 327-28.

²⁰⁶ *But see* Otto-Preminger Institut, 19 Eur. H.R. Rep. at 57-60 (using the concepts of toleration and pluralism to justify government ban on blasphemous movie designed to protect the religious "feelings" of majority Catholic population). There are obvious parallels between this mode of analysis and the rights jurisprudence of the United States Supreme Court. *See supra* notes 158-62 and accompanying text.

²⁰⁷ *See supra* notes 190-206 and accompanying text.

²⁰⁸ *See supra* notes 172-81 and accompanying text.

²⁰⁹ *See supra* notes 141-44 and accompanying text. Other important doctrines

recognizes a hierarchy among rights in measuring state discretion.²¹⁰ While controversial for other reasons,²¹¹ hierarchies among rights in this context would allow human rights institutions to distinguish those rights susceptible to culturally based variation from those that are not. Such hierarchies similarly allow these institutions to demand greater justifications for state limitations on certain rights.²¹² Fourth, the ECHR couples the margin of appreciation doctrine with a dynamic and teleological view of interpretation such that the meaning of rights and its view of permissible restrictions generally favor an expansive view of rights and protection of the individual.²¹³ In this way, human rights institutions may work toward the progressive development of rights, enhance the protection given to individuals, and avoid stagnation in the status quo of oppressive cultural traditions. The ECHR has adopted an approach to interpretation that ultimately emphasizes protection of the right holder by placing the burden of justification for restrictions on the state.

that are used by the ECHR to constrain state discretion include a teleological orientation to interpretation and the principles of "effective remedy" and "European supervision." See *supra* notes 174-75 and accompanying text.

²¹⁰ See *supra* notes 163-65, 179-80, 201-04 and accompanying text.

²¹¹ The idea that there may be hierarchies among rights has been strongly resisted in many quarters, especially in the developing world. See, e.g., *Indivisibility and Interdependence of Economic, Social, Cultural, Civil, and Political Rights*, G.A. Res. 44/130, U.N. GAOR, 44th Sess., Supp. No. 49, at 209, U.N. Doc. A/44/49 (1990). Much of the genesis for this resistance lies in the debate regarding priorities between economic development rights versus political and civil rights. While most Western governments and non-governmental organizations have human rights agendas dominated almost exclusively by civil and political rights, many Third World governments have alleged the primacy of economic and social rights. Rhoda Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUM. RTS. Q. 467, 469 (1983). See also Civic, *supra* note 48, at 320-22 (describing China's continuing adherence to the argument that economic rights take priority over civil and political liberties).

²¹² The use of hierarchies among rights is a central feature of American jurisprudence regarding Constitutional liberties. See generally CHEMERINSKY, *supra* note 158, at 638-43. See *supra* notes 158-62 and accompanying text.

²¹³ See *supra* notes 174-75 and accompanying text.

Finally, the ECHR remains the final arbiter of the meaning of rights, tempering state discretion with international supervision. Although perhaps inevitably problematic in a state-centric system, the exercise of meaningful supervisory authority seems critical to the ultimate success of the international human rights system and to the progressive development of rights.

These general features of the margin of appreciation doctrine seem appropriate and useful to the difficult task suggested by the Vienna Declaration: advancing universal rights while simultaneously respecting cultural diversity, self-governance and autonomy. Their critical attribute is the creation of an approach to these competing concerns that allows a measured degree of discretion to national authorities, significantly limited by appropriate criteria and subject to international supervision. Thus, the essential features of margin of appreciation jurisprudence, when coupled with a dynamic teleological view of interpretation that endorses progressive evolution of human rights, present a promising general approach to the problem of mediating between universality and diversity at the international level.

There are, of course, also reasons to doubt whether the margin of appreciation doctrine itself may or should be adopted generally by other international human rights institutions. Its potential, although promising, is tempered by some significant differences in context and institutional circumstances. Most obviously, the European system enjoys a degree of homogeneity in cultural, political, and religious orientations not shared by global human rights institutions.²¹⁴ While there is significant, and growing, diversity within the Council of Europe,²¹⁵ these differences

²¹⁴ See, e.g., David Seymour, *The Extension of the European Convention on Human Rights to Central and Eastern Europe: Prospects and Risks*, 8 CONN. J. INT'L L. 243, 244 (1993).

²¹⁵ See *id.* at 245-47. Since the fall of the Berlin Wall, membership in the Council of Europe has increased dramatically with the addition of former socialist states

are clearly not as profound as those that exist globally. Moreover, these differences pale in comparison to important commonalities among European Convention states. By agreement, these European states are committed, at least in theory, to some form of liberal democracy²¹⁶ and are increasingly reliant on market capitalism. With the exception of some recently admitted members, nearly all have strong traditions favoring individual autonomy with an emphasis on civil and political liberties. Most are also dominated by Judeo-Christian religious traditions.²¹⁷ Nearly all have industrialized economies, with highly educated populations.

In this context, one of the primary factors constraining state discretion under margin of appreciation analysis, the existence of a significant degree of "European consensus," makes considerable sense. It may make less sense globally where significant consensus over specific issues will often be hard to find. Moreover, European Convention states share fundamental conceptions about the function of rights in democratic societies. These critical beliefs about the relationship between rights, the individual, and society are not universally shared among the world's diverse

from Central and Eastern Europe. Since 1990, membership in the Council has increased by 18 states, most of which are former Soviet bloc countries. See Council of Europe, at <http://www.coe.int/portalT.asp> (last visited Dec. 21, 2001). All of these states have also ratified the European Convention on Human Rights as an unwritten precondition for membership in the Council. Seymour, *supra* note 214, at 250. See also Rudolf Bernhardt, *Current Development: Reform of the Control Machinery Under the European Convention on Human Rights: Protocol 11*, 89 AM. J. INT'L L. 145, 147 n.10 (1995). The addition of states such as Bulgaria, Russia, Albania, Romania and Slovenia, has added significant new diversity to the European human rights system. See Seymour, *supra* note 214, at 244-47.

