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Rael v. Taylor and the Colorado Constitution: How Human Rights Law Ensures Constitutional Protection in the Private Sphere

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I. INTRODUCTION

Many Practitioners and scholars in the United States have adopted the position that the ratification of human rights treaties adds little or nothing to the protection of rights in America.[1] This is due to a perceived advanced state of constitutional rights protection.[2] However, most international human rights advocates have lamented the apparent lack of impact that the ratification of the International Covenant on Civil and Political Rights [ICCPR] has had on U.S. jurisprudence. They blame this on the many reservations, understandings, and declarations attached during its ratification by the Senate.[3]

The impact of the ratification has yet to be fully understood as an extremely important interpretive device for federal and state constitutions.[4] One such area is the vertical and horizontal character of human

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1. One practitioner raises the following question: "why should I apply international human rights law, which I can't even shepardize and which I have trouble finding, in a lawsuit between Californians raising issues of California law?" He goes on, however, to discuss how human rights can be useful in promoting rights in state courts. Paul Hoffman, *The Application of International Human Rights Law in State Courts: A View from California,* 18 INT'L LAW. 61, 62 (1984). One scholar indicates there are difficulties in using human rights law for "international law is a mystery to most judges." Curtis A. Bradely & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position,* 110 HARV. L. REV. 815, 815 (1997).

2. For example, the State Department claims that "because the basic rights and fundamental freedoms guaranteed by the Covenant on Civil and Political Rights . . . have long been protected as a matter of federal constitutional and statutory law, it was not considered necessary to adopt special implementing legislation to give effect to the Covenant's provisions in domestic law." Initial Report of the United States of America to the U.N. Human Rights Committee under the International Covenant of Civil and Political Rights, at 29 (July 1994). For an opposing view, see, Dorothy Q. Thomas, *Essay: Advancing Rights Protection in the United States: An International Advocacy Strategy,* 9 HARV. HUM. RTS. J. 15 (1996).

3. *See, e.g.*, Cherif Bassiouni, *Reflections on Ratification of the International Covenant on Civil and Political Rights by the United States Senate,* 42 DEPAUL L. REV. 1169 (1993).

4. Some scholars have predicted and suggested that advocates can use the Covenant "as an interpretive aid, and it is likely with U.S. ratification of the treaty, this role . . . will

rights, which means human rights law will have an important evolutionary impact on the application of constitutional rights, not only in the public, but also in the private sphere.[5]

This article will show the vital role the ICCPR should play in resolving a case pending in the Colorado courts since 1981, involving the descendants of the original Mexican settlers to Southern Colorado and their struggle to regain land rights with a 150 year history. The ratification of the ICCPR should profoundly alter the traditional "state action" limitation in cases seeking to vindicate constitutionally protected rights. The ICCPR should form the constitutional arguments made in the case of *Rael et al. v. Taylor*.[6]

The ICCPR was originally drafted as a blueprint for a society where human rights are respected by all. The effect on traditional constitutional analysis is the creation of a transparent method for the examination of all rights involved and the value judgments underlying them. This is true even when the alleged violator has traditionally been considered a private actor and therefore free from scrutiny.[7]

This article will provide a short history of *Rael v. Taylor*; outline the constitutional analysis of the case prior to the ICCPR; discuss the ratification of the ICCPR and its meaning; and conclude with a consti-

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expand." Jordan J. Paust, *Avoiding Fraudulent Executive Policy: Analysis of the Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257, 1277 (1993).

5. For a thorough overview of the practical and theoretical development of horizontal human rights, see ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993). The terms "horizontal" and "private" sphere are used as descriptive categories which reflect a particular legal history. These distinctions or terms are not capable of describing reality.

6. In 1981 a group of citizens representing the heirs and successors in the interest of the original settlers of the *Sangre de Cristo* grant filed a civil action in Costilla County District Court to quiet title to the "Mountain Tract" or *la sierra* and alternatively, for damages. Rael v. Taylor, Civil Action No. 81CV5 (Dist. Ct. Costilla Cty. Colo., 1981). The District Court granted defendant Taylor's motion for summary judgement holding that the action was barred by the principle of res judicata and certain statutes of limitation. The court cited two related actions. The first is a Torrens action filed by Taylor in U.S. District Court in 1960. In this action, title to the Mountain Tract or *la sierra* was confirmed and registered in Taylor's name. Taylor v. Jaquez, Civil Action No. 6904 (D. Colo. Oct. 5, 1965). The 10th Circuit affirmed the lower court's holding, reasoning that the U.S. Congressional confirmatory Act of 1860 extinguished any usufructuary rights derived from Mexican law. Sanchez v. Taylor, 377 F.2d 733, 737 (10th Cir. 1967). The second is a quiet title action filed in 1960 by Taylor's predecessor in interest regarding the Salazar tract. Salazar v. Allis, Civil Action No. 1483 (Dist. Ct. Costilla Cty., Colorado July 8, 1960). The 1981 District Court ruling was appealed. The decision was affirmed by the Colorado Court of Appeals. Rael v. Taylor, 832 P.2d 1011 (Colo. Ct. App. 1991). The Court of Appeals ruling was appealed. The Colorado Supreme Court affirmed in part and reversed in part, the lower court's ruling. Rael v. Taylor, 876 P.2d 1210 (Colo. 1994). Specifically, the Colorado Supreme Court held that the due process rights of the heirs may have been violated during the 1960 Torrens action and for that reason the application of res judicata would be inappropriate, and remanded the case for further action. *Id.* at 1229.

7. *See generally*, Duncan Kennedy, *The Status and Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

tutional analysis of the *Rael* case in light of the ICCPR's ratification.

II. THE HISTORY OF RAEL V. TAYLOR

In 1844, what is now Costilla County, Colorado, was Mexican territory including the land presently in contention in the *Rael v. Taylor* case.[8] That year the Mexican government issued to Narcisco Beaubien and Stephen Luis Lee the *Sangre de Cristo* land grant on the condition they encourage settlement in that area.[9] As was the custom at that time, Mexican law granted the businessmen a portion of the land with the remainder to be divided among the successful homesteaders and common areas.[10] These common areas would be used as pastures and a mountain tract for hunting, fishing, wood gathering and as a water supply. The land used for these common areas was held by the community with usufructuary rights to all settlers, however, title to the land reserved for common use was most often held by the local government or community but it could be held by the federal government or by an individual.[11]

In the early 1800's, Mexico and the United States were competing to expand into what is now the Southwestern part of the United States.[12] The Mexican government used attractive incentives to persuade settlers into this area. [13] It allowed title to be recognized without being formalized until after the land had already been settled. Even without formalized title, the general pattern of settlement was well known and systematically followed.[14] This made custom an extremely important part of Mexican land law during this period of rapid expansion.[15]

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8. *See, e.g.*, Calvin Trillin, *U.S. Journal: Costilla County, Colorado A Little Cloud on the Title*, NEW YORKER, Apr. 26, 1976, at 122.

9. For a complete study of the land grant and its sociological and anthropological impact on the region, see Marianne L. Stoller, The History of the *Sangre de Cristo* Land Grant and the Claims of the People of the Culebra River Villages on the Lands (unpublished manuscript 1980). Attached as an exhibit to plaintiff's brief in opposition to Motion for Summary Judgement in 1981 civil action.

10. Typically 30% was awarded to the grantee (businessman). The remainder was to be held individually and in common by the settlers. FREDERIC HALL, THE LAWS OF MEXICO: A COMPILATION AND TREATISE 103-06 (1885).

11. GEORGE MCCUTCHEN MCBRIDE, THE LAND SYSTEMS OF MEXICO 107-111 (1923).

12. *See* Placido Gomez, *The History and Adjudication of the Common Lands of Spanish and Mexican Land Grants*, 25 NAT. RESOURCES J. 1039, 1065 (1985).

13. The terms did not improve only for the settlers, but for the grantee as well. In that larger tracts of land than typically granted were being distributed by the Mexican government to facilitate settlement of its northern border. *Id.* at 1066.

14. MCBRIDE, *supra* note 11, at 1, 57, 85.

15. At this point, custom and usage became even more important:

> The supreme authorities of the remote province of New Spain, afterwards the Republic of Mexico, exercised from time immemorial certain prerogatives and powers, which, although not positively sanctioned by congressional enactments, were universally conceded by the Spanish and Mexican governments; and there being no evidence that these prerogatives and powers were revoked or repealed by the supreme authorities, it is to be presumed that the exercise of the them was lawful.

