

**NO CHILD LEFT BEHIND? AN INTEREST-
CONVERGENCE ROADMAP TO THE
U.S. RATIFICATION OF THE
CONVENTION ON THE
RIGHTS OF THE CHILD**

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In 2008, then-United States presidential candidate Barack Obama was among those arguing that the United States’ failure to ratify the United Nations Convention of the Rights of the Child (CRC or Convention) is an embarrassment. At the time, the United States and Somalia were the only two nations not party to the CRC. The United States is now alone on this front. As populist authoritarian forces gain strength under the administration of President Donald J. Trump, assaults on human rights are occurring with regularity, exacerbating the impact of our absence from global rights-conferring documents that seek to protect vulnerable groups. Illuminating the nation’s backsliding, asylum-seeking families are being ripped apart simply for seeking a better life and migrant children are dying in the custody of the United States government. As a consequence, the United States’ moral authority is waning—a development President Macron of France alluded to in a November 2018 address—compromising our ability to exercise global leadership.

With due attention to these developments, this article argues that the global impact of the crisis at the U.S.-Mexico border is a pressure point where political will can be marshaled to ratify the CRC. It suggests that Professor Derrick Bell’s interest-convergence theory, which posits that the progress of minorities in the United States is defined by the extent to which it converges with the material interests of the political majority, can be applied as a normative tool to explore the United States’ ratification of the Convention. In reaching this conclusion, we must bear in mind that while Trump’s instincts are to withdraw from globalism wherever possible, the political majority—comprised of transnational actors including civil society, the media, courts, and Congress—has not lost sight of the fact that engagement with ongoing transnational legal processes has historically been central to the nation’s “soft power” approach to foreign policy because it facilitates the United States’ ability to cooperate with other nation’s around shared goals.

Given the United States’ history as the *only* U.N. member state not party to the CRC, ratification is in the interest of the political majority because it would help to close the distance with other nations by joining a transnational legal project where there is near-universal participation. For children’s rights advocates, the clarion

call for U.S. participation in the treaty began when the CRC was adopted more than 30 years ago. CRC ratification is in the interest of children's rights advocates because it would at long last operationalize the CRC, which affords robust protections to children including freedom from inhumane treatment and detention.

INTRODUCTION

Seven-year-old Jakelin Caal Maquin died in the custody of the U.S. Customs and Border Protection (CBP) on December 13, 2018.¹ Her autopsy revealed that she was visibly sick for several hours before succumbing to septic shock.² Likely contributing to her untimely death was CBP's failure to provide earlier medical care³—a recurring theme for children in the custody of the United States government during the month of Jakelin's death.⁴ Just weeks later, eight-year-old Felipe Alonzo-Gomez died of the flu.⁵ Felipe's death prompted CBP to revisit its protocol for evaluating children in its custody for medical problems.⁶ These tragedies focused attention on the unsettling reality that the United States' moral authority is waning.⁷ Indeed, commentators across the globe have repudiated the United States' handling of migrants at the U.S.-Mexico border

1. Amanda Arnold, *Everything We Know About the 8-Year-Old Migrant Boy Who Died in U.S. Custody*, THE CUT (Dec. 28, 2018), <https://www.thecut.com/2018/12/felipe-alonzo-gomez-cbp-death-reports.html> [<https://perma.cc/UU7C-2SRJ>].

2. *See id.*

3. Sheri Fink, *Migrant Girl's Autopsy Shows She Would Have Been Visibly Sick for Hours, Doctors Say*, N.Y. TIMES (Mar. 29, 2019), <https://www.nytimes.com/2019/03/29/us/migrant-girl-death.html> [<https://perma.cc/2BKV-G8BT>].

4. There are many examples to draw from illuminating the U.S. government's failure to ensure the welfare of all children. A particularly horrifying one involves an ailing five-month old girl reportedly held in a freezing cell and denied proper medical care. Adam Raymond, *Migrant Baby Contracted Pneumonia After Five Days in a 'Freezing' Holding Cell*, INTELLIGENCER (Dec. 20, 2018), <http://nymag.com/intelligencer/2018/12/migrant-baby-got-pneumonia-after-days-in-freezing-cell.html> [<https://perma.cc/5DUH-TXLF>].

5. Arnold, *supra* note 1.

6. Fink, *supra* note 3.

7. *See* David Nakamura et al., *Macron Denounces Nationalism as a 'Betrayal of Patriotism' in Rebuke to Trump at WWI Remembrance*, WASH. POST (Nov. 11, 2018, 12:20 PM), https://www.washingtonpost.com/world/europe/to-mark-end-of-world-war-i-frances-macron-denounces-nationalism-as-a-betrayal-of-patriotism/2018/11/11/aab65aa4-e1ec-11e8-ba30-a7ded04d8fac_story.html [<https://perma.cc/PL3P-GDVW>].

as an unjustified attack on children and families, as well as a flagrant violation of human rights norms.⁸

Although these and other tragic events have stirred the public consciousness in profound ways, it is true that the United States' failure to ensure robust protections for migrant children and their families is not uniquely a defect of the Trump administration.⁹ To take a recent example, controversy also surrounded the Obama administration's treatment of this vulnerable group.¹⁰ However, under Trump, the xenophobic policies invoked under the pretext of protecting against national security threats have escalated the situation into a global humanitarian crisis, throwing into doubt the nation's commitment to human rights and the rule of law.¹¹ In light of this development, this article suggests that the international gaze on the U.S. government's mistreatment of migrant children and families intensifies the need for the United States to shore up its commitment to human rights by ratifying the United Nations Convention on the Rights of the Child (CRC or Convention) and that Professor Derrick Bell's interest-convergence thesis provides a useful framework to explore ratification.

This article proceeds in four parts. Part I begins with a brief overview of the Convention, describing its adoption and its rights-conferring articles. It then examines the arguments against importing the CRC into the framework of domestic law, which are primarily two-fold: (1) ratification of the CRC impinges on the U.S. system of federalism, and (2) the CRC is incompatible with U.S.

8. See Zeid Ra'ad Al Hussein, High Comm'r for Hum. Rts., United Nations, Opening Statement and Global Update of Human Rights Concerns (June 18, 2018).

9. Carrie F. Cordero et al., *The Law Against Family Separation*, 51.2 COLUM. HUM. RTS. L. REV. 432, 436 (2020) ("To be sure, bona fide concerns about children's safety and increased awareness of the problem of human trafficking mean that some children were likely also separated from accompanying adults prior to 2017.").

10. The Obama administration was criticized for housing children and families crossing the border illegally in detention centers that were constitutionally inadequate. See, e.g., Richard Gonzales, *Obama Immigration Detention Policies Under Fire*, NAT'L PUB. RADIO (June 12, 2015, 5:57 PM), <https://www.npr.org/sections/itsallpolitics/2015/06/12/414023967/obama-immigrant-detention-policies-under-fire> [<https://perma.cc/DW79-QGES>].

