

**The U.N. Convention on the Rights of the Child:
After 25 Years, Should Americans Still Care?**

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For many child advocates in the United States, knowledge of the United Nations (U.N.) Convention on the Rights of the Child is limited to two points: (1) the Convention is an admirable attempt to promote the rights and well-being of children around the globe, and (2) it has been ratified by every recognized country in the world except for the United States and Somalia. One out of two is not bad (Somalia finally ratified in January of 2015),² but shouldn't we do better? Twenty-five years after the Convention entered into effect as an international treaty,³ is it time for the lone holdout – a rogue nation, at least on this issue – to reassess?

From Ferguson to Baltimore and beyond, Americans in 2015 are struggling with the rights of the individual in the face of state power. A nation that built itself on a model of rugged individualism and personal liberty is coming to terms with the compromises inherent in an ordered society of laws. If government is entrusted with social control, what rights are reserved for the individual? For those of us who advocate and even litigate on behalf of children, what rights of the individual apply to children? Are parents (and the state, in *parens patriae*) omnipotent as caregivers, or do children have rights of their own?

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² *Government of Somalia ratifies UN Convention on the Rights of the Child*, UNICEF (Jan. 20, 2015), http://www.unicef.org/infobycountry/media_78732.html.

³ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> [hereinafter Convention].

Those questions were the focus of the Convention's ten years of development, all of which occurred during the Republican presidencies of Ronald Reagan and George H.W. Bush. The U.S. government was an active participant⁴ as officials, advocates and experts of every stripe collaborated and negotiated their way to a "consensus document."⁵ Yet that document was not cut from whole cloth. The Convention's preamble acknowledges a debt to both the U.N.'s broader Universal Declaration of Human Rights and its International Covenants on Human Rights.⁶ Its form and substance also derived in part from previous, U.S.-supported international agreements regarding children: the League of Nation's Geneva Declaration of the Rights of the Child of 1924 and the U.N.'s Declaration of the Rights of the Child of 1959.⁷ Ten years of work culminated when the U.N. General Assembly adopted the Convention on November 20, 1989, and the Convention entered "into force" on September 2, 1990.⁸ The U.S. signed the Convention in 1995, but has never become a party to the treaty by taking the next step of ratification.⁹

What did this process produce? The Convention is a wide-ranging, ambitious manifesto, inviting the world's children to enjoy "the equal and inalienable rights of all members of the human family."¹⁰ The children are promised "full and harmonious development . . . in an atmosphere of happiness, love and understanding."¹¹ Those ideals are promoted through forty-one substantive articles, most of which are framed as affirmative "rights."¹² Governments,

⁴ David P. Stewart, *Feature: Ratification of the Convention on the Rights of the Child*, 5 GEO. J. FIGHTING POVERTY. 161, 162 (1998).

⁵ *Frequently asked questions, Convention on the Rights of the Child*, UNICEF (Nov. 30, 2005), http://www.unicef.org/crc/index_30229.html [hereinafter *FAQ*].

⁶ Convention, *supra* note 3, at 44.

⁷ Maria Grahn-Farley, *Human Rights & U.S. Standing Under the Obama Administration: The U.N. Convention on the Rights of the Child and the Forgotten History of the White House Children's Conferences, 1909-1971*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 307, 311 n.14 (2011).

⁸ Convention, *supra* note 3, at 44, n. 1.

⁹ Stewart, *supra* note 4, at 162.

¹⁰ Convention, *supra* note 3, at 44.

¹¹ *Id.* at 45.

¹² *Id.*

termed “States Parties,” are in some instances to “respect” or “recognize” those rights directly.¹³ In other instances, governments are given a more vague directive to “undertake to ensure” or “take all appropriate measures” to deliver a right to children, while being admonished to still protect “the rights and freedoms of others.”¹⁴ Throughout the manifesto, what many Americans may see as children’s needs or interests are, in the U.N.’s own words, “legally binding rights,” with the individual child becoming the “subject or holder” of those rights.¹⁵

The scope of the child’s rights is immense: health, education, due process of the law, identity, non-discrimination and privacy, to name just a few.¹⁶ Some rights are posed as freedoms, such as the freedoms of thought, conscience, religion and association, while others are described as protections, from maltreatment, kidnapping, exploitation and trafficking.¹⁷ The Convention guards the basics of an adequate standard of living, but does not hesitate to reach for the stars, creating a “right of the child to rest and leisure, to engage in play. . . .”¹⁸ In its ambition, its breadth and its compassion, the Convention warms the hearts of child advocates. If only we could live in such a world!