Tameling v. U.S. Freehold and Emigration Co., 93 U.S. 644, 658 (1876)(quoting William

The original grantees, Narcisco Beaubien and Stephen Luis Lee, were killed in 1847 during the Taos Rebellion.[16] Narcisco's father, Carlos Beaubien, inherited his son's undivided one-half interest in the property and purchased the remaining interest from Lee's estate.[17] By 1848, when the governance of that area was transferred from Mexico to the United States, the necessary steps to fulfill the terms of the land grant had been well underway.[18] Following a change of sovereignty, the underlying property claims remain unchanged.[19] Settlement in *Sangre de Cristo* continued in accord with the terms of original Mexican grant.[20]

In accordance with the terms of the original *Sangre de Cristo* grant, a tract of mountain land was set aside as common area (*la sierra*). *La sierra* compromised a portion of what is now the *Sangre de Cristo* mountain range. In 1863, Beaubien memorialized the original Mexican settler's rights to this communal tract of land in a document referencing two types of common areas; pasture lands (*la vega*) and mountain lands (*la sierra*). This document states:

> Town of San Luis of Culebra, May 11, 1863 Book 1, Page 256.
>
> It has been decided that the Rito Seco lands shall remain uncultivated for the use of the residents of San Luis, San Pablo, and the Vallejos, and other inhabitants of said towns, for pastures and community

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Pelham, Surveyor General in relation to the *Sangre de Cristo* land grant, Dec.30, 1856).

16. *Id.*

17. Rael, 876 P.2d at 1210, 1213 .

18. Treaty of Peace, Friendship, Limits and Settlement with the Republic of Mexico, Feb. 2 1848, U.S. - Mex., 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo].

19. The concept of conquest in international law called for the new sovereign to recognize and respect the property rights of the previous inhabitants of the territory it had just acquired. This concept was clearly established in U.S. courts. United States v. Percheman, 32 U.S. 51, 88 (1833). Fisher v. Allen, 3 Miss. (2 Howard) 611 (1837) (holding that a change in citizenship cannot interfere with the rights to property previously acquired). In fact, the U.S. Supreme Court reiterated this same principle in a case delineating the boundaries of the *Sangre de Cristo* land grant. "We have repeatedly held that individual rights of property, in the territory acquired by the United States from Mexico, were not affected by the change sovereignty and jurisdiction." Tameling, 93 U.S. at 661.

The Treaty of Guadalupe Hidalgo recognized this concept in its text:

> Mexicans now established in territories previously belonging to Mexico . . . shall be free to continue to reside, or remove at any time to the Mexican republic, retaining the property which they possess in the said territories . . . . In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. Mexicans who, in the territories aforesaid . . . shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

Treaty of Guadalupe Hidalgo, *supra* note 18, Arts. VIII, IX.

20. Stoller, *supra* note 9, at 26-30.

> grounds, etc. And that Rito Seco waters are hereby distributed among the said inhabitants of the town of San Luis, and those on the other side of the *vega*, whose lands lie in the vicinity and cannot be irrigated by the water of the Rio Culebra .
>
> All the inhabitants shall have the use of pasture, wood, water, and timber and the mills that have been erected shall remain where they are, not interfering with the rights of others. No stock shall be allowed in said lands, except for household purposes. All those who come as settlers shall agree to abide by the rules and regulations and shall help, as good citizens and be provided with the necessary weapons for the defense of the settlement.[21]

This statement is entirely typical of Mexican land grants from that time.[22]

The Mexican land grant's common area provisions are reminiscent of the practice brought by early settlers from England to United States.[23] *La vega* is one of the few common pasture areas recognized by United States courts West of the Mississippi River.[24]

While the original Mexican homesteaders continued to settle the area, the United States government recognized the entire *Sangre de Cristo* grant.[25] During this period plots were provided to the settlers for cultivation and they were also given usufructuary rights to *la vega* and *la sierra*. In 1864, when Beaubien transferred the underlying fee in *la sierra* he reaffirmed the traditional usufructuary rights of the original

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21. Rael, 876 P.2d at 1231 (quoting a document executed by Carlos Beaubien on May 11, 1863 translated from the Spanish original).

22. The Spanish colonies in the new world normally held pasture lands, mountains, and water in common for the use of the residents of the settlement. "We have ordained that pastures, mountains, and water, shall be common in the Indies." JOHN SAYLES AND HENRY SAYLES, EARLY LAWS OF TEXAS 3, Vol. 26 (2d ed. 1891) (discussing the Law and Decrees of Spain relating to land in Mexico). This practice of colonial Spain filtered into Mexican law. *See* MCBRIDE, *supra* note 11, at 1, 57, 85.

23. Such a property arrangement characterized feudal agrarian society. *See, e.g.*, MARC BLOCH, FEUDAL SOCIETY (L.A. Manyon trans., 2d ed. 1962) (1961). For a more extensive overview of the legal history relevant to the case, see Richard D. Garcia & Todd Howland, *Determining the Legitimacy of Spanish Land Grants in Colorado: Conflicting Values, Legal Pluralism, and Demystification of the Sangre De Cristo/Rael Case*, 16 CHICANO-LATINO L. REV. 39 (1995).

24. Costilla State Development Company v. Delphino Salazar, Civil Action No. 118 (Dist. Ct. Costilla Cty., Colo., Jan. 21, 1916).

25. In accord with the Treaty of Guadalupe Hidalgo, the U.S. Surveyor General made findings and recommendations regarding property which had become part of U.S. territory. The U.S. Congress confirmed that the legal owner under Mexican law of the *Sangre de Cristo* grant was Carlos Beaubien. This as well as a number of other land grants were confirmed by U.S. Congress through, An Act to Confirm Certain Private Land-Claims in the Territory of New Mexico, June 21, 1860, ch. 167, 12 Stat. 71-72 (1860). This confirmation eventually provided Beaubien with a quitclaim deed to the property related to the grant, the relevant section of which reads: "this patent shall only be construed as a quitclaim deed or relinquishment on the part of the United States, and shall not affect the adverse right of any other person or persons whomever." Following a lengthy debate over the exact size of the grant, in 1880 a Congressional patent was issued based upon the 1860 confirmation. Tameling, 93 U.S. 644. *See also* Stoller, *supra* note 9, at 33-35.

Mexican settlers.[26]

Geographic isolation, combined with the rather unusual property arrangement for that period of American legal history nurtured a unique, self-sufficient culture. The land provided all the of the settler's needs, from subsistence agriculture on their individual tracts, to hunting, fishing, and wood gathering on *la sierra*. In fact, without access to *la sierra* it would have been impossible for the settlers and their descendants to have survived. For one hundred and fifty years, the villages established by these settlers have continued to function in the same manner, preserving a unique American heritage found nowhere else. The language, religion, and customs practiced by the descendants of the original settlers can be traced back to historic Spanish-Indio culture.[27]

In 1960, major changes began to unfold in Costilla County. John (Jack) T. Taylor, a North Carolina lumberman, purchased the underlying fee of approximately 77,000 acres of *la sierra*. His purchase included the Culebra Mountain, the only privately owned 14,000 foot mountain peak in the state of Colorado.[28] Taylor's deed contains language similar to the 1863 County Record, indicating he was fully aware that the descendants of the original settlers of the *Sangre de Cristo* grant had usufructuary rights to the property he was purchasing.[29] *La sierra* was adjacent to the individual tracts of property used by the original settlers for agricultural purposes and as common pasture lands [*la vega?*]. Taylor fenced in areas of *la sierra*, infringing the traditional usufructuary rights. This generated a steadily increasing tension which continues to divide the region.[30]

In 1961, Taylor filed a Torrens action in Denver (250 miles from Costilla County) attempting to register his recently acquired property without recognizing the original settlers' descendants' usufructuary rights mentioned in his deed. Taylor named in his Torrens action only

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26. The instrument of conveyance from the estate of Carlos Beaubien to William Gilpin reads:

> [C]ertain settlement rights before then conceded by said Charles Beaubien to residents of the settlements of Costilla, Culebra and Trinchera, within said Tract included, shall be confirmed by said William Gilpin as made by him, the said Charles Beaubien during his [sic] occupancy of said Tract and as understood and agreed by and between him and said settlers.

Rael, 876 P.2d at 1213-14.

27. *See generally* Stoller, *supra* note 9, for a more extensive discussion of this aspect of development of the community which grew out of the original grant.

28. *Id.*

29. In Rael, the Court stated:

> [a]ll of the land hereby conveyed being subject to rights of way of record and all rights of way heretofore located and now maintained and used on, through, over and across the same; and also subject to claims of the local people by prescription or otherwise to right to pasture, wood, and lumber and so-called settlements [sic] rights in, to and upon said land, but not subject to rights granted by the party of the first part or its predecessors from and after January 1, 1900; and also subject to taxes for the year 1960 and subsequent years, and existing leases, if any.

Rael, 876 P.2d at 1214.