11. See, e.g., Thomas M. McDonnell & Vanessa H. Merton, *Enter at Your Own Risk: Criminalizing Asylum-Seekers*, 51.1 COLUM. HUM. RTS. L. REV. 1, 3 (2019) ("Not only do the Trump Administration's harsh immigration policies and practices violate international law and American values, but also foretell a government tending toward exclusion, racism, nationalism, parochialism, authoritarianism, and disregard of the rule of law.").

views of family policy. While these concerns are understandable and are entitled to some weight, they provide only a partial view of the CRC landscape and should not be considered dispositive because the U.S. Senate has demonstrated in the context of other treaties that it is adequately equipped to address each by passing appropriate implementing legislation. Part II begins by laying the conceptual groundwork for the interest-convergence thesis. The thesis posits that the progress of minorities in the United States is defined by the extent to which it converges with the material interests of the political majority.¹² “But absent such convergence, governmental institutions—assumed to be controlled by the [political] majority—will not protect or advance minority interests in meaningful ways.”¹³ The term “political majority” as used in this Article refers to the collection of individuals and institutions that drive domestic or international policies. It is comprised of our “allies; states, municipalities, and localities of the United States; government bureaucracies; the media; courts; nongovernmental organizations (NGOs); international organizations (IGOs); and committed individuals.”¹⁴ Drawing from legal historian Mary Dudziak’s account of the foreign policy considerations that motivated the *Brown v. Board of Education* decision, Part II then situates the insights of Bell’s thesis in historical context to highlight its descriptive and normative value.

With that background in place, Part III operationalizes the thesis in the context of the separation of migrant families. It argues that because of the outrage attendant to the sundering of migrant children from their families, the interests of children and the political majority are joined by the United States ratifying the CRC. For children’s rights advocates, the interest in ratifying the CRC is straightforward and rests on the puzzlingly controversial idea that becoming party to the most robust document conferring rights to

12. See Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 6 (1976) (“[T]he most significant political advances for blacks resulted from policies which were intended and had the effect of serving the interests and convenience of whites rather than remedying racial injustices against blacks”); see also Sudha Setty, *National Security Interest Convergence*, 4 HARV. NAT’L SEC. J. 185, 187 (2012) (explaining that “[i]nterest convergence is the process by which the divergent self-interests of different political groups overlap to the degree necessary to enable the formation of an issue-specific coalition powerful enough to effect serious policy change”).

13. Kevin L. Terry, *Community Dreams and Nightmares: Arizona, Ethnic Studies, and the Continued Relevance of Derrick Bell’s Interest-Convergence Thesis*, 88 N.Y.U. L. REV. 1483, 1490 (2013).

14. HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* 7 (2019).

children would help to improve the condition of children domestically and abroad. It is in the interest of the political majority to ratify the CRC, this Article contends, because ratification would help to rehabilitate the United States' global reputation on human rights, an interest that extends beyond placating foreign critics.

The Trump administration's mistreatment of children at the U.S.-Mexico border has indicated that the United States is no longer committed to human rights norms¹⁵ and has damaged international relations in the process. As such, ratifying the CRC is in the interest of the political majority because participation in the Convention may help to alleviate concerns about the nation's commitment to rules-based international institutions and global democratic ideals.¹⁶ Cooperating with "rights-respecting democratic allies" has historically been central to the United States' "broader national security interests"¹⁷ and key to its ability to construct and lead international institutions. Flagrantly violating global human rights norms is obviously incongruous with the goal of fostering cooperation with global allies. If Trump's unorthodox approach to engaging with the global community continues to gain the upper hand, a worrying possibility is that rules-based institutions might be irreparably altered and the nation's ability to effectively engage with allies will be dealt a serious blow. To that end, for the political majority, ratifying the CRC may help to allay concerns about the United States' commitment to human rights and rules-based institutions, facilitating the reconstruction of our relationships with our global allies.

I do not intend to suggest that the interest-convergence thesis is an infallible instrument for ratifying the CRC. Indeed, there are some constraints to the proposal that warrant consideration. For example, we cannot preclude the inference that relying on interest-convergence to ratify the CRC may result in a hollow victory for children's rights. In what Professor Bell referred to as a "contradic-

15. The Leadership Conference on Civil and Human Rights has developed a compendium of the human rights rollbacks under the Trump administration. Among other things, the compendium makes clear that the administration is actively withdrawing the United States from the global human rights framework. See Leadership Conf. on Civ. & Hum. Rts., *Trump Administration Civil and Human Rights Rollbacks*, <https://civilrights.org/trump-rollbacks/> [<https://perma.cc/ED5Z-AVTY>] (last visited Sept. 28, 2020).

16. Debra Cassens Weiss, *US Falls Out of Top 20 in Rule of Law Index, While Global Declines Continue*, A.B.A. J. (Mar. 12, 2020, 11:39 AM), <https://www.abajournal.com/news/article/us-falls-out-of-top-20-in-rule-of-law-index-while-overall-declines-continue> [<https://perma.cc/PNB8-VN53>].

17. Koh, *supra* note 14, at 34.

tion-closing” case,¹⁸ the mere fact of ratification could be used as cover to argue that the interests of children have been sufficiently addressed, obviating the need for further reform. The limitations of the proposal are taken up in Part IV and a conclusion follows.

I. THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD

The United Nation’s adoption of the U.N. Declaration of Human Rights in 1948 marked the first time children’s rights were collectively recognized by U.N. member states.¹⁹ The declaration provides that “[m]otherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”²⁰ The rights enumerated in the U.N. Declaration were expanded by the 1959 Declaration of the Rights of the Child (1959 Declaration).²¹ The 1959 Declaration called “upon parents, voluntary organizations, local authorities, and national governments to recognize children’s rights and ‘strive for their observance by legislative and other measures.’”²² And in 1989, the then-190 member states of the United Nations General Assembly (UNGA) unanimously adopted the United Nations Convention on the Rights of the Child, continuing the momentum of the previous two documents.²³ This section provides background on the CRC and the reasons that have informed the United States’ non-participation in the treaty.

A. *Background on the Convention on the Rights of the Child*

The CRC is the most robust international document recognizing the rights of children. At the heart of the treaty is the view that children are “agents who share the power to shape their own lives”

18. Derrick Bell, *The Supreme Court 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 32 (1985).

19. See generally LUISA BLANCHFIELD, CONG. RESEARCH SERV., R40484, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: BACKGROUND AND POLICY ISSUES 1 (2009).

20. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25 (Dec. 10, 1948).

21. G.A. Res. 1386 (XIV), Declaration of the Rights of the Child (Nov. 20, 1959) [hereinafter 1959 Declaration].

22. Warren Binford, *The Constitutionalization of Children’s Rights in South Africa*, 60 N.Y.L. SCH. L. REV. 333, 336 (2016) (quoting the 1959 Declaration).

23. See U.N. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

and should fully exercise those rights.²⁴ The Convention's fifty-four articles and three optional protocols "set out the civil, political, economic, social and cultural rights that all children everywhere are entitled."²⁵ The CRC articles range in coverage from inhumane treatment and detention (Article 37)²⁶ to separation from parents (Article 9)²⁷ to the right to education (Article 28).²⁸ The drafters had intended that all articles be treated with equal importance.²⁹ The CRC's three optional protocols concern the sale of children, child prostitution, and child pornography; the involvement of children in armed conflict; and the adjudication of complaints.³⁰ Thirty years after its adoption, the Convention is the most widely ratified human rights treaty ever.³¹ Despite playing a central role in drafting the Convention and "[making] textual recommendations for 38 of the 40 substantive law articles,"³² including the article establishing a child's right to family reunification,³³ the United States is the only member of the United Nations that has not ratified the treaty.³⁴

24. Lotem Perry-Hazan, *Freedom of Speech in Schools and the Right to Participation: When the First Amendment Encounters the Convention on the Rights of the Child*, 2 *BYU EDUC. & L.J.* 421, 422 (2015).

25. *How We Protect Children's Rights with the UN Convention on the Rights of the Child*, UNICEF, <https://www.unicef.org.uk/what-we-do/un-convention-child-rights/amp/> [<https://perma.cc/E3LR-ATDK>] (last visited Apr. 20, 2020).