The Convention is also flawed. The particular imperfections identified by critics may say less about the Convention than they do about the particular critic’s view of child and family law and policy. That said, it still must be stated here that the Convention fails to adequately incorporate the role – and rights – of parents. The preamble properly asserts that the family is “the fundamental group of society” and that children “should grow up in a family environment,”¹⁹ while Article 5 respects the “responsibilities, rights and duties of parents.”²⁰ Yet

¹³ *Id.*

¹⁴ *Id.* at 46.

¹⁵ *FAQ*, *supra* note 5.

¹⁶ Convention, *supra* note 3, at 46-47, 49,

¹⁷ *Id.* at 49, 54-55.

¹⁸ *Id.* at 54.

¹⁹ *Id.* at 45.

the Convention establishes certain rights for children, such as freedom of association, with no mention of parents' corresponding role and responsibility (and right) to limit that freedom. To an extent, the Convention is no different than any other work of pragmatic policymakers, dodging the task of resolving the roiling tensions between the roles of parents and the development of children. In its present form, though, some of the Convention's child-centered language would not successfully graft itself onto the reality of American child-rearing. We love children and want to empower them, but we still see good parents as the most essential enablers of any child's success.²¹ In the American heart, the parent-child relationship transcends all law.

Ambitious, inspiring and imperfect, the Convention might seem no different than many laws or treaties long accepted by the United States. Why, then, has it not been ratified?

It cannot be claimed that American children do not need the help. Recent figures show more than twenty percent live in poverty, and almost one third live in families where no parent has year-round, full-time employment.²² That disadvantage plays out in multiple life domains. In education, two thirds of American fourth graders are not proficient in reading, and almost one fifth of students fail to graduate high school on time.²³ The path to employment is challenging, with eight percent of teenagers neither in school nor work.²⁴ Fourteen percent of American kids live in areas of concentrated poverty, where both jobs and successful adult role models are in short supply.²⁵ Any hope that our nation has entered a post-racial, egalitarian era is crushed by the data: nearly every indicator is significantly worse for American children of color.²⁶

²⁰ *Id.* at 47.

²¹ See, e.g., Annie Murphy Paul, *Why Parenting Is More Important Than Schools*, TIME (Oct. 24, 2012), <http://ideas.time.com/2012/10/24/the-single-largest-advantage-parents-can-give-their-kids/>.

²² THE ANNIE E. CASEY FOUNDATION, KIDS COUNT 2015 DATA BOOK: STATE TRENDS IN CHILD WELL-BEING 6 (2015).

²³ *Id.* at 13.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 15.

Do we ignore the Convention's call to action because we do not care? Polarized politics, growing economic inequality and demonized views of minorities and the poor in political discourse reveal a country reluctant to confront the challenge of helping children in need. The reluctance to embrace the Convention, though, is more complex. Both the structure and substance of the treaty raise serious issues for ratification and implementation in the U.S.

Sovereignty is a structural concern that has accompanied many international agreements and institutions, from the North American Free Trade Agreement to the World Trade Organization.²⁷ If a nation signs on to international law, the fear is that domestic law is set aside and the will of the American people is trumped by foreign values. Opponents of the Convention see this as a real danger; the treaty “creates binding rules of law” and “overrides even our Constitution.”²⁸ Christian schools would be prohibited from teaching their religion, even the vague and aspirational “right to leisure” would be “legally enforceable,” as the treaty is “binding on American families, courts, and policy-makers.”²⁹ In a country where “French fries” became “freedom fries” overnight,³⁰ our resistance is strong to “foreign” law and policy. Passions run high, with the Convention derisively termed “clearly socialistic,”³¹ with “no doubt” among critics that the treaty would supersede U.S. law.³²

The U.S. Supreme Court, interpreting the Supremacy Clause of the U.S. Constitution, has said otherwise. *Reid v. Covert* stands for the principle that no treaty can override the

²⁷ Lainie Rutkow & Joshua T. Lozman, *Suffer the Children? A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 175 (2006).