30. Trillin, *supra* note 8.

about 15% of the readily ascertainable landowners that would be affected.[31] The U.S. District Court granted Taylor's request to extinguish the usufructuary rights of the original settlers and their descendants even though they had been using that land in question in an uninterrupted fashion for more then one hundred and fifty years. The court did not require Taylor to give notice to almost 85% of the landowners who were affected by its decision.[32] This decision was affirmed by the U.S. Circuit Court.[33]

With the court supported and enforced fencing of *la sierra*, tensions remained high and the residents of Costilla County suffered a major economic downturn, due to the dislocation from their traditional way of life. Descendants of the original settlers were arrested for attempting to exercise their traditional rights.[34] By 1978, Costilla County had the highest percentage in Colorado of residents receiving public assistance - about one half of all adult residents.[35] Residents were disaffected with a system that did not recognize their rights, and for the most part did not even give them a day in court before their rights were stripped away. The descendants of the original settlers suffered both material loss in well-being and a loss of dignity stemming from the loss of their traditional way of life and self-sufficiency.[36]

In 1981, some of the descendants of the original settlers of the *Sangre de Cristo* land grant and residents of Costilla County banded together to file a claim against Taylor. Their claim alleged that Taylor had violated their traditional rights without ever having their day in court. This challenge failed in the district,[37] and appellate courts.[38] The

31. Costilla County property records listed almost all those who would have been affected by the decision.

32. Taylor v. Jaquez, No. 96-1426, 1997 WL 627025, at *1 (D. Colo. 1997).

33. Sanchez v. Taylor, 377 F.2d 733, 737 (10th Cir. 1967).

34. Trillin, *supra* note 8.

35. Stoller, *supra* note 9, at 91.

36. The most recent complaint (District Court of Colorado 1997) of the heirs of the original settlers lists a number of causes of action, which include: Plaintiffs' properties received and became affixed with easements by grant or dedication to use the Historical (usufructuary) Rights on the Mountain Tract. Plaintiffs are, third party beneficiaries to the existence of the covenants and servitudes, which covenants and servitudes served to impress and burden the Mountain Tract, and to benefit the Plaintiffs' properties. Plaintiffs' properties, acquired easements which are implied both by pre-existing use and by necessity to use the Historical Rights on the Mountain Tract. Plaintiffs' properties, through open, continuous, notorious, hostile and adverse use, acquired easements by prescription to use the Historical Rights on the Mountain Tract. Beaubien and his successors-in-interest granted licenses, which have ripened into easements. Circumstances surrounding the creation of the Historical Rights warrants imposition of an equitable trust against the Mountain Tract. Heirs and successors of the original settlers are entitled to continued communal use of the Historic Rights in the Mountain Tract in accordance with Mexican law and custom that established these rights. The application of these rights is protected by the Constitution of the State of Colorado as informed by binding human rights law, by international treaties, including the Treaty of Guadalupe-Hidalgo, as well as international legal principles recognized in U.S. courts, including the law of conquest. Plaintiff's Complaint, Rael v. Taylor, Civil Action No. 81CV5 (Dist. Ct. Costilla Cty., Colo., 1981).

37. Rael v. Taylor, Civil Action No. 81CV5 (Dist. Ct. Costilla Cty., Colo., 1981).

38. Rael v. Taylor, 832 P.2d 1011 (Colo. Ct. App. 1991).

Colorado Supreme Court, however, held in favor of the residents stating that the defendant Taylor did not provide adequate notice to those his original Torrens action would divest, given the ease of identifying all potentially injured parties.[39] The case has now been remanded to the district court to allow the settler's descendants to argue their rights were violated when Taylor stripped them of their usufructuary rights to *la sierra*.[40]

The descendants of the original settlers challenge Taylor's action of cutting access to *la sierra*, and thereby depriving them of their traditional rights to hunt, fish, and gather wood.[41] The descendants also claim that Taylor's actions have destroyed their livelihood, their way of life, and their community. These effects indicate that some cluster of rights has been violated, however, the difficulty presented is in determining whether any of those rights create a cause of action which is recognizable in a U.S. court. Should an action exist, the Taylor's rights to enjoy the use of his land, and the usufructuary rights of the settler's descendants are in conflict and will need to be resolved.

III. CONSTITUTIONAL DEVELOPMENT AND *RAEL V. TAYLOR* PRE-ICCPR

Traditionally, scholars have viewed the 1791 Bill of Rights to the U.S. Constitution as an attempt to curtail the central government's infringement of rights of individuals.[42] Early court cases restricted the Federal governments powers, it was not until the 13th [1865] and 14th [1868] Amendments to the Constitution were passed that focus shifted to any infringement of an individual's rights.[43]

Although most scholars have views the language of the Bill of Rights as limitations placed on the Federal government, there is some ambiguity as to their application on state governments. The 14th Amendment clearly eliminates that ambiguity placing a firm restriction on state governments.[44] Additionally, the 13th Amendment creates a constitutional right for individuals against other individuals.[45]

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39. Rael v. Taylor, 876 P.2d 1210 (Colo. 1994).

40. Two of the three kinds of property derived from the original land grant have always been recognized as valid. The individual plots for cultivation and the common land for pasturing. Costilla State Development Company v. Delphino Salazar, et. al., Civil Action No. 118 (Dist. Ct. Costilla Cty., Colo., Jan. 21, 1916). But the usufructuary rights to the Mountain Tract or *la sierra* were interrupted in 1961 and with active state intervention have not been exercised since.

41. The popular press is already following the issue closely as it involves a number of issues, like sustainable living and respect for the environment, that are widely valued in Colorado. *See, e.g.*, Jillian Lloyd, *150-Year-Old Land dispute Intensifies in Colorado,* CHRISTIAN SCI. MONITOR, Mar. 3, 1997, at 4.

42. *See, e.g.*, Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65, 78 (1996).

43. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

44. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." U.S. CONST. amend. XIV, §1.

45. "Neither slavery nor involuntary servitude, except, as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, §1.

U.S. jurisprudence has moved slowly to reflect these changes:

> It took from 1868 to 1925 for the Supreme Court to rule that the Fourteenth Amendment protection of life, liberty, and property against state attacks including attacks on the rights set forth in the First Amendment. The first time a statute was over turned for violating the First Amendments was 1931. And it was 1953 before the Supreme Court upheld the conviction of a large Washington, D.C. department store for discriminating against Negro customers in violation of the acts of 1872 and 1873 passed by the Legislative Assembly of the District of Columbia. It was 1968 before the Supreme Court upheld a challenge to the practice of refusing to sell a home to a Negro under the law passed in 1866.[46]

It has taken time to accept the idea that States must respect the rights contained in the Bill of Rights. The idea that individuals must respect the rights contained in the Bill of Rights has been a much more convoluted process.

After the Civil War, the Supreme Court did not embrace the idea that it should protect individuals from violation committed by another individual. The Court developed the "state action" distinction, whereby a deprivation of a constitutional right is remediable only when a state actor is responsible.[47] In the Civil Rights cases of 1883, the Court attempted to create a distinction between public and private deprivations of an individual's rights. Discrimination in the private sphere was a protected constitutional right, while in the public sphere, it was a blight that was to be stuck down.[48] A whole tapestry of cases has followed trying to draw a clear distinction between these spheres.[49] Many judicial resources have been expended trying to avoid looking seriously at the rights of both parties and determining how and why one person's rights should prevail.

While a number of scholars have attempted to clarify the distinction between public and private deprivations, one gets the feeling that the distinctions being made are a bit slippery.[50] In some cases it has been argued that "[r]ights created by the first section of the 14th

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46. Ann Fagan Ginger, *The Energizing Effect of Enforcing a Human Rights Treaty*, 42 DEPAUL L. REV. 1341, 1352-53 (1993) (construing Gitlow v. New York, 268 U.S. 652, 666 (1925); Stromberg v. California, 283 U.S. 359 (1931); District of Columbia v. John R. Thompson, Co., 346 U.S. 100 (1953); and Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)). Note also that it was not until 1962 that the Eighth Amendment was applied to the States.

47. David Pickle, Comment, *State Court Approaches to the State Action Requirement: Private Rights, Public Values, and Constitutional Choices*, 39 U. KAN. L. REV. 495 (1990-1991).

48. Civil Rights Cases, 109 U.S. 3 (1883).

49. Coppage v. Kansas, 236 U.S. 1 (1915) (allowing employers to discriminate against union members in employment decisions); West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding minimum wage by reading liberty to protect against attacks on welfare by individual, even though the defendant claimed his right to liberty protected his freedom to contract); Marsh v. Alabama, 326 U.S. 501 (1946) (Court reviewed and overturned state preference for the property right of a mall owner, over the rights of freedom of expression of others).

50. *See, e.g.*, LAWRENCE TRIBE, CONSTITUTIONAL CHOICES 259-60 (1985).

Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."[51] While in other cases it has been argued that "[n]othing in the Due Process Clause itself requires the State to protect life, liberty, property of its citizens against an invasion by private actors."[52] The reasoning of this line of cases presupposes that the world is divided between public and private spheres, that assumption is difficult to fit into today's world.[53]

The lines between state and non-state actors are blurring, if there ever was a clear distinction. Today, for example private organizations are running prisons and schools, increasing the number of institutions that perform traditional "state functions." There are symbiotic relationships requiring state compulsion to be valid. For example, private property is nothing without government intervention and protection.[54]

The present state of the law normally calls for legislative action before constitutional rights can be applied against governments [horizontally] or between individuals [vertically]. Other than favoring the status quo, some scholars believe that the distinction between public and private is not legally justifiable, nor desirable, in that it helps sustain the racist and male dominated aspects of society.[55] Implicit in a no state action holding is a declaration that a claim has no constitutional merit. As scholars have noted, it would be intellectually more honest and beneficial for society to openly discuss the rights in conflict in a transparent fashion, strike a balance, or if necessary, confirm that one side's right is more important then the others.[56]

The distinction between public and private law is considered by sociologist to be inappropriate.[57] Durkheim has said: "All law is private in the sense that it is always about individuals who are presented and acting; but more importantly, all law is public, in the sense that it is a social function and that all individuals are, whatever their various titles, functionaries of society."[58]

IV. RATIFICATION ON THE ICCPR AND ITS MEANING

President Carter signed the ICCPR and transmitted it to the Senate for its advice and consent in 1977.[59] Fifteen years later it was rati-

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51. Shelley v. Kraemer, 334 U.S. 1 (1948).

52. DeShaney v. Winnebage Cty. Soc. Serv., 489 U.S. 189 (1989).

53. For a criticism of the underlying assumption and the values attached to it, see Duncan Kennedy, *The Status and Decline of the Public/Private Distinction,* 130 U. PA. L. REV. 1349 (1982).

54. For a more detailed discussion of this area, see Pickle, *supra* note 47.

55. *E.g.,* Kennedy, *supra* note 53.

56. Pickle, *supra* note 47, at 499, 505, 516.

57. CLAPHAM, *supra* note 5, at 131.

58. EMILE DURKHEIM, THE DIVISION OF LABOUR IN SOCIETY 68 (1964).

59. *International Covenant on Civil and Political Rights,* G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* Mar. 23, 1976 [hereinafter ICCPR]. The ICCPR has 27 substantive articles touching on most aspects of what are generally classified as political and civil rights.

fied by the Senate.[60]

The ICCPR is considered to be one of the foundation documents of human rights law. It is solidly grounded in the Universal Declaration of Human Rights.[61] The ICCPR is often refereed to as part of the International Bill of Rights.[62] It took the world community 19 years to negotiate and draft the ICCPR treaty, with the participation and consent of one hundred and three nations as well as indirect input from non-governmental organizations.[63] The United States delegation was one of the more active groups during the drafting process.[64]

Despite the extensive United States participation in the ICCPR's drafting, the Senate's ratification was remarkable in the number of limitations and clarifications it attempted to attach to the treaty. The Senate following extensive deliberations attached five reservations, five understandings, and four declarations to the ratification of the ICCPR.[65] While both under international law[66] and in domestic courts, the status of these attachments is questionable,[67] this article will focus

60. 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992). The U.S. deposited its instruments of ratification on June 8, 1992, *reprinted in 31* I.L.M. 645 (1992). It was not until September 8, 1992 that the ICCPR entered into force in the United States. U.S. Department of State Dispatch, Monday, May 16, 1994.

61. G.A. Res. 217A (III), U.N. Doc. A/810, at 72 (1948).

62. The other half of the International Bill of Rights is the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), *entered into force* Jan. 3, 1976. *See, e.g.*, LOUIS HENKIN, THE INTERNATIONAL BILL OF RIGHTS (1987).

63. *See* HENKIN, *supra* note 62; *see also*, MARC J. BOSSUYT, GUIDE TO THE *TRAVAUX PREPARATOIRES* OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS XIX, XX (1987).

64. The U.S. even sat on the original eight-member drafting committee in June of 1947. *Id.* at XIX. A noted political scientist in the area has divided U.S. interest in human rights into four phases: 1945-1953, U.S. Limited Support; 1954-1974, U.S. Neglect; 1974-1981, U.S. Renewed Interest; and 1981-19?, Era of Subservience to Cold War Politics. David Forsythe, *The United States, the United Nations, and Human Rights, in* THE UNITED STATES AND MULTILATERAL INSTITUTIONS, 261 (Margaret P. Karns & Karen A. Mingst, eds. 1990).

65. For a detailed discussion, see David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183 (1993).

66. Many countries registered complaints regarding the manner in which the U.S. attempted to limit its treaty obligation. Countries such as Finland and Sweden referred to article 19(c) of the Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, 8 I.L.M. 679 (1969), stating that regardless of what a country calls it, a reservation, understanding, or declaration, any attempt to opt out of what is the essence of the treaty is incompatible with its object and purpose. The countries reminded the U.S. that a party to the treaty may not invoke provisions of its internal law as justification for failure to respect provisions of the treaty. *See* UN Treaty Database (visited April 2, 1997) <http://www.un.org/cgi-bin/treaty2.pl>. Given this principle of treaty construction, it is questionable whether U.S. attempts to limit its obligations under the ICCPR through a series of reservations, understandings, and declarations could withstand a challenge in the International Court of Justice.

67. The non-self-execution provision found in the first declaration has been widely criticized. Scholars have pointed out that self-execution is a judicial doctrine regarding whether the obligations and wording in the treaty are sufficiently clear to ground a private right of action. Some believe it is for the courts, not for the Senate to decide, especially given the fact that non-self-execution is at odds with the language of the treaty

on what the Senate did not attempt to limit, thereby leaving no impediment in the way of using those aspects of the treaty.

Article 2 of the ICCPR states: "Each State Party to the present Convention undertakes to respect and ensure that all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind. . ."[68] If the Senate intended to exclude any possible application of the ICCPR in the United States and in state courts, it would have entered a reservation to article 2, it did not.[69]

The Senate, through one of its understandings, declared the ICCPR's "non-self executing" in nature, and thereby attempted to avoid litigation based directly upon the ICCPR. Instead, the Senate indicated that the fundamental rights and freedoms protected by the ICCPR are also guaranteed as a matter of U.S. law, both constitutional and statutory, and can be effectively asserted by individuals in the judicial system.[70] This incorporationist position attempts to minimize the impact of the ICCPR without denying it significance. In other words, the Senate looks to the interpretation of current law to reflect any modification required by the ICCPR. This incorporationist position is seen in the fifth understanding to the Senate's ratification of the ICCPR which states "[the ICCPR] shall be implemented by the Federal Government to the extent it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments."[71]

The Senate's attempts to limit the application of the ICCPR fall mainly into three categories: the first relates to free speech, the second relates to criminal procedural protections and punishment, and the third relates to discrimination.[72] The free speech limitation highlights a different conception of this right than that found in the Covenant, in that U.S. practice is civil libertarian based, while the ICCPR limits speech that is offensive to human rights. In the second area, the Senate

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which obligates a State Party to the ICCPR to provide an effective remedy when there is a violation of a right contained in the Covenant. *See, e.g.*, Paust, *supra* note 4, at 1265. Other scholars have been more blunt with their criticism of the Senate. They posit that a declaration regarding self-execution does not change the treaty obligation and does not bind courts. Stefan R. Riesenfeld & Frederick M. Abbott, *Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI-KENT L. REV. 293, 296-97 (1991). The D.C. Circuit has held that statements other than reservations made by the Senate have no force of law. Power Authority v. Federal. Power Comm'n, 247 F.2d 538, 546 (D.C. Cir. 1957).

68. ICCPR, *supra* note 59, at Part II, art. 2.

69. John Quigely, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287 (1993).

70. Stewart, *supra* note 65, at 1203; *see also*, United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, Jan. 30, 1992, 31 I.L.M. 645, 658-59.

71. Senate Committee on Foreign Relations, Covenant on Civil and Political Rights, U.S. Senate Exec. Rep. 102-23, (102 Cong. 2d Sess.) *reprinted in* 31 I.L.M. 657.

72. *Id.*

has no fundamental difference in conception regarding the rights in question, but prefers a much more limited interpretation of what those rights mean. For those rights, the Senate does not want the ICCPR to expand or change the present U.S. interpretation. The last area, discrimination, the Senate wanted to maintain the U.S. interpretation which allows discrimination in the private sphere and where it is tied to a rational government objective.

The Senate accepted many aspects of the ICCPR, indicating approval of the law and how that law had been interpreted by the UN and other nations. Where the Senate differed in conception differed, the Senate choose to placed a reservation, understanding or declaration on its ratification of the ICCPR. The lengthy deliberations and number of limitations made to the ICCPR indicate a rigorous attempt by the Senate to eliminate aspects which, from its perspective, were undesirable.