26. CRC, *supra* note 23, at art. 37.

27. *Id.* at art. 9.

28. *Id.* at art. 28.

29. *Introducing the United Nations Convention on the Rights of the Child*, UNICEF, <https://www.unicef.org.uk/rights-respecting-schools/the-rsa/introducing-the-crc/> [<https://perma.cc/JXA9-2M7K>] (last visited Apr. 20, 2020).

30. The United States is party to the CRC Optional Protocol on the Sale of Children and the Optional Protocol on Children and Armed Conflict. S. REP. NO. 107-4, at 2 (2002).

31. *See Convention on the Rights of the Child*, UNICEF, <https://www.unicef.org/crc/> [<https://perma.cc/27FF-CGC9>] (last visited May 20, 2020).

32. Cris R. Revaz, *An Introduction to the U.N. Convention on the Rights of the Child*, in *THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION* 13 (Jonathan Todres et al., eds., 2006).

33. Howard Davidson, *Does the U.N. Convention on the Rights of the Child Make a Difference?*, 22.2 *MICH. ST. INT'L L. REV.* 497, 501 (2014).

34. Amy Rothschild, *Is America Holding Out on Protecting Children's Rights?*, *THE ATLANTIC* (May 2, 2017), <https://www.theatlantic.com/education/archive/2017/05/holding-out-on-childrens-rights/524652/> [<https://perma.cc/QY46-BU5X>]. As a signatory to the Convention, the United States is only legally obligated to refrain from contravening the object and purpose of the Convention.

B. U.S. Non-participation in the Convention on the Rights of the Child

To some observers, it is an embarrassment that the United States has not ratified the CRC.³⁵ Non-participation suggests “we haven’t focused attention on children in the United States.”³⁶ Our failure to ratify the convention is shaped in different measure by the arguments that ratification is (1) at odds with the U.S. system of federalism,³⁷ and (2) would impinge on traditional American views on family policy.³⁸ But these grievances should not stand in the way of the United States ratifying the CRC.

1. Federalism

A primary reason CRC ratification efforts have stalled in the United States is because of concerns that importing the treaty into domestic law would conflict with the U.S. system of federalism.³⁹ Opponents of ratification point to the Supremacy Clause of the United States Constitution as prohibitive. A typical argument that helps to explain the opposition on federalism grounds is as follows: under the Supremacy Clause, ratified treaties are the supreme law of the land.⁴⁰ Since the CRC primarily covers areas of the law that are traditionally the jurisdiction of state governments,⁴¹ ratification would impinge on states’ rights by allowing the federal government to legislate in its place.⁴² But left unsaid is that a treaty ratified by

35. See, e.g., NICHOLAS D. KRISTOF & SHERYL WUDUNN, TIGHTROPE: AMERICANS REACHING FOR HOPE 221 (2020) (“It’s perhaps telling that the United States for years was, embarrassingly, the only country in the world that had not ratified the Convention on the Rights of the Child. That has now changed: the United States is the *only* nation that hasn’t bothered to ratify it.”).

36. Karen Attiah, *Why Won’t the U.S. Ratify the U.N.’s Child Rights Treaty?*, WASH. POST (Nov. 21, 2014, 4:12 PM), https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/?noredirect=on&utm_term=.c505bef098c1 [<https://perma.cc/4XJV-QE66>].

37. See generally Susan Kilbourne, *The Convention on the Rights of the Child: Federalism Issues for the United States*, 5 GEO. J. ON FIGHTING POVERTY 327, 329-30 (1998).

38. See, e.g., Soo Jee Lee, *A Child’s Voice vs. A Parent’s Control: Resolving a Tension Between the Convention on the Rights of the Child and U.S. Law*, 117 COLUM. L. REV. 687, 690 (2017) (“U.S. law treasures the right of parents to control the upbringing of their children . . .”).

39. For a comprehensive discussion on U.S. ratification of the CRC and the issue of federalism, see Kilbourne, *supra* note 37, at 327.

40. U.S. CONST. art. VI, cl. 2.

41. See, e.g., Cynthia L. Schirmer, *Punishing Children as Adults: On Meeting International Standards and U.S. Ratification of the U.N. Convention on the Rights of the Child*, 16 MICH. ST. J. INT’L. L. 715, 719 (2008) (explaining opposition to ratification on federalism grounds as “limiting [states’] jurisdiction over children”).

42. *Id.*

the United States is usually subject to a declaration that the treaty's provisions will be "non-self-executing," or will not automatically change federal or state laws and will require legislation to implement.⁴³ Indeed, the United States certainly *could*, and likely *would* include a similar "non-self-executing" declaration if it ratified the CRC, thereby reducing any concerns that ratification would step on the toes of individual states.⁴⁴ Moreover, the Convention does not actually *require* the federal government to pass legislation implementing its provisions.⁴⁵ Instead, *state* legislatures could take on the role of ensuring compliance with the terms of the CRC by passing the necessary legislation at the state level, ameliorating any federalism concerns.⁴⁶

Should the federal government exercise its authority to pass legislation implementing the CRC, federalism concerns would also be addressed because the United States consistently includes "federalism understandings" on ratified treaties, setting forth that the federal government's implementation power is limited to issues it "exercises legislative and judicial jurisdiction over."⁴⁷ Given this history, and in light of the fact that the Senate included a federalism understanding when it ratified the CRC's Optional Protocol on the Sale of Children, Child Pornography, and Child Prostitution,⁴⁸ it seems doubtful that a federalism understanding would not be attached to the federal government's legislation implementing the CRC.

Another way the Senate could address federalism concerns is by including reservations in its advice and consent to the CRC. Reservations are declarations that purport to "exclude, limit, or modify

43. 138 CONG. REC. 8071 (1992). The Senate's advice and consent to the *International Covenant on Civil and Political Rights*, for example, included a declaration "[t]hat the provisions of Articles 1 through 27 of the Covenant are not self-executing."

44. Lawrence L. Stentzel, *Federal-State Implications of the Convention*, in CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW 57, 57 (Cynthia Price Cohen & Howard A. Davidson eds., 1990).

45. Kilbourne, *supra* note 37, at 329.

46. *Id.* at 334.

47. Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 422 (2000) (quoting U.S. Reservations, Understandings, and Declarations to International Covenant on Civil and Political Rights, 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992)).

48. Cris Revaz & Jonathan Todres, *The Optional Protocols to the Convention on the Rights of the Child and the Impact of U.S. Ratification*, in THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 300 (Jonathan Todres et al. eds., 2006).

the state's legal obligation"⁴⁹ and seek to harmonize international treaties with domestic law. Some reservations lay out the interpretive boundaries for the terms of a treaty⁵⁰ while others explicitly decline to consent to specific treaty obligations.⁵¹ When the United States ratified the International Covenant on Civil and Political Rights, a reservation preserving states' rights was attached:

[T]he United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.⁵²

Assertions that the CRC cannot square with U.S. principles of federalism overlook a number of relevant mechanisms that would permit ratification while ensuring states' rights are not disrupted. That the United States has previously ratified treaties, while attaching mechanisms that stipulate that Congress intends to leave issues dominated by state law in the hands of state legislatures, demonstrates that compliance with the CRC could be achieved with acceptable legislation.⁵³

2. Religious Fundamentalism

The religious fundamentalist critique of U.S. ratification of the CRC is that the Convention's recognition of children as full rights-bearing individuals is a threat to traditional U.S. views on family

49. RESTATEMENT (THIRD) OF THE FOREIGN AFFAIRS LAW OF THE UNITED STATES § 313 cmt. g (1987).

50. The United States included a reservation to the Torture Convention's prohibition on "cruel, inhuman, or degrading treatment or punishment." Bradley & Goldsmith, *supra* note 47, at 418 (quoting Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pmbl., para. 4, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85, 113).