²⁸ *20 Things You Need To Know About the UN Convention on the Rights of the Child*, PARENTALRIGHTS.ORG, parentalrights.org (last visited Sep. 9, 2015), http://www.parentalrights.org/index.asp?Type=B_BASIC&SEC=%7BB56D7393-E583-4658-85E6-C1974B1A57F8%7D&DE [hereinafter *20 Things*].

²⁹ *Id.*

³⁰ Sean Loughlin, *House Cafeterias Change Names for 'French' Fries and 'French' Toast*, CNN (Mar. 12, 2003, 10:52 AM), <http://www.cnn.com/2003/ALLPOLITICS/03/11/sprj.irq.fries/>

³¹ Michael P. Farris, *Nannies in Blue Berets: Understanding the United Nations Convention on the Rights of the Child: A Legal Analysis*, 2 REGENT J.L. & PUB. POL'Y. 107, 113 (2010).

³² *Id.* at 109.

Constitution.³³ In addition, the U.S. has traditionally classified human rights treaties as “non-self-executing,” meaning that those treaties’ terms do not have independent authority, only attaining legal effect through action by legislative bodies in the U.S.³⁴ Legal enforceability of Convention provisions is further undermined by the reality that “Nothing in the Convention requires that it be made directly applicable in the domestic law of a State Party or provide a basis for suits by private individuals against the government.”³⁵ Non-self-execution prevents judges from deciding domestic cases based on the provisions of an international treaty.³⁶

The further challenge to critics who assert that the Convention will replace the law of our sovereign nation is the utter lack of meaningful enforcement embedded in the treaty. Derived from the Convention’s administrative Article 43, the Committee on the Rights of the Child was created in 1991 to “monitor” States Parties’ implementation of the Convention.³⁷ Their activities, however, are limited to “examination of States’ reports,” followed by questions and recommendations.³⁸ No sanctions, penalties or remedies are available, and even the Convention’s most strident critics are forced to concede that, “The Committee has no true enforcement power.”³⁹ If the treaty trumps U.S. law, then, it does so only theoretically.

With child and family matters largely addressed not by the federal government but by state and local law, federalism concerns also arise as a structural obstacle. Will the Convention necessitate the federalization of child and family law in the U.S.? *Missouri v. Holland* seems to open that door, standing for the notion that “Congress has power to enact legislation to implement a treaty, even if it would lack the power to enact the same legislation absent the

³³ 354 U.S. 1, 16 (1955). See also *FAQ*, *supra* note 5.

³⁴ Rutkow, *supra* note 27, at 183.

³⁵ Stewart, *supra* note 4, at 183.

³⁶ Rutkow, *supra* note 27, at 183.

³⁷ *Fact Sheet: The Committee on the Rights of the Child, Convention on the Rights of the Child*, UNICEF (May 19, 2014), http://www.unicef.org/crc/files/Committee_fact_sheet.pdf.

³⁸ *Id.*

³⁹ Farris, *supra* note 31, at 96.

treaty.”⁴⁰ Yet *Missouri* was followed by the Bricker Amendment of the 1950s, a proposal for a constitutional amendment to reverse the effect of *Missouri*, limiting the influence of international human rights treaties on domestic legislation. While the Bricker Amendment was ultimately defeated, President Eisenhower promised that the U.S. would not surrender its authority to international human rights treaties and conventions.⁴¹ As a practical matter, no president since that time has strayed from that position.

The Convention also contains no explicit instruction on how it is to be implemented, leaving the U.S. free to pursue the treaty’s goals within the existing structure of federalism and individual U.S. states’ power over child and family law. Countries are also free – with many exercising this freedom – to ratify the Convention with substantial caveats, termed in this context as “reservations, understandings and declarations.”⁴² If a provision in the Convention conflicts with the U.S. Constitution, for example, the U.S. can attach a reservation to the provision, effectively nullifying it. Understandings and declarations similarly assert the interpretation of a Convention provision by the U.S., shaping the effects of the Convention to comport with U.S. law.⁴³ In practice, the U.S. typically attaches a federalism clause as part of its “reservations, understandings and declarations” to human rights treaties, neutering the effect of the *Missouri* principle and leaving child and family law decision-making (including Convention implementation) to the states.⁴⁴

If those structural impediments are rightly minimized in any thoughtful analysis, substantive concerns still stand in the way of U.S. ratification of the Convention. Primary among

⁴⁰ Rutkow, *supra* note 27, at 176 (citing *Missouri v. Holland*, 252 U.S. 416, 431 (1920)).