The wording of the ICCPR, its *Traveaux Preparatoires* [legislative history], and the official interpretations of by the UN Human Rights Committee indicate that the rights contained in the ICCPR are both vertical and horizontal in nature. This allows them to be applied in both the public and the private spheres. The Senate made no specific limitation on this point, indicating its acceptance of this concept.

While the language of the ICCPR clearly sets out a duty on the State Party to the treaty, it does not directly preclude application against individuals.[73] Most of the articles are written in an open style, not specifying who has a duty. For example, article 7 states: "no one shall be subjected to torture."[74] Also, article 8 states: "no one shall be held in slavery."[75] Both of these articles are difficult to construe as only applying against state action. Their plain meaning is that torture and slavery are prohibited no matter who does it. This language is used throughout the ICCPR. Perhaps the most compelling support of this interpretations is in the preamble to the ICCPR itself, "Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights in the present Convention."[76]

The ICCPR does specify that those who are bound by its terms are not just states, but organizations and individuals.

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.[77]

An examination of the *Traveaux Preparatiores* of the ICCPR indicates that the treaty was designed to reach individual action. "Al-

73. ICCPR, *supra* note 59 art. 2.
74. *Id.* art. 7.
75. *Id.* art 8.
76. *Id.*
77. *Id.*, art. 5.

though a suggestion was made that freedom of assembly should be protected only against 'governmental' interference, it was generally understood that the individual should be protected against all kinds of interference in the exercise of this right."[78]

The only exception to the general application of rights in the private sphere was made in regard to article 26 on the prohibition of discrimination. Here, the treaty's history supports limiting the application of the article to state action.[79] Interestingly enough, it was probably the debate on the applicability of this provision to all actions, and to its rejection by the drafters, which led to the creation of the International Convention on Elimination of All Forms of Racial Discrimination.[80] It has also been considered the primary reason for the creation of the Convention on the Elimination of All forms of Discrimination Against Women.[81]

Many countries, upon adopting the ICCPR, and the UN, began to see article 26 as relevant to both state and private actions.[82] The Senate observed this trend in interpretation, and decided to reinforce its position that article 26's antidiscrimination language would not apply in the private sphere. An understanding to that effect was attached to the Senate's ratification of the ICCPR.

In regard to the rest of the ICCPR, the official UN body in charge of compliance, the UN Human Rights Committee has stated, "[t]he Covenant by its substance was capable of extending rights to all persons . . . It should be considered to have a third party applicability."[83] The language of the ICCPR, its history, and its authoritative interpretation all provide support for the applicability of rights to state and non-state actors. This conception is reflected in the modern trend in jurisprudence.

The traditional view of international law is that it regulates the relations between nations.[84] However, international human rights law regulates conduct of individuals.[85] Many scholars have attempted to limit the application of human rights law to only state actors.[86] There

78. U.N. Doc. E/CN.4/SR.121, p.3 (F); A/2929 ch. VI sec. 139 (22 June 1973).

79. CLAPHAM, *supra* note 5, at 98-102.

80. *Opened for signature* Mar. 7, 1966, *entered into force* Jan. 4, 1969, 660 U.N.T.S. 195.

81. *Convention on the Elimination of all Forms of Discrimination Against Women*, U.N. GAOR 3rd Comm., 34th Sess., Agenda Item 75, U.N. Doc A/Res/34/180 (1980).

82. The UN Human Rights Committee has stated it is concerned about private discrimination. U.N. Doc. CCPR/C/Rev. 1/Add. I p. 3 (21 Nov. 1989)

83. In other words, horizontal application. U.N. Doc. CCPR/C/SR 321 para. 34 (Opsahl); U.N. Doc. CCPR/C/SR 321 para. 46 (Graefrath); GAOR 36th Sess. Supp. No. 40(A/37/40), annex v. 93. For further elaboration of this idea, see discussion *infra* note 87 (22 Sept. 1982). For further elaboration of this idea, see discussion *infra* note 87

84. *See, e.g.*, JAMES LESLIE BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 1 (6th ed. 1963).

85. 1 INTERNATIONAL LAW: THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 147-49 (E. Lauterpacht ed. 1970); T.O. Elias, *New Perspectives and Conceptions in Contemporary Public International Law*, 10 DEN. J. INT'L L. & POL'Y 409, 411 (1981).

86. W.N. Nelson, *Human Rights and Human Obligation, in* HUMAN RIGHTS 275-291 (J.R. Pennock & J.W. Chapman, eds. 1981). LOUIS HENKIN, THE RIGHTS OF MAN TODAY 2 (1979), *but see* Henkin, *supra* note 62, at 10 for a position that has shifted from his origi-

is another trend toward outlawing certain conduct or situations which violate individual and collective rights regardless of the perpetrator.[87]

Public international law, especially in the area of human rights, has been an evolving and contextual approach in its interpretation.[88] Moving rights toward application in the private sphere has been a part of human rights jurisprudence since their birth in modern form following World War II. It is not surprising that one of the first national systems to adopt the vertical and horizontal application of rights was Germany through its post-war constitution.[89] Many other states have followed either completely or partially adopting the application of human rights to both public and private activity. For example, the Netherlands,[90] the UK,[91] Canada,[92] South Africa, [93] Belgium, Austria, and

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nal position toward the modern trend. THE RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. VII, introductory note, at 144-45 (1987) does not fully commit to any position, but states: "how a state treats individual human beings . . . is a matter of international concern and a proper subject for regulation by international law."

87. *See, e.g.*, CLAPHAM, *supra* note 5. It is clear that contemporary human rights law places obligations on individuals. This can be seen in the creation of the International Criminal Tribunals for Former Yugoslavia and Rwanda, *e.g.*, U.N. Doc. S/1994/1125 (October 4, 1994); decisions by the Inter-American Court on Human Rights, *e.g.*, Velasquez Rodriguez v. Honduras, Judgement 29 July 1988, *reprinted in*, 28 I.L.M. 291 (1989) (placing an obligation on the State to investigate and punish those individuals responsible for disappearances); and can even be seen in U.S. courts in Filartiga and its progeny, Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

88. *See, e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Not Withstanding Security Council Resolution 276 (Namibia), 1971 I.C.J. 16, 31(June 21); *see, e.g.*, Ireland v. U.K., 25 EUR.CT.R. (ser.A) at 65 (1978).

89. Drittwirkung der Grundrechte or third-party effect of fundamental rights is well established in German jurisprudence. Kenneth M. Lewan, *The Significance of Constitutional Rights for Private Law: Theory and Practice in 'West Germany,'* 17 INT'L & COMP. L. Q. 571 (1968).

90. The preamble to the Dutch Bill of Rights reads:

> No more consideration should be given to the thought that all fundamental rights in general do not have any effect whatsoever or, on the contrary, that all fundamental rights have the same effect to the same extent on horizontal relations. The question concerning the horizontal effectiveness need not be answered in a similar fashion for every fundamental right. The answers may differ from article to article, or from one part of an article to another, perhaps only in respect to various particular categories found in a single article. This approach has the advantage of liberating the problem of horizontal effectiveness from its dogmatic nature and of bringing it back to normal proportions of constitutional interpretation.

Explanatory Preamble to the Bill on Fundamental Rights which was to become part of the Dutch Constitution, *cited in* D. Simmons, *Bestand und Bedeutung der Grundrechte im den Niederlanden*, 1978 EUROPAISCHE GRUNDRECHTE-ZEITSCHRIFT 450, at 454.

91. "If there is to be no interference by public authority, all the more so there should be no interference by private individuals." Associated Newspaper Group v. Wade, (1979) 1 W.L.R. 697 at 709.

92. The Canadian Charter of Rights and Freedoms, prevents discrimination on the grounds of sexual orientation. Veysey v. Canadian Correctional Service [1989] 44 CRR 364, [1990] 1 F.C. 321, 29 F.T.R. 74 (T.D.). The Quebec Charter of Human Rights and Freedoms protects those infected with AIDS against discrimination, for example in rent-

Switzerland.[94]

The European Court of Human Rights has adopted the modern trend. The European Convention on Human Rights "creates an obligation for states which involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."[95] Additionally, the Convention "sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if needed."[96] One of the leading authorities in this area has concluded, "states may not argue that international human rights treaties have no relevance for activities of private actors."[97]

V. CONSTITUTIONAL ANALYSIS OF THE *RAEL* CASE, POST RATIFICATION OF THE ICCPR

"State action" is a concept that does not limit the application of human rights.[98] For this reason the ICCPR affects the way rights are viewed in courts. The U.S. Constitution places treaty law in the hierarchy of laws:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.[99]

Thus, treaties supercede previous inconsistent federal statutes.[100] Additionally, through the preemption doctrine, treaties can supercede state laws.[101] The Supreme Court has held that the Constitution is superior to inconsistent treaties.[102] The Court has also held that treaties are subject to the rights found in the Bill of Rights.[103]

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ing an apartment or obtaining insurance. Bulletin de la Commission des Droits de la Personne du Quebec at 1-2 (4 June 1988).