51. The U.S. attached a reservation to the International Covenant on Civil and Political Rights restricting propaganda for war and hate speech. Declarations and Reservations to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

52. 138 CONG. REC. 8071 (1992) (U.S. Senate's resolution for ratification of the International Covenant on Civil and Political Rights).

53. Kilbourne, *supra* note 37, at 333.

policy.⁵⁴ Opponents of the United States ratifying the CRC argue that conferring rights to children through the terms of the Convention would upend traditional conceptions of the parent-child relationship and destabilize long-standing U.S. views of children as “purely passive objects of the authority of parents and governments.”⁵⁵

These concerns are animated by CRC provisions like Article 13. Under Article 13, “[t]he child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.”⁵⁶ There has been a tendency to interpret Article 13 as displacing parental authority in favor of the child’s complete agency.⁵⁷ This view generally contends that the legal consequences of integrating the CRC into the United States’ body of law “may lead to extremes which are destructive of the family and thus detrimental to the children we seek to protect.”⁵⁸ While a piecemeal reading of the CRC may indicate that furnishing protection to children under the treaty is detrimental to parents and families in the United States, traditional parental roles are firmly established within the object and purpose of the Convention. Article 5 of the Convention is a case in point. It requires that nations “respect the responsibilities, rights, and duties of parents.”⁵⁹ Another example is Article 7, which establishes the rights of the child to “know and be cared for by his or her parents.”⁶⁰

The Committee on the Rights of the Child (the Committee), the primary institution charged with interpreting and implementing the CRC, has routinely urged states to “*do more to support struggling families* in order to make sure children stay under the care and

54. Eric Engle, *The Convention on the Rights of the Child*, 29 QUINNIPIAC L. REV. 793, 797–98 (2011); see also Richard G. Wilkins et al., *Why the United States Should Not Ratify the Convention on the Rights of the Child*, 22 ST. LOUIS U. PUB. L. REV. 411, 412 (2003) (arguing that the CRC’s recognition “of separate rights for children with the Government accepting [the] responsibility of protecting the child from the power of parents” is at odds with traditional conceptions of the American family).

55. Lee, *supra* note 38, at 687.

56. CRC, *supra* note 23, at art. 13.

57. Schirmer, *supra* note 41, at 721 (“Article 13 is read by some as replacing parental authority on the part of the child.”).

58. Barbara J. Nauck, *Implications of the United States Ratification of the United Nations Convention on the Rights of the Child: Civil Rights, the Constitution and the Family*, 42 CLEV. ST. L. REV. 675, 676 (1994).

59. CRC, *supra* note 23, at art. 5.

60. *Id.* at art. 7.

control of their parents, rather than enter the custody of the government.”⁶¹ Consider, for example, the Committee’s recommendation to Sweden, emphasizing that state programs should prioritize “protecting the natural family environment.”⁶² In another instance, it was recommended by the Committee that Bolivia take all steps “to return [children] to their families whenever possible and consider placement of children in institutions as a measure of last resort and for the shortest possible period.”⁶³ Contrary to what some critics of ratification maintain, the global experience with the CRC affirms the view that the CRC does not seek to empower children at the expense of the family unit.

II. THE INTEREST-CONVERGENCE THESIS

In his classic article *Brown v. Board of Education and the Interest-Convergence Dilemma*,⁶⁴ Derrick Bell proposed that the U.S. Supreme Court’s decision to overturn *Plessy v. Ferguson*’s⁶⁵ “separate but equal” doctrine as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment and assign a fundamental right to children was driven by a desire to rehabilitate the nation’s global reputation.⁶⁶ Specifically, as communist regimes began to undermine the image of American democracy by including stories of American racism in their propaganda, the United States sought to distance itself from the darkness of racial segregation by presenting an airbrushed account of racial progress in the country.⁶⁷

When the Court first heard *Brown*, arguments made in favor of desegregation did not win over a number of the Justices.⁶⁸ The ground shifted on the issue when racial inequality in the United States became a fixture of the international press. Many nations

61. Davidson, *supra* note 33, at 526.

62. *Id.* (quoting *Concluding Observations of the Comm. On the Rights of the Child: Sweden*, U.N. Comm. on the Rts. of the Child, 51st Sess., para. 35, U.N. Doc. CRC/C/SWE/CO/4 (June 12, 2009)).

63. *Id.* (quoting *Concluding Observations of the Comm. On the Rights of the Child: Bolivia*, U.N. Comm. on the Rts. of the Child, 52nd Sess., para. 46, U.N. Doc. CRC/C/BOL/CO/4 (Oct. 2, 2009)).

64. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

65. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

66. Bell, *supra* note 64, at 524.

67. See DUDZIAK, *infra* note 69, at 107.

68. For a thorough review of the Justice’s deliberations leading up to the *Brown* decision, see Mark Tushnet & Katya Lezin, *What Really Happened in Brown*, 91 COLUM. L. REV. 1867 (1991).

questioned “how the United States could argue that its form of government was a model for the world when American democracy accommodated racial oppression.”⁶⁹ The U.S. government understood that news coverage around the globe underscoring the race issue in the United States could be ameliorated with court decisions invalidating discriminatory practices against African Americans.⁷⁰ “In *amicus curiae*, or ‘friend of the court,’ briefs in civil rights cases [like *Shelley v. Kraemer*⁷¹ and *Brown*], the Truman administration stressed to the Supreme Court the international implications of race discrimination and at times focused on the negative impact on U.S. foreign relations that a pro-segregation decision might have.”⁷² The DOJ under President Dwight D. Eisenhower filed an *amicus* brief explaining that

The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.⁷³

In 1954, the Court handed down a unanimous 9-0 decision in *Brown*, giving “the U.S. government the counter to Soviet propaganda it had been looking for.”⁷⁴

The extent to which the Justices’ ruling in *Brown* was guided by foreign policy considerations is not definitive.⁷⁵ But ample evidence supports the conclusion that members of the Court were “acutely aware of the nation’s need to protect its national security against those who would exploit our internal difficulties for the benefit of external forces,”⁷⁶ and that “[t]he historic attraction to granting recognition and promising reform of racial injustice when such action

69. MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 76 (2000).

70. *Id.* at 32.

71. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that racially restrictive covenants were unenforceable under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution).

72. DUDZIAK, *supra* note 69, at 90.

73. *Id.* at 100.

74. *Id.* at 107.

75. See generally Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 *Nw. U. L. REV.* 149 (2011); see also Tushnet & Lezin, *supra* note 68, at 1868 (“[W]hat happened behind the scenes in *Brown* . . . cannot be definitive.”).

76. DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 66 (2004). For example, Chief Justice Earl Warren—who wrote the Court’s opinion—recognized that vulnerability on the racial issue “enabled our enemies to attack us with no ready response available.” *Id.* And Justice Felix Frankfurter, another member of the *Brown* court, ob-

converges with the nation's interests, provided an unacknowledged motivation for the Court's ringing statement in *Brown*.⁷⁷

News of the decision traveled across the globe. A few months after *Brown* was decided, a National Security Council Report published by the United States Information Agency proclaimed that some countries in Africa viewed the decision as “the greatest event since the Emancipation Proclamation, and it remove[d] from Communist hands the most effective anti-American weapon they had in Black Africa.”⁷⁸ Others were less sanguine in their interpretation of *Brown*'s significance. In China, for example, “the *People's Daily* thought that the U.S. did not really intend to protect black people's rights, but to hoodwink the public domestically and abroad.”⁷⁹ The skepticism towards the “racial progress” account of *Brown* was best conveyed by the inimitable James Baldwin: “White Americans congratulate themselves on the 1954 Supreme Court decision outlawing segregation in the schools; they suppose, in spite of the mountain of evidence that has since accumulated to the contrary, that this was proof of a change of heart-or, as they like to say, progress.”⁸⁰ The presumption was that *Brown* was a way to placate foreign critics by “reinforc[ing] the story of race and democracy that had already been told in U.S. propaganda.”⁸¹

Bell's thesis rejects the traditional narrative that *Brown* was decided on the basis of a moral and legal reckoning with the injustices of racial segregation in public schools.⁸² Rather, it posits that driving the *Brown* calculus was a desire to repair the image of the United States abroad as a nation that took civil rights, human rights, and democratic ideals seriously. Today, interest-convergence is a cornerstone of the legal realist position at the heart of critical race theory and challenges the principles of classical legal theory

served in an earlier decision that the Court “may take judicial notice” when communist propaganda threatens the “institutions of this country.” *Id.*

77. *Id.* at 67.

78. DUDZIAK, *supra* note 69, at 109.

79. *Id.* at 135.

80. JAMES BALDWIN, *THE FIRE NEXT TIME* 86 (1963).

81. DUDZIAK, *supra* note 69, at 109.

82. Those who share the intuition that extra-legal concerns motivated the *Brown* decision can point to the racial arrangements in public schools today for support. Not much has improved. See P.R. Lockhart, *65 Years After Brown v. Board of Education, School Segregation is Getting Worse*, Vox (May 10, 2019, 7:00 PM), <https://www.vox.com/identities/2019/5/10/18566052/school-segregation-brown-board-education-report> [<https://perma.cc/63SY-C33V>].

that advancements in civil rights will be achieved by relying on doctrinal developments and sophisticated legal strategies alone.⁸³

While the interest-convergence thesis initially emerged in the *Brown* context, its insights have been applied to contemporary issues involving the interplay of power and oppression from a descriptive and normative perspective.⁸⁴ These scholarly contributions have shifted the application of the thesis beyond the black and white binary Bell introduced in 1980 and showcased the theory's versatility as a legal realist tool. Bell, for example, later used interest-convergence to explain doctrinal developments in cases concerning race and education in the United States.⁸⁵ Professor Stephen Feldman used interest-convergence as a framework for explaining courts' interpretation of religion clauses under the First Amendment and its relationship to non-Christian groups.⁸⁶ And another scholar has even deployed the theory to examine the viability of building coalitions to secure animal rights.⁸⁷ Taking cues from this rich body of scholarship, this article argues in Part III that the interest-convergence thesis offers a framework for the United States to ratify the CRC.

83. William M. Carter, Jr., *The Maryland Constitutional Schmooze: The Thirteenth Amendment, Interest Convergence, and the Badges and Incidence of Slavery*, 71 MD. L. REV. 21, 23 (2011).

84. See Danné L. Johnson, *What's Love Got to Do With It? Interest-Convergence as a Lens to View State Ratification of Post-Emancipation Slave Marriages*, 36 W. NEW ENG. L. REV. 143, 150 (2014) ("Scholars can use interest-convergence as a tool or, . . . a new pair of glasses, to help view historical developments related to equality and justice."); see also Raymond H. Brescia, *When Interests Converge: An Access-to-Justice Mission for Law Schools*, 24 GEO. J. ON POVERTY L. & POL'Y 205, 223 (2017) ("While Bell articulated the *Interest-Convergence Theory* as a way of explaining and justifying the Court's decision in *Brown*, some have taken it as a theory of social change itself, a way of both explaining how social change occurs and also spurring that change.").

85. See, e.g., BELL, *supra* note 76 (explaining how the Supreme Court's decision in *Grutter v. Bollinger* illuminated the continued relevance of the interest-convergence theory).

86. Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA L. REV. 833 (1996).

87. See Joseph Lubinski, *Screw the Whales, Save Me! The Endangered Species Act, Animal Protection, and Civil Rights*, 4 J.L. SOC'Y, 377, 413 (2003).

III.
AN INTEREST CONVERGENCE ROADMAP TO THE
U.S. RATIFICATION OF THE CONVENTION
ON THE RIGHTS OF THE CHILD

As the Cold War context shows, there is authority for the idea that enacting rights-protective measures for the politically powerless can advance the foreign policy interests of the political majority. Applying the central insight of Bell's interest-convergence thesis, my argument comes in three parts. The first part explores the division between Trump and the political majority in their approach to international rules-based institutions. The second part contends that Trump's freewheeling approach to international rules-based institutions has compromised the United States' global standing. Finally, the third part contends that the political majority's adherence to transnational legal processes can be used as pressure point to form a single-issue coalition to ratify the CRC.

A. *President Trump's Approach to International Rules-based
Institutions Diverges with the Political Majority's*

1. Transnational Legal Processes have been Upended under Trump

Prior to the Trump administration, a soft-power strategy had underwritten the nation's foreign policy since World War II.⁸⁸ A soft-power strategy

means first that, given the choice, the United States—and other like-minded states—should choose *engagement* over unilateralism. When faced with a foreign policy problem, the United States should not proceed alone but rather seek to engage with other countries and adversaries around common values in search of diplomatic solutions that can be embedded within durable international law principles.⁸⁹

When Trump entered the White House, “he found himself enmeshed in a complex web of international and domestic rules that created a persistent default path to compliance with preexisting norms,” writes Professor Harold Koh.⁹⁰ This transnational legal process, “[o]nce in place . . . became a ‘guardrail’ keeping certain political and policy decisions traveling along previously

88. See, e.g., Amy Ebitz, *The Use of Military Diplomacy in Great Power Competition*, BROOKINGS INST.: ORDER FROM CHAOS (Feb. 12, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/02/12/the-use-of-military-diplomacy-in-great-power-competition/> [https://perma.cc/3C7Y-68C6].

89. KOH, *supra* note 14, at 9–10 (emphasis in the original).

90. *Id.* at 141.

agreed-upon paths.”⁹¹ Trump’s foreign policy strategy of staking out positions untethered to the ideas that built the global community—and propelled the United States to global leadership—“has moved a lot of us out of our comfort zone, me included,”⁹² said Trump’s former national security adviser H.R. McMaster. Traditionally, “the consensus view has been that engagement overseas is an unmitigated good, regardless of the circumstances,” Secretary McMaster reminds us.⁹³

The President’s unorthodox views are a magnet for criticism. Journalist David A. Graham of *The Atlantic* describes the situation like this: “In essence, executive-branch employees are hearing orders from Trump and responding, *I don’t have to listen to you—you’re just the president.*”⁹⁴ Peter Baker, Chief White House Correspondent for the *New York Times*, noted that “the president’s own advisers and allies are challenging his view of the world and his prescription for its problems.”⁹⁵ Recognizing Trump’s anti-globalist posture as a threat to national security, Congressional lawmakers have repeatedly pushed back at Trump. In 2017, a near-unanimous Congress passed sanctions on Russia despite Trump’s objections.⁹⁶ The Senate voted overwhelmingly in 2019, in a bipartisan repudiation, “to advance legislation drafted by the [Senate] majority leader [Mitch McConnell] to express strong opposition to the President’s withdrawal of United States military forces from Syria and Afghanistan.”⁹⁷ Senator Lindsey Graham, one of the President’s most vocal supporters on Capitol Hill, summed it up this way: “I expect the

91. *Id.*

92. Mark Landler, *Trump, the Insurgent, Breaks with 70 Years of American Foreign Policy*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/us/politics/trump-world-diplomacy.html> [https://perma.cc/ZA6J-54DX].