⁴¹ *Id.* at 177.

⁴² , *Myths and Facts on the Convention on the Rights of the Child (CRC)*, Campaign Materials, THE CAMPAIGN FOR U.S. RATIFICATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD, <http://www.childrightscampaign.org/images/documents/Myths%20and%20Facts.pdf> (last visited Sept. 9, 2015) [hereinafter *Myths*].

⁴³ *Id.*

⁴⁴ Rutkow, *supra* note 27, at 183.

those concerns is the aforementioned gap between the Convention's child-centered paradigm and the reality of parent-driven child rearing practices in American society.

Even within the terms of the Convention itself, the roles of parents and children are unclear. The preamble declares that "childhood is entitled to special care and assistance," but fails to identify whether it is parents, the state, or others who are to provide that care.⁴⁵ It lauds the family as "fundamental" and "natural," but cannot bring itself to utter the words "parent" or "parents" anywhere within the preamble.⁴⁶ More broadly, many of the rights asserted for children arise not in a parent-supervised, family context, but instead seem to float on sea of hopes and dreams.

This obstacle to ratification takes tangible shape when individual Convention provisions are examined in the context of parental rights and responsibilities. Article 3 establishes a "primary consideration" of the "best interests of the child" in "all actions concerning children."⁴⁷ While "best interests" is also the bedrock in American child law, it is as problematic in the Convention as it is elsewhere. The concept is laudable (who, exactly, is for the "worst interests" of any child?) The difficulty comes when we must determine who is to be the arbiter of any disagreement (inevitably, neither the child nor parent) and what standards they are to use in making best interests decisions. In American child and family law, best interests considerations arise only in certain circumstances, such as abuse and neglect by parents, and even then are questionable (is it really in the best interests of hundreds of thousands of American children to languish in foster care?). The Convention's use of substituted judgment, based on best interests – replacing the wishes of children and parents with the wishes of others – threatens parental control and family integrity.

⁴⁵ Convention, *supra* note 3, at 45.

⁴⁶ *Id.*

⁴⁷ *Id.* at 46.

Article 16 protects “unlawful interference” with a child’s privacy, which some have interpreted to allow or even encourage children to seek abortions.⁴⁸ That interpretation may be a stretch, conditioned by fevered debates over the issue in the U.S., as the Convention very deliberately takes no position on family planning or abortion.⁴⁹ It is also noteworthy that most of this country’s largest Christian denominations, including the Catholic Church as represented by the Holy See, have supported ratification of the Convention.⁵⁰ Article 16 was aimed not at parents but at government abuses,⁵¹ yet it still chafes against the reality of contemporary child rearing: are parents not expected to know their child, with complete access to every aspect of a child’s life? Article 15’s freedom of association is similarly intended to address overreach by government, not by parents, but does anyone expect American parents to surrender their right (or ignore their responsibility) to control where their children go or with whom they spend their time? Would we want parents to keep such a distance?

Article 19’s prohibition against “mental and physical violence” also concerns parents’ rights advocates, raising the specter of government intrusion into a parent’s discretionary use of physical discipline.⁵² Article 17 requires governments to “ensure that the child has access to information and material from a diversity of national and international sources.”⁵³ Combined with a child’s newfound right to privacy, some worry that this gives children access to harmful information and materials, including pornography. While critics claims on the Convention’s dismissal of parental rights may be overstated, many might still tend to agree with the late Senator Jesse Helms, who objected to the Convention, as it “forces its way into the relationship

⁴⁸ *Id.* at 49.

⁴⁹ *Myths, supra* note 42.

⁵⁰ Grahn-Farley, *supra* note 7, at 317-18.