93. The plurality position of the new South African Constitutional Court is that fundamental rights may apply directly in litigation between private parties. Almost every Justice wrote a separate opinion in a case, where no clear majority position developed. For interesting discussion of the horizontal application of rights and its importance to the respect of human rights. *See* In the Matter of D. Du Plessis v. DeKlerk, G.F.J., Case No.CCT8/95 (visited April 8, 1997), htp.www.wits.ac.za/judgments/duplessis.html>.

94. CLAPHAM, *supra* note 5, at 179-181.

95. X. and Y. v. The Netherlands, 91 Eur. Ct. H.R. (ser. A) at 23 (1985).

96. Plattform Artze fur das Leben v. Austria, 139 Eur. Ct. H.R. (ser. A) at 32 (1988).

97. CLAPHAM, *supra* note 5, at 111.

98. Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUMAN RTS. J. 51, 53 (1992).

99. U.S. CONST. art. VI.

100. Penhallow v. Doane's Adm'r, 3 U.S. (3 Dall.) 54, 85-93 (1795).

101. Missouri v. Holland, 252 U.S. 416 (1920).

102. Reid v. Covert, 354 U.S. 1 (1957).

103. Boos v. Barry, 485 U.S. 312, 324 (1988).

There is an axiom in both treaty interoperation and constitutional law that instructs courts, if possible to fashion an interpretation so that both laws are met.[104] Courts have frequently used the ICCPR and other human rights instruments to inform their developing understanding of constitutional or fundamental rights. Some courts, like those in the U.K., have stated they feel "obliged" to look at human rights treaty law when interpreting rights.[105] Australia and Canadian courts have found this approach to be useful as well.[106]

Both textual comparison and a review of the evidence before the Special Joint Committee of the Senate and House of Commons on the Constitution, 1981-82, confirm that the International Covenant on Civil and Political Rights was an important source of the terms chosen since Canada ratified the Covenant in 1976, with unanimous consent of the federal and provincial governments, the Covenant constitutes an obligation upon Canada under international law, by article two thereof, to implement its provisions within this country. Although our Constitutional tradition is not that a ratified treaty is self-executing within our territory. . . . Nevertheless, unless the domestic law is clear to the contrary, it should be interpreted to conform with our international obligations.[107]

This is also true generally in U.S. jurisprudence. It is traditionally thought that the words of the amendments to the Constitution are not precise, and that their scope is not static. The Constitution must draw its meaning from evolving standards of a maturing society.[108] Today, human rights law provides the mark of those evolving standards. Given that the ICCPR has had a relatively short life as a ratified treaty in the U.S., no case has yet to apply it as a treaty to inform constitutional standards. Previously, courts have applied, ignored, and misinterpreted human rights law.[109]

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104. *See, e.g.*, "An Act of Congress ought never to be construed to violate the laws of nations, if any other possible construction remains." Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). "[This Court] must read the statutes to give effect to each if we can do so while preserving their sense of purpose." Watt v. Alaska, 451 U.S. 259, 267 (1981); U.S. v. Lee Yen Tai, 185 U.S. 213, 221 (1962). Another related axiom is that courts should construe treaties "in a broad and liberal spirit, and when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." Asakura v. City of Seattle, 265 U.S. 332, 342 (1924).

105. Derbyshire County Council v. Times Newspapers Ltd., (1992) 1 Q.B. 770, 894; (1992) 3 All E.R. 65, 93.

106. Mabo v. Queensland, 107 A.L.R. 1 (1992).

107. The Queen v. Videoflicks, 14 D.L.R. (4th) 10, 35-36 (Ont. C.A. 1984). *See also*, the Queen v. Keegstra [1990] 1 S.C.R. 697, 749-58 (stating "I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.").

108. Trop v. Dulles, 356 U.S. 86 (1958).

109. There are many cases in the U.S. of indirect application of human rights law. For an overview, see Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Court: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 72-80 (1992). An example of where U.S. courts applied human rights law would be Lareau v. Manson, 507 F. Supp. 1177 (D. Conn. 1980); Thompson v. Oklahoma, 487 U.S. 815, 831 n.34 (1987) is an example of where the plurality of the court made reference to international norms.

Richard Lillich, a leading American scholar of international law, believes that the proper way for human rights to be applied in U.S. courts is as a mechanism to inform or contribute to the development of U.S. constitutional and statutory interpretation.[110] Other noted scholars have demonstrated how the human rights provisions in the UN charter were a factor in resolving constitutional issues.[111] It has also been posited that U.S. courts frequently use human rights law, whether that be treaty, custom, or standards, but do not cite to item, because U.S. jurists have a difficult time accepting the fact that the Constitution is not always superior in terms of rights protection compared with human rights law.[112]

Even if that may be the case, courts have recognized the importance of human rights law to constitutional interpretation:

> International custom and treaties . . . limiting attacks on civilians are not derogatory to our Constitution. Rather they expand and give substance to a developing enriched concept of right of the individual that harmonizes with our Constitutional developments.[113]

In *Rael v. Taylor*, the first hurdle the plaintiff will have to cross will be that of convincing the court that the "state action" doctrine is irrelevant. Some courts may accept a *Shelley v. Kraemer* type argument that the prolonged court ordered state intervention in this case constitutes sufficient state action to entertain a private right of action based on the Constitution.[114] Especially considering that the exercise of the descendants of the original settlers' rights have been interrupted with state assistance for well over three decades. Nonetheless, the use of this type of analysis, while not improper given the slippery nature of the "state action" doctrine, it would be contrary to the current trend in

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The following year in a case with almost the same facts the plurality ignored human rights law, but the dissent felt the U.S. was obligated to read constitutional standards in light of the human rights law, Stanford v. Kentucky, 492 U.S. 361 (1988) (this case was decided well before the ICCPR's ratification by the Senate). *See* Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311 (1993). Linder v. Calero Portocarrero, 747 F. Supp. 1452, 1462 (S.D. Fla. 1990) is an example of a case where the court based its decision on an antiquated and simply incorrect notion of human rights, stating "torture by a non-state actor is not a violation of international law."

110. This usage would avoid the problem of an "independent rule of decision." Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 CINN. L. REV. 367, 410 (1985).

111. Oscar Schachter, *The Charter and the Constitution: the Human Rights Provisions in American Law*, 4 VAND. L. REV. 643, 644, 658 (1951). Professor Schachter cites Oyama v. California, 185 U.S. 579, 604 (1948) (Murphy, J. and Rutledge. J., concurring) and Namba v. McCourt, 185 Or. 579, 604 (1949) to support his position.

112. Bernhard Schuluter, *The Domestic Status of the Human Rights Clauses of the United Nations Charter*, 61 CALIF. L. REV. 100, 157 (1973).

113. In the Matter of the Petition of Mahmoud El Abed Ahmad v. Wigen, 726 F. Supp. 389, 411 (E.D. N.Y. 1989).

114. Shelley v. Kraemer, 334 U.S. 1 (1947).

human rights law. On the other hand, the court could interpret human rights law as found in the ICCPR [now the law in Colorado] to eliminate the "state action" hurdle found in previous applications of the Constitution. This would conform to a trend in comparative jurisprudence, international jurisprudence, and even in the U.S..

There has been a little linear movement from the time of the thirteenth amendment to date as to the horizontal application of constitutional rights. Recently, that movement has increased with the horizontal application of human rights . A logical extension of this movement would be its application to constitutional rights.

Perhaps even predating the thirteenth amendment, the common law applied rights in a horizontal fashion. The notion of *sic utere tuo at a lienum non laedas* [one cannot use their property to harm the property of another] can be found in both U.S. and international law.[115] While this concept may typically have been seen as a limit on the individual right of the property owner, for example through a nuisance action, the concept really is about overlapping property rights. This situation can be almost directly analogous to horizontal application of constitutional rights.

Two modern examples in U.S. courts demonstrate this idea. In environmental law, which limits property rights to protect complex ecosystems and related values.[116] Also in cases where the traditional usufructory rights of Native Americans cause a collision between hard title to property and treaty commitments and tradition-based practices.[117] This cases have a common recognition of a constitutional right to property on both sides and an attempt by the courts to balance these interests.

In the human rights field, the U.S. has quite effortlessly used the horizontal application of human rights in foreign countries. For example, economic sanctions could be applied by the U.S. government based on the violation of an employee's human rights by an employer.[118] Recently, President Clinton placed investment sanctions on Burma citing the violation of the human rights of the political opposition, workers,

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115. *See, e.g.*, Grundgesetz [Constitution][GG], art. 14, sec. 2 (F.R.G) (holding that property imposes duties in that it should also serve the public weal).