93. *Id.*

94. David A. Graham, *No One Listens to the President*, THE ATLANTIC (Apr. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/04/no-one-listens-to-the-president/587557/> [https://perma.cc/S8KK-VHQB].

95. Peter Baker, *A Growing Chorus of Republican Critics for Trump’s Foreign Policy*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/us/politics/trump-foreign-policy.html?searchResultPosition=1> [https://perma.cc/7QQ3-YH76].

96. Patricia Zengerle & Amanda Becker, *House Approves New Russia Sanctions, Defying Trump*, REUTERS (July 25, 2017, 1:08 PM), <https://www.reuters.com/article/us-usa-trump-russia-idUSKBN1AA28W> [https://perma.cc/CYE9-64X9].

97. Catie Edmondson, *Senate Rebukes Trump Over Troop Withdrawals From Syria and Afghanistan*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/2019/01/31/us/politics/senate-vote-syria-afghanistan.html> [https://perma.cc/X368-VJUD].

American president to do what's in our national security interest. It's never in our national security interest to abandon an ally"⁹⁸

2. The Family Separation Policy Exemplifies Trump's Attacks on International Rules-based Institutions

Many of Trump's policies have created a wedge between the United States and its allies. Illuminating this wedge is the Department of Homeland Security's (DHS) cruel policy and practice of separating migrant children from their parents at the U.S.-Mexico border.⁹⁹ In April 2018, then-U.S. Attorney General Jeff Sessions rolled out a "zero-tolerance" policy, prosecuting any adult who crossed or attempted to cross the U.S.-Mexico border illegally.¹⁰⁰ He described the policy as follows:

I have put in place a "zero tolerance" policy for illegal entry on our Southwest border. If you cross this border unlawfully, then we will prosecute you. It's that simple. If you smuggle illegal aliens across our border, then we will prosecute you. If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law. If you make false statements to an immigration officer or file a fraudulent asylum claim, that's a felony. If you help others to do so, that's a felony, too. You're going to jail. So if you are going to come to this country, come here legally. Don't come here illegally.

National security was used as a pretext for the "zero-tolerance" policy.¹⁰¹ But it is clear that the policy was enacted to deter immi-

98. Press Release, Senator Lindsey Graham, ICYMI: Graham on Syria Withdrawal: "Disaster in the Making" (Oct. 7, 2019), <https://www.lgraham.senate.gov/public/index.cfm/2019/10/icymi-graham-on-syria-withdrawal-disaster-in-the-making> [<https://perma.cc/4ANH-S2LQ>].

99. Perhaps no policy enacted during Trump's administration has struck a global nerve like the family separation policy. A strong contender is Executive Order 13769, the Trump administration's policy barring immigrants from Muslim-majority countries from entering the United States in the name of a superficial national security threat. More on Trump's "travel ban" can be found at Editorial, *Diplomats Decry Muslim Ban*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/opinion/diplomats-decry-muslim-ban.html?searchResultPosition=5> [<https://perma.cc/UNG2-VMS7>].

100. Memorandum from the Attorney General (Apr. 6, 2018) (on file with Dep't of Justice) <https://www.justice.gov/opa/press-release/file/1049751/download> [<https://perma.cc/ZKF4-PLN2>].

101. Press Release, Dep't of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [<https://perma.cc/M3LJ-DCD2>]. Trump has routinely described immigrants arriving from the U.S.-Mexico border as an "invasion." See, e.g., Kathryn Krawczyk,

gration to the United States from the Southwest border, as then-White House Chief of Staff and former Secretary of DHS explained in unambiguous terms: “[Family separation] would be a tough deterrent . . . a big name of the game is deterrence”¹⁰²

Before the policy was implemented, DHS’s practice was to “catch and release” any families with children attempting to cross the border illegally, meaning that the Department released immigrants in deportation proceedings from its physical custody within twenty days,¹⁰³ as mandated by the 1997 *Flores* settlement.¹⁰⁴ Peddling the false charge that immigrants released during deportation proceedings never show up to their court dates, Trump tried to deal with this alleged “catch and release” loophole by separating thousands of children from their parents at the U.S.-Mexico border.¹⁰⁵

Trump Just Called Immigration an ‘Invasion.’ So Did the New Zealand Shooter, THE WEEK (Mar. 15, 2019), <https://theweek.com/speedreads/829486/trump-just-called-immigration-invasion-did-new-zealand-shooter> [<https://perma.cc/9S5P-MAAU>]. This disturbing rhetoric rings hollow when we consider that the per capita crime rate for native-born U.S. Americans is higher than for immigrants. See Alex Nowrasteh, *Illegal Immigrants and Crime—Assessing the Evidence*, CATO INST.: CATO AT LIBERTY (Mar. 4, 2019), <https://www.cato.org/blog/illegal-immigrants-crime-assessing-evidence> [<https://perma.cc/9ZLA-Y4UT>]. Moreover, when the Director of National Intelligence presented the 2018 and 2019 World Threat Briefing to Congress, he did not identify migrants arriving from Central America as a national security threat to the United States. See *Worldwide Threat Assessment of the U.S. Intelligence Community: Hearing Before the S. Select Comm. On Intelligence*, 115th Cong. (Feb. 13, 2018) (statement of Daniel R. Coats, Dir. Of Nat’l Intelligence).

102. Bill Chappell & Jessica Taylor, *Defiant Homeland Security Secretary Defends Family Separations*, NAT’L PUB. RADIO (June 18, 2018, 9:42 AM), <https://www.npr.org/2018/06/18/620972542/we-do-not-have-a-policy-of-separating-families-dhs-secretary-nielsen-says> [<https://perma.cc/4MMR-4Z3K>].

103. Dara Lind, “Catch and Release,” *Explained: The Heart of Trump’s New Border Agenda*, VOX (Apr. 9, 2018, 12:50 PM), <https://www.vox.com/2018/4/9/17190090/catch-release-loopholes-border-immigrants-trump> [<https://perma.cc/KM7W-YGK9>].

104. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997).

105. Ron Nixon, “Zero Tolerance” Immigration Policy Surprised Agencies, *Report Finds*, N.Y. TIMES (Oct. 24, 2018), <https://www.nytimes.com/2018/10/24/us/politics/immigration-family-separation-zero-tolerance.html/> [<https://perma.cc/N8ZH-ZJCT>]. A January 2019 report by the Inspector General of the Department of Health and Human Services concluded that at least 2,737 immigrant children had been separated from their parents as a result of the zero-tolerance policy, and the true number was likely “thousands” greater. U.S. DEP’T OF HEALTH AND HUM. SERVS., OEI-BL-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE I (2019).