⁵¹ *Myths, supra* note 42.

⁵² Convention, *supra* note 3, at 50.

⁵³ *Id.* at 49.

of a parent and child and should not be considered in federal legislation, let alone international treaties.”⁵⁴

As a final substantive obstacle to ratification, those favoring smaller government and limited intervention in the lives of families by government fear that the Convention’s call for an adequate standard of living will force public policy and public spending to turn left. Critics claim the Convention would make it “illegal for a nation to spend more on national defense than it does on children’s welfare.”⁵⁵ Requirements for sufficient education and health care embedded in the articles inherently call for greater public resources than American public policy currently tolerates. Claims that the Convention would dictate American public sector budgets are not supported by the facts. Those claims resonate in the current public debate, however, and the fear of mandates to serve children in need reveals a core American objection to the Convention: we do not want anyone to tell us we must do more for impoverished and disadvantaged children. If the American ethos of self-reliance and self-determination has a dark side, it is our resolute refusal to share our country’s considerable blessings with our most vulnerable citizens. In part, we refuse to ratify the Convention on the Rights of the Child because we will not accept that every child has such rights, or merit such support from our government.

These obstacles and objections represent only some of the issues that have thwarted support for ratification of the Convention by the U.S. It is fair to say that the treaty has never come within shouting distance of ratification. Is ratification necessary, though, to achieve the Convention’s goals for American children? Can child advocates still care about the Convention,

⁵⁴ Stewart, *supra* note 4, at 165.

⁵⁵ *20 Things*, *supra* note 28.

and bemoan our country's outlier status, yet still move forward on the rights and wellbeing of our children?

“Yes,” is the answer, in part because, practically speaking, the Convention is less of an international law and more of an aspirational document, expressing our hopes for all children. Enforcement of its provisions is nonexistent. No country has been overrun by “nannies in blue berets”⁵⁶ sent by the U.N. or seen its legal infrastructure upended. The U.S. itself, while failing to ratify the Convention, already ratified two optional protocols to the Convention concerning children in armed conflict and child trafficking and exploitation under President George W. Bush.⁵⁷ The sun still rises, and American jurisprudence is largely undisturbed, for better or worse. If the Convention's bite is so ineffective, child advocates may rightly ask where the harm is in ratification.

For those who embrace the Convention but acknowledge the unlikelihood of ratification by our government, we may take heart in the fact that our country is moving in the Convention's direction, substantive concerns and partisan politics aside. A reading of literature produced shortly after the Convention's creation shows that the concerns at the time were overcome not by ratification of a treaty, but by the march of progress. Sometimes, we do move forward.

At the time of the Convention's initial adoption, we worried about how our country's use of the death penalty for children convicted of crimes would survive under the Convention.⁵⁸

*Roper v. Simmons*⁵⁹ changed that, with no help from the U.N., and *Miller v. Alabama*⁶⁰ leads the charge for those challenging life without parole sentences for minors. At the Convention's debut

⁵⁶ Farris, *supra* note 31, at 107.

⁵⁷ Rutkow, *supra* note 27, at 172-73 (2006).

⁵⁸ *Id.* at 183.

⁵⁹ 543 U.S. 551, 578-79 (2005).

⁶⁰ 132 S.Ct. 2455, 2469 (2012).

in 1990, health care and health insurance for all children was a distant vision for some, and opposed by many.⁶¹ Multiple legislative efforts, capped by the Affordable Care Act, have completely transformed that policy landscape in ways few would have predicted twenty-five years ago.⁶²

The U.N. Convention on the Rights of the Child calls us to dream of a better world for all children. It has all the force and all the weakness of any international agreement, ultimately subject to the good intentions of individual nations. For child advocates and all who seek to use the law for the benefit of the vulnerable, the Convention is an inspiration. Whether or not we ratify this treaty, our advocacy can build on its foundation to create better law and a better country for America's children.

⁶¹ See e.g., *NATIONAL HEALTH INSURANCE- A Brief History of Reform Efforts in the U.S.*, THE HENRY J. KAISER FAMILY FOUND. (Mar. 2009), <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/7871.pdf>.

⁶² Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (codified at 42 U.S.C. § 18091 and 26 U.S.C. § 5000A).