116. At present the U.S. Supreme Court is considering a case which highlights the limits that can be placed on private property or perhaps better stated the conflicting uses of private property. *See, e.g.*, Robert Marquand, *Court Weighs Widow's Right to a Lake Tahoe View*, CHRISTIAN SCI. MONITOR, Feb. 27, 1997, at 1.

117. Recognition of usufructuary rights in Anglo-American jurisprudence traces back to the Statutes of Merton (1235) and Westminster (1285). U.S. case law has sustained traditional usufructuary rights of Native Americans protected by a treaty, except where explicitly eliminated by an act of Congress. *See* United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981); People v. LeBlanc, 248 N.W.2d 199 (1976); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight, 700 F.2d 341 (7th Cir. 1983).

118. The entire Generalized System of Preference system and the related Caribbean Basin Initiative is based on this notion. *See generally*, Philip Alston, *Labor Rights Provisions in United States Trade Law: "Aggressive Unilateralism?"*, 15 HUM. RTS. Q. 1 (1993). The GSP provisions can be found in Sec. 502 of the Trade Act of 1974, 19 U.S.C.A. § 2462 (1988).

and students as his reasoning.[119] Further, a recent U.S. District Court decision held that UNOCAL, an American company doing business in Burma, could be held liable for violating the human rights of Burmese victims.[120] On April 14, 1997, the White House announced an agreement between clothing manufactures, labor organizations, and human rights groups designed to protect the human rights of workers around the world from violations committed by their employers.[121]

From the above examples it can be concluded that the U.S. has a history of horizontal application of rights, even if not termed as such. Given the recent ratification of the ICCPR, calling for the application of rights in the private sphere, and the U.S. history of applying rights in such a manner, it is not only appropriate but an obligation for the court to read Colorado Constitution in light of the ICCPR.

The roots of the horizontal application of human rights in the Colorado Constitution can be found generally in the areas of property and the prohibition of discrimination. Also, the Colorado Constitution contains a number of provisions that directly apply to the private sphere. It contains a prohibition on slavery similar to the federal law.[122] There is also a takings clause that prohibits the taking of private property from one individual by another without compensation.[123] Also in property law, there is a provision that "private property shall not be taken for private use unless by the consent of the owner."[124]

Generally, the Colorado Supreme Court has held that rights "should be protected from infringement or diminution by any person as well as any department of the government."[125] The Court, however, has determined created a limiting principal by stating that one person's rights cannot detrimentally affect or harm another persons rights.[126] In the area of discrimination, the Colorado Supreme court has held: "[A]n inherent human right will be upheld by this court against action by any person or department of the government which would destroy such a right or result in discrimination in the manner in which enjoyment thereof is to be permitted as between persons of different races, creeds, or color[s]."[127]

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119. Public Papers of the Presidents: Statements of Investment Sanction Against Burma, Apr. 22, 1997, *available in* LEXIS, Executive Library, Presidential Documents File.

120. Benson v. UNOCAL, Case No. 96-6959 (C.D. CA 1997)(UNOCAL's motion to dismiss was denied).; *see also*, Yindee Lertcharoenchok, *UNOCAL PLEA*, Nation (April 3, 1997).

121. Christina Nifong, *'No Sweat' pact to Cut Garment Worker Abuse,* CHRISTIAN SCI. MONITOR, Apr. 14, 1997 at 3.

122. COLO. CONST. art. II, § 26. (1876).

123. *Id.* art. II, § 15.

124. *Id.* art. II, § 14.

125. Colorado Anti-Discrimination Comm'n v. Case, 151 Colo. 235, 245, 380 P.2d 34, 40 (1962). There also appears to be the acceptance of the horizontal application to the right to privacy. Wells v. Premier Indus., 691 P.2d 765, 768 (Colo. Ct. App. 1984).

126. Nebbia v. New York, 291 U.S. 502 (1934), *cited in* Colorado Anti-Discrimination Comm'n, 151 Colo. at 245, 380 P.2d at 41.

127. Colorado Anti-Discrimination Comm'n, 151 Colo. at 245, 380 P.2d at 41.

The following looks at some of the possible constitutional arguments presented in *Rael v. Taylor*, given the self-executing nature of the Bill of Rights of the Colorado Constitution. Article II, section 3 of the Constitution of the state of Colorado provides: "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring possessing and protecting property; and of seeking and obtaining their safety and happiness."[128]

VI. PROPERTY[129]

The ratification of the ICCPR ensures that the court must look at the property rights of the plaintiff and defendants. The court should balance these rights. If possible, the court should strike a balance which recognizes the overlapping nature of the property rights in contention. For example, this could be achieved via time, place, and manner restrictions of the exercise of the plaintiffs' usufructory rights and of the defendant's underlying fee.

The ICCPR may also be helpful at defining the desirable values underlying the respect for property rights. In human rights, the concept of property goes beyond mere title. It recognizes the complex social relation between an individual and other individuals and the land itself.[130] From this perspective, the UN Human Rights Committee in adversarial cases has found that individuals are entitled to a continuing relationship with lands and natural resources according to traditional patterns of use or occupancy, notwithstanding lack of hard title to the land.[131] Without respect for these type of property rights, a whole range of human rights violations could be produced.[132]

In *Rael v. Taylor*, the law of the "commons" in both Mexican law and U.S. law supports the descendants of the original settlers' traditional usurfructory rights to *la sierra*. These usufructory rights are also supported by the legal principles of custom, easement, and equitable

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128. Medina v. People, 154 Colo. 4, 387 P.2d 733 (1963).

129. COLO. CONST. art. II, §§ 14, 15 (adding a protection that property cannot be taken for private use without consent or compensation).

130. For an interesting discussion of how U.S. property law should reflect this complex social relation, see Jack. M. Beerman and Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 946-956 (1989).

131. *See, e.g.*, Ominayak, Chief of the Lubicon Lake Band v. Canada, Communication No. 267/1984, Report of the Human Rights Committee, U.N. GAOR, 45th Sess., Supp. No. 40, Vol. 2, at 1, U.N. Doc. A/45/40, Annex 9 (A) (1990) (*views adopted* March 26, 1990); Lovelace v. Canada, Communication No. R.6/24, Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, at 166, U.N. Doc. A/36/40, Annex 18 (1977) (*views adopted* Dec. 29, 1997); U.N. Subcommission on Prevention and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7, Add.4, at 39 (1986) ("It must be understood that, for indigenous populations, land does not represent simply a possession or means of production . . . . It is also essential to understand the special and profoundly spiritual relationship of indigenous peoples with Mother Earth as basic to their existence and to all their beliefs, customs, traditions and culture.").

132. *Id.*

trust. The usufructory rights exist, but it is for the court to determine whether it should be respected/ To do so, the court should openly discuss and weigh the competing rights, taking into account the complex and culturally unique relationship between the settlers' descendants and the land.

VII. LIFE AND LIBERTY

The Colorado Supreme Court has interpreted the rights of life and liberty to mean that one has a right to practice a learned profession.[133] It has also determined that one has the right to pursue a legitimate trade or business.[134] This idea finds historical support in the interpretation of rights by the U.S. Supreme Court, which has held that life means something more than a mere basal existence.[135] It is interesting to note that this idea has not received much attention recently in U.S. courts, even though this theory has been expanded and followed in some states.[136]

The concept of a right to life and liberty has had such a pervasive influence that other countries have started to follow it. In India, for example, a right to life and liberty provision similar to that in the Colorado Constitution has been incorporated in its own.[137] The Supreme Court of India has interpreted that clause to mean:

> An equally important facet of that right [to life] is the right to a livelihood because, no person can live without the means of living, that is the means of living a livelihood. If the right to a livelihood is not treated as a part of the Constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means to a livelihood to the point of abrogation. Such deprivation would not only denude life of its effective content and meaningfulness but it would make life impossible to live. There is thus a close nexus between life and the means to a livelihood and as such that, which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life.[138]

This case demonstrates the manner in which one country has applied a right to life and liberty in a manner consistent with the ICCPR. The ICCPR has been interpreted to encompass a cluster of rights related to the right to life and liberty. It language is very clear, "in no

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133. Prouty v. Heron, 127 Colo. 168, 255 P.2d 755 (1953).

134. Olin Mathieson Chem. Corp. v. Francis, 134 Colo. 160, 301 P.2d 139 (1956).

135. Munn v. Illinois, 94 U.S. 113 (1877).

136. *E.g.*, "The right to work I have assumed was the most precious liberty that man possesses. Man has indeed, as much right to work as he has to live, to be free and to own property. To work means to eat and it also means to live." Barsky v. Board of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

137. "No person shall be deprived of his life or personal liberty except according to procedure established by law." INDIA CONST. article 21. "No person shall be deprived of life, liberty or property, without due process of law." COLO. CONST. art. II, § 25.