3. The Family Separation Policy Struck a Global Nerve

The family separation policy did not go unnoticed by the international community. In June 2018, then-U.N. High Commissioner for Human Rights offered a biting assessment of the situation at the U.S.-Mexico border: “[T]he practice of separating families amounts to arbitrary and unlawful interference in family life, and is a serious violation of the rights of the child.”¹⁰⁶ Later that month, a similar point was made by the Permanent Council of the Organization of American States, “reminding the United States of its international legal obligation to respect the human rights of migrants, and especially children.”¹⁰⁷ The Inter-American Commission on Human Rights explained that, “the rights to family life and personal integrity, as well as the right to identity of the children are *prima facie* in a situation of risk. . . . [The United States should assure] that these rights are protected through the reunification of children with their biological families and in support of the children’s best interests”¹⁰⁸ In July 2019, U.N. High Commissioner for Human Rights Michelle Bachelet, echoed her predecessor’s sentiments on the family separation policy:

In most of these cases, the migrants and refugees have embarked on perilous journeys with their children in search of protection and dignity and away from violence and hunger. When they finally believe they have arrived in safety, they may find themselves separated from their loved ones and locked in undignified conditions. This should never happen anywhere.¹⁰⁹

The European Parliament adopted a policy denouncing the “illegal family separations and the arbitrary and indefinite detention of asylum seekers without parole [as] cruel policies and flagrant violations of both U.S. asylum law and international law.”¹¹⁰

Images of families forcibly separated from their parents blanketed the world’s press. In France, Brian Miles of *Le Devoir* warned

106. Al Hussein, *supra* note 8.

107. Cordero et al., *supra* note 9 (citing Permanent Council Res. 1106 (2168/18) (July 6, 2018)).

108. INTER-AM. COMM’N ON HUMAN RIGHTS, RES. 64/2018, at 1 (Aug. 16, 2018).

109. Bachelet *Appalled by Conditions of Migrants and Refugees in Detention in the US*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R (July 8, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24800> [<https://perma.cc/4XWB-Y449>].

110. Resolution on the Situation at the USA-Mexico Border, EUR. PARL. DOC. 2019/2733 (RSP) (July 18, 2019).

that “President Donald Trump once again sinks into the depths of bigotry and resentment with his migration policy . . . taking children hostage in the vain hope of wresting concessions from the Democrats on building a wall between the United States and Mexico.”¹¹¹ *El Universal* of Mexico calculated that “under the international framework of protection for children and considering also the protection that the United States establishes for children, it is an unjustifiable attack on minors.”¹¹² In the United Kingdom, *The Independent* put it like this: “Trump has no shame, though hopefully the country as a whole will find its own and stop this barbarism at the border before more lives are ruined.”¹¹³

Transnational actors in the United States also weighed in. Amnesty International USA attacked the Trump administration’s “policies of cruelty towards migrant and asylum-seekers at the border” calling for an immediate end “before any more children are harmed.”¹¹⁴ The pro-immigration group America’s Voice sounded a similar concern, characterizing DHS’s policies as “deliberately cruel and dehumanizing.”¹¹⁵ The American Civil Liberties Union sued the Trump administration,¹¹⁶ winning a court order from U.S.

111. Brian Myles, *Trump Prend des Enfants en Otage* [Trump Takes Children Hostage], LE DEVOIR (June 19, 2018), <https://www.ledevoir.com/opinion/editoriaux/530657/immigration-trump-prend-des-enfants-en-otage> [https://perma.cc/5BH8-PF6P].

112. Tonatiuh Guillen Lopez, *Estado Unidos Contra sus Niños* [United States Against their Children], EL UNIVERSAL (Mar. 24, 2017), <http://www.eluniversal.com.mx/entrada-de-opinion/colaboracion/tonatiuh-guillen-lopez/nacion/2017/03/24/estados-unidos-contra-sus> [https://perma.cc/APE4-98VR].

113. David Osborne, *History Will Never Let Donald Trump Escape the Shame of Separating Parents and Children at the Border*, THE INDEPENDENT (May 29, 2018, 4:59 PM), <https://www.independent.co.uk/voices/trump-us-border-children-immigrants-wall-parents-separate-families-a8374671.html> [https://perma.cc/7UF4-DDM].

114. *Statement Responding to Another Child’s Death in Custody of Customs and Border Protection*, AMNESTY INT’L (Dec. 25, 2018), <https://www.amnestyusa.org/press-releases/statement-responding-to-another-childs-death-in-custody-of-customs-and-border-protection/> [https://perma.cc/5JDQ-LNBN].

115. Press Release, Am.’s Voice Educ. Fund, Frank Sharry: “Will this be the Death that Leads to a Thorough Investigation and Some Genuine Accountability?” (Dec. 14, 2018), https://americasvoice.org/press_releases/frank-sharry-will-this-be-the-death-that-leads-to-a-thorough-investigation-and-some-genuine-accountability/ [https://perma.cc/C8BZ-DEVE].

116. Trevor Hughes, *Meet the Judge Who is Forcing the Government to Reunite Immigrant Families*, USA TODAY (July 14, 2018, 3:39 PM), <https://www.usatoday.com/story/news/2018/07/13/immigrant-children-judge-dana-sabraw-profile/775946002/> [https://perma.cc/9TG6-RQDH].

District Court Judge Dana M. Sabraw.¹¹⁷ The order provided that the administration had fourteen days to reunite separated children younger than five with their parents and thirty days for older children.¹¹⁸ Judge Sabraw wrote:

[T]here is no genuine dispute that the government was not prepared to accommodate the mass influx of separated children. Measures were not in place to provide for communication between governmental agencies responsible for detaining parents and those responsible for housing children, or to provide for ready communication between separated parents and children. There was no reunification plan in place and families have been separated for months.¹¹⁹

Issuing an executive order ostensibly intended to reverse the family separation policy,¹²⁰ Trump yielded to transnational actors when pressure was applied.¹²¹ The administration's decision to rescind the "zero-tolerance" policy is directly traceable to actors in the political majority condemning the policy as a flagrant violation of international human rights norms and the rule of law. A likely inference to be drawn is that even as Trump attempts to remove the United States from ongoing transnational legal processes, the political majority continues to embrace the benefits of engaging with transnational legal processes.¹²² As Harold Hongju Koh explains, "The first years of the new administration have shown that the United States is much bigger than Donald Trump. Donald Trump will shift on many aspects of his stated foreign policy aims if subjected to enough political pressure."¹²³

117. *See* Ms. L. v. U.S. Immigration & Customs Enf't, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (order granting plaintiffs' motion for preliminary injunction).

118. *Id.* at 1149.

119. *Id.* at 1137.

120. Exec. Order No. 13841, 83 Fed. Reg. 29,435 (June 20, 2018). The order instructed the DHS Secretary to "maintain custody of alien families during the pendency of any criminal improper entry or immigration proceedings" except where joint detention would endanger the child.

121. Charlie Savage, *Explaining Trump's Executive Order on Family Separation*, N.Y. TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/us/politics/family-separation-executive-order.html?smid=nytcore-ios-share> [<https://perma.cc/3RNB-GKUQ>].

122. KOH, *supra* note 14, at 153.

123. *Id.* at 139.

B. *President Trump's Freewheeling Approach to International Rules-based Institutions has Compromised the United States' Global standing*

In the foregoing discussion this article has attempted to show that “under [Trump’s] worldview, the United States should act based on its perceived national interests, not international rules: an approach grounded on perceived *national* rights, not the universal rights on which this country was founded and that form the foundation of modern international human rights law.”¹²⁴ Trump’s penchant for operating on the fringes of transnational legal processes bears responsibility for the United States’ diminishing international standing and “soft-power.”¹²⁵

The Pew Research Center reported in 2017 that “[a]lthough [President Trump] has only been in office a few months, [his] presidency has had a major impact on how the world sees the United States,” as the chart below shows.¹²⁶ “Trump and many of his key policies are broadly unpopular around the globe, and ratings for the U.S. have declined steeply in many nations.”¹²⁷ This shift in opinion “stands in stark contrast to the final years of Barack Obama’s presidency,” where a median of sixty-four percent of respondents expressed confidence in Obama “to direct America’s role in the world,” compared to twenty-two percent of respondents under Trump.¹²⁸

124. *Id.* at 13 (emphasis in the original).

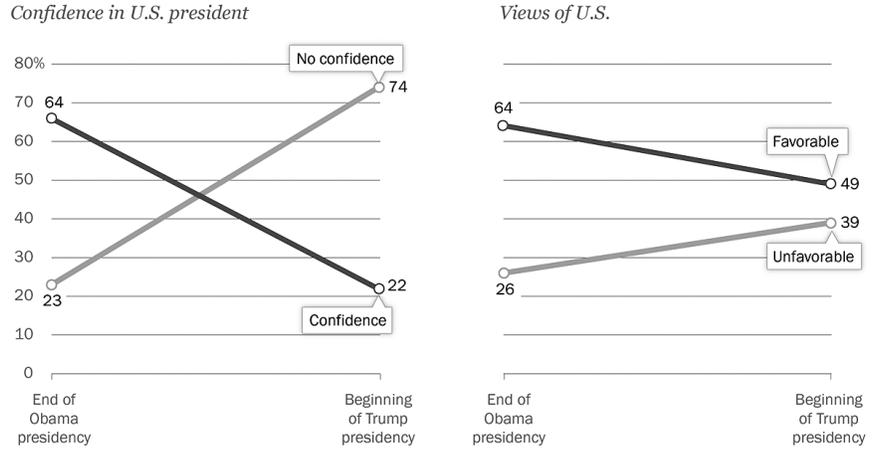
125. See, e.g., Thomas B. Edsall, *The Self-Destruction of American Democracy*, N.Y. TIMES (Nov. 30, 2017), <https://www.nytimes.com/2017/11/30/opinion/trump-putin-destruction-democracy.html> [<https://perma.cc/453M-VSEG>].

126. Richard Wilkes et al., *U.S. Image Suffers as Publics Around World Question Trump Leadership*, PEW RSCH. CTR. (June 26, 2017), <https://www.pewglobal.org/2017/06/26/u-s-image-suffers-as-publics-around-world-question-trumps-leadership/> [<https://perma.cc/62ML-D789>]. The survey, which polled 40,448 respondents spanning 37 countries, was conducted from February 16 to May 8, 2017.

127. *Id.*

128. *Id.*

Low global confidence in Trump leads to lower ratings for U.S.



Note: Percentages are global medians based on 37 countries. Obama presidency medians are based on the most recently available data for each country between 2014 and 2016. Source: Spring 2017 Global Attitudes Survey. Q12a & Q30a.

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More recently, a similar study found that “[f]avorable views of the U.S. remain at historic lows” across the twenty-five countries where the survey was conducted.¹²⁹ Although the “shift began in the sixth year of the Obama administration, after the National Security Agency spying scandal . . . it has accelerated [since 2017].”¹³⁰ The problems are compounded by the considerable negative influence Trump’s “America First” agenda has had on international relations. The diminishing image of the United States abroad is especially pervasive in Europe, where “people are more critical of the civil liberties record under President Trump than under prior administrations.”¹³¹ “Positive opinions of the U.S. have declined significantly” in Europe, including “dips of 27 percentage points in Germany, 25 points in France and 11 points in the UK.”¹³² A similar story emerges from North America where “positive views of the U.S. are sharply down from the last reading in the Obama presidency in

129. Richard Wike et al., *America’s International Image Continues to Suffer*, PEW RSCH. CTR. (Oct. 1, 2018), <https://www.pewglobal.org/2018/10/01/americas-international-image-continues-to-suffer/> [<https://perma.cc/L247-TVPU>].

130. *Id.*

131. *Id.*

132. *Id.*

both Mexico (-34 percentage points) and Canada (-26 points).”¹³³ While the image of the United States is generally positive among allies in Asia, views “have trended slightly downward since Donald Trump became president.”¹³⁴

C. *The Political Majority’s Adherence to International Rules-based Institutions can be used as a Pressure Point to Form a Single-issue Coalition to Ratify the CRC*

1. Ratifying the CRC is in the Interest of the Political Majority

As Trump’s policies continue to place extraordinary hardship on children and families, the United States’ allies have also been dealt a serious blow. “Far from learning on the job or modifying his views to fit imperatives of America’s global role—as did so many of his predecessors—Mr. Trump is falling back on the familiar mix of belligerence and isolationism that fueled his ‘America First’ campaign.”¹³⁵ It is unmistakable that “the United States’ global standing—and its moral authority and ability to persuade other countries to comply with international legal standards—have been severely damaged.”¹³⁶

CRC ratification is an attractive tool for the United States to close the distance with its global allies for a number of reasons. One reason is the nation’s history as the *only* U.N. member state not party to the Convention. Indeed, there are other treaties that the United States has not ratified. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) comes to mind. However, while it is regrettable that the United States has failed to ratify the most comprehensive international agreement to improve the conditions of women, non-participation in CEDAW does not highlight the nation’s failure to engage with global institutions like non-participation in the CRC.¹³⁷ On the CEDAW side, pointing out that other nations have not ratified the treaty can mitigate challenges to the United States’ commitment to human rights. As the *only* U.N. member state not party to the Convention, the

133. *Id.*

134. *Id.*

135. Mark Landler, *On Foreign Policy, President Trump Reverts to Candidate Trump*, N.Y. TIMES (Apr. 3, 2018), <https://www.nytimes.com/2018/04/03/us/politics/trump-foreign-policy.html?searchResultPosition=28> [https://perma.cc/DJ48-KBPD].

136. Cordero et al., *supra* note 9, at 486.

137. It is worth noting that the U.S. is the only industrialized country that has not ratified CEDAW. See U.N. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13.

United States cannot mount the same defense when it comes to the CRC.

Another reason is that the U.S. government's mistreatment of migrant children illuminates a common theme about the Trump administration's abdication of human rights norms. Trump's hostility towards the global human rights project comes from a bigoted worldview that is guided by doctrines of racial hierarchy. In addition to the policies at the U.S.-Mexico border, this worldview found expression in January 2018 when Trump was discussing a bipartisan immigration deal, which included protections for immigrants from Haiti, El Salvador, and Africa.¹³⁸ On the grounds that immigrants from these parts of the world could not help America economically, Trump questioned "why [the United States was] having all these people from these shithole countries here?"¹³⁹ Instead, he spoke of allowing immigrants to the United States from European countries like Norway.¹⁴⁰ It should come as little surprise that his remarks were globally condemned. To take one example, the President of the International Rescue Committee did not mince words when he stated that, "Trump Administration [is] leading a race to the bottom on refugees and immigrants that is a betrayal of America's future as well as of its history. These are PEOPLE."¹⁴¹

At this critical juncture, participation in the Convention may help to alleviate concerns about the United States' commitment to human rights and facilitate the reconstruction of our relationships with our global allies. The United States cannot afford to continue to ignore the warnings from transnational actors. Should Trump's patterned ways of implementing policies in contempt of human rights norms continue, it may prove exceedingly difficult for other nations to credibly rely on the United States to take action to uphold rule-based institutions, tarnishing our legitimacy as a nation that takes global democratic ideals seriously. If our reputation for legitimacy is compromised, it imposes constraints on our ability to exercise global leadership.¹⁴²

138. Josh Dawsey, *Trump Derides Protections for Immigrants from 'Shithole' Countries*, WASH. POST (Jan. 12, 2018, 7:52 AM), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html [<https://perma.cc/2727-6SSH>].

139. *Id.*

140. *Id.*

141. David Millband (@DMillband), TWITTER (Jan. 11, 2018, 7:45 PM), <https://twitter.com/DMiliband/status/951616195379236864> [<https://perma.cc/Y8Z5-9HRG>].

142. KOH, *supra* note