²¹⁶ See Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL'Y 709, 777-78 (1999); Thomas M. Franck, *The Democratic Entitlement*, 29 U. RICH. L. REV. 1, 28 (1994). All members of the Council also participate in the Organization for Security and Co-operation in Europe, which has made democratic governance a pre-requisite to official recognition of statehood and government legitimacy. Franck at 27-29.

²¹⁷ Turkey and Albania have predominately Islamic populations and stand out as clear exceptions to the Judeo-Christian religious orientation of the other Convention states.

communities. Thus, the degree of potential "cultural discord" between national versus international interpretations of rights and their appropriate function is far more likely on a global, as opposed to a regional, level.

More importantly, the search for consensus on the global level may often prove not only elusive but also may hinder the development of human rights standards. An obvious critique of the margin of appreciation doctrine is that the discretion it allows constitutes an abdication of function. The very parties (i.e., governments and political majorities) whose behavior is to be constrained are allowed to set the agenda. If the lack of global consensus leads to wide margins of discretion, international rights may conceivably be reduced to lowest common denominators, with only minimum core values being protected. Relying on the consensus of majorities, the margin of appreciation doctrine may inadequately protect individuals and minorities from the "tyranny" of democracy. The use of discretion limiting criteria other than consensus may, however, combat this prospect and is therefore critical.²¹⁸

The most serious distinction between the European System and other international human rights institutions may well be their institutional contexts. The ECHR supervises the conduct of states that, by and large, respect both human rights and recognize the ECHR's legitimacy.²¹⁹ Its mandate is well defined and its authority and credibility well established. For a variety of reasons that generally

²¹⁸ See *supra* notes 208-13 and accompanying text.

²¹⁹ Professors Helfer and Slaughter have perceptively described the "sad paradox" that human rights institutions are most "effective" in the states that "arguably need them least: those whose officials commit relatively few, minor, and discrete human rights violations." Helfer & Slaughter, *supra* note 98, at 329. They cite the existence of strong, independent domestic institutions, committed to the rule of law and responsive to individual claimants, as a "strongly favorable precondition for effective supranational adjudication." *Id.* at 333-34. See also Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L. J. 1397, 1404-04 (1999) (critiquing the view that the existence of liberal democratic institutions itself explains compliance).

don't prevail in the context of other human rights institutions, European Convention States have accepted the ECHR and its judgments as legitimate, binding and enforceable.²²⁰ This authoritative status ensures that the important concept of "European supervision"²²¹ is a meaningful one. It similarly allows the ECHR, as the final authority on European rights issues, to both effectively check national discretion and to limit the possibility that oppressive practices will be preserved in the name of diversity. Other international human rights institutions simply do not currently enjoy either the mandate or status of the ECHR.²²²

To the degree that institutional legitimacy is a critical factor in limiting state discretion, limitations in the existing international system may at first seem to counsel against adoption of margin of appreciation analysis. There is, however, an important counter consideration. Taking the long view, the margin of appreciation doctrine may well provide international institutions with the flexibility necessary for their long-term development as credible and authoritative decisionmakers. The ECHR owes much of its current success to a process of incremental confidence building over time, slowly substantiating its authority and legitimacy with the very states that created it.²²³ The margin of appreciation doctrine has been one of the essential ingredients in the ECHR's incremental development of legitimacy by recognizing, while at the same time controlling, a significant element of discretion by state authorities.²²⁴ The persistent realities of national

²²⁰ See Helfer & Slaughter, *supra* note 98, at 276-77, 293-98. See also Seymour, *supra* note 214, at 244; Janis, *supra* note 117, at 39-46 (pointing out unanswered questions regarding the "efficacy" of the Strasbourg institutions).

²²¹ See *supra* notes 174, 198-99, 213 and accompanying text.

²²² See *supra* notes 116-36 and accompanying text; Helfer & Slaughter, *supra* note 98, at 336-68 (providing a general overview of similarities and contrasts between the characteristics and circumstances of the HRC and the ECHR); Mutua, *Looking Past*, *supra* note 59, at 214-37, 252-60.

²²³ See Helfer & Slaughter, *supra* note 98, at 355-56, 367; *supra* notes 143-44.

²²⁴ See YOUNG, *supra* note 166, at 196; Helfer, *supra* note 172, at 137-38; Helfer

sovereignty within the state-centric international legal order require that international human rights institutions follow a similar path of incremental development. Intelligent deployment of the margin of appreciation doctrine may allow currently weak international institutions to build their authority over time and slowly work toward more assertive forms of jurisprudence as their legitimacy grows.

CONCLUSION

The profound diversity which characterizes our world poses significant dilemmas for international human rights standards. How can rights be universal and yet accommodate the demands of genuine diversity and the important values of democratic self-governance and autonomy? While there are no easy answers to this important question, significant insights regarding how international institutions might approach the problem may be drawn from the jurisprudence of the European Court of Human Rights and of the U.S. Supreme Court. Important parallels exist between the issues these courts confront and those of international diversity and the balancing of individual versus communal interests. The nuanced standards of review created by these institutions, particularly the ECHR's "margin of appreciation" doctrine, provide important insights regarding the ways in which concerns over sovereignty, institutional roles, state discretion, and international supervision may be mediated in a positive manner to protect human rights without sacrificing respect for democratic self-governance and diverse cultural, social, and political traditions.

& Slaughter, *supra* note 98, at 315-17.