138. Olga Tellis and Others v. Bombay Municipal Corporation and Others, 3 SCC [Supreme Court of India] 545 (1985).

case a people may be deprived of its own means of subsistence."[139]

This concept of the right to life and liberty is very important in *Rael v. Taylor*, for the descendants of the original settlers were using the land to allow them to farm, and live in a self-sufficient fashion. Now, Taylor is using the land exclusively for profit-making endeavors at the expense of the descendants who are being displaced from their previous self-sufficient existence to one of poverty and dependence on the state for assistance.[140]

VIII. RIGHT TO CULTURE AND COMMUNITY

"The enumeration in this constitution of certain rights shall not be construed to deny, impair or disparage others retained by the people."[141] While not specifically protected in the Colorado Constitution, the right to one's culture or community is protected by the ICCPR:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[142]

While U.S. courts have never specifically recognized culture or community as a right, various articles of the Constitution have been interpreted to support what could be construed as a right to culture or community.[143] For example, the right to exercise religion freely may implicate lifestyle choices, such as subsistence farming, which deserve protection.[144] The right to associate may protect the nonexclusive use of public parks by racist groups.[145] Regarding education, there is the right to teach the language of choice.[146] There is also the right for parents to direct the upbringing and education of their children.[147] Parents have a right to have a child's cultural heritage considered in curriculum development.[148] Finally, regarding family, there is a recognition of the extenuated family relationship.[149] There is also a right to marry within a chosen community.[150]

A court interpreting the meaning of article II, section 28 of the

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139. ICCPR, *supra* note 59, art. 1, para. 2.

140. Stoller, *supra* note 9.

141. COLO. CONST. art. II, § 28.

142. ICCPR, *supra* note 59, art. 27.

143. The line of cases cited stand for the idea that religious and culture differences of subgroups must be respected, when those subgroups' goals are shared with the larger community. In the *Rael v. Taylor* case, the common values are self-sufficiency and the sustainable family existence. *See* Martha Minow, *Pluralisms*, 21 CONN. L. REV. 965 (1989).

144. Wisconsin v. Yoder, 406 U.S. 205 (1972).

145. Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

146. Meyer v. Nebraska, 262 U.S. 556 (1974).

147. Pierce v. Society of Sisters, 268 U.S. 510 (1924).

148. Lau v. Nichols, 414 U.S. 563 (1974).

149. Moore v. East Cleveland, 431 U.S. 494 (1977).

150. Loving v. Virginia, 388 U.S. 1 (1966).

Colorado Constitution would be well advised to consider the ICCPR's protection of individual rights.[151] First there is a direct statement in the ICCPR regarding the protection of culture and community. Second, the detrimental impact the actions of Taylor have had on the unique community and culture of the descendants of the original settlers of the *Sangre de Cristo* land grant has been well documented.[152] What had developed in Southern Colorado was a unique community and culture. In the time since *la sierra* has been fenced and the usufructory rights denied tot he descendants of the original settlers, there has been a visible, but hopefully not irreversible, loss of community and culture.

IX. POTENTIAL ARGUMENTS AGAINST THE HORIZONTAL APPLICATION OF CONSTITUTIONAL PRINCIPLES

Human rights are important considerations in any society, whether it be a local, national, or global society. Many people would differ on the exact content of these rights, nor would most people know from where human rights are derived, or how they are directly relevant to their lives. This shows that legislatures, courts, lawyers and the public will continue to content with the content and significance of human rights for many years to come.

Some may argue that the application of constitutional principles in the private sphere will result in an unwanted intrusion of government into every facet of life. They worry an undesirable "Big Brother" moral police would need to be created to apply rights in the private sphere. This is not what the application of constitutional rights in the private sphere would entail. Private life, which truly does not impact the lives of others, remains untouched Court review is required only when one perceives ones rights have been violated by another person. If such a conflict arises, the ICCPR indicates that reinforcing the existing power relations such as male domination and racism would not be valued. Nonetheless, it would be for the court to weigh the competing values in an open fashion to make a determination as to which right should be upheld.[153]

Others may argue that the recognition of a horizontal application of rights will lead to increased litigation and clog the courts with frivolous claims. This complaint is similar to almost any legal change in a litigious society. Mechanisms already exist to reduce and eliminate frivolous claims. Presently, the courts deal with many cases which are eventually dismissed as frivolous claims. In these cases, after prolonged debate, many of the plaintiffs eventually have their day in court based on the common law or a statute. Recognition of a private sphere of constitutionally applied rights would not in fact generate a significant in-

151. Courts should be cautious in dismissing a case where the pleadings show that an alleged violation of a constitutional right is at issue, since fundamental rights and public policy questions are necessarily involved. Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972).

152. Stoller, *supra* note 9.

153. *See generally*, Pickle *supra* note 47.

crease in court work loads. The courts would have a much easier analysis in these cases, having to weigh only the individual party's rights against the other, without governmental concerns. The courts seem quite capable of weighing, creating methods, and discussing competing interests and rights, and thus it would be no major change for the courts to apply constitutional rights in the private sphere.[154]

Another possible problem would be the perceived interference with the democratic process.[155] The difficulty in this case is how democracy is defined. While some would define it as a society where human rights are respected, others would choose a forma; definition linked to a specific form of representative government.[156] For people thus defining democracy, the ICCPR may constitute "imported" values that are somehow delegitimized because they did not follow the traditional law making process.[157] This form of government and legislating is not necessarily more democratic or reflective of the will of the people then the process used to create the ICCPR.

Another possible criticism is a revival of substantive due process, leading to open-ended modes of constitutional adjudication and to the adoption of "rights" not traceable to the Constitution's text, structure, or history.[158] In this instance, the law being used is directly tied to constitutionally provided process. The rights included in the ICCPR are clearly defined by its text, history, and legal interpretations. The process of adjudicating these rights is transparent.

X. CONCLUSION

Adapting to a changing world is not easy, especially when these changes do not respect traditional geopolitical boundaries. Human rights law is one of the first sets of laws to seriously deal with this hurdle. Such a global approach may better reflect today's reality, than one tied to a specific idea of law making and democracy grounded in a geopolitical entity.[159] It is worth noting that the U.S. can effectively accommodate this type of law via the established constitutional mechanism for treaty adoption.

What has happened to the descendants of the original settlers of

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154. *See generally*, CLAPHAM *supra* note 5, at 90, 298.

155. *See* Bradley, *supra* note 1 (discussing of how certain applications of customary international law in U.S. courts may undermine constitutional integrity).

156. Some scholars have seen a tension between majoritarian politics that is more directly electorally accountable and the process used to create human rights law. Bayefsky & Fitzpatrick, *supra* note 109, at 87. While this criticism, from a formal point of view, may resonate some in relation to customary international law, it is difficult to see how human rights treaties in the U.S. context are disconnected from the electoral process and its accountability.

157. U.S. CONST. art. I, § 7.

158. This approach has been controversial. *See, e.g.*, GERALD GUNTHER, INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 103 (5th ed. 1992).

159. Most disciplines are struggling with today's interdependent world. For example, traditional normative political theory tied to fixed borders may be seen as outmoded. *See, e.g.*, Daniel Warner, *An Ethics of Human Rights: Two Interrelated Misunderstandings*, 24 DENV. J. INT'L L. & POL'Y 395, 396 (1996).

the *Sangre de Cristo* land grant is best understood as a violation of their human rights. The disruption of their fundamental rights like those to property, livelihood, and culture, have resulted in a loss of dignity which occurs when anyone has had their means to self-sufficiency and their mechanism to contribute to their community and society stripped from them. The relevance of the Colorado Constitution to this problem has been highlighted by ratification of the ICCPR.[160]

The ICCPR shifts constitutional review of alleged violations of rights from the state/non state action dichotomy to a more productive one which forces the court to balance the competing rights involved. Such an analysis will no doubt uncover a number of values underlying the competing rights.

It is unfortunate that this analysis was not available from the beginning of the controversy, for with its application it would have been possible to avoid a great deal of suffering by fashioning a remedy that respects the overlapping nature of the rights involved. Such a decision is long overdue and with the ratification of the ICCPR, not only does a vehicle exist to reach this conclusion, its use is mandated.

160. There is no problem of *ex post facto* application, because it is the Colorado Constitution that is being applied. The ICCPR is simply informing its involving interpretation. It should be kept in mind, that as the legal and social context changes, applying the old rule or interpretation means something different. *See, e.g.* Karl Llewellyn, *The Case Law System in America*, 88 COLUM. L. REV. 989 (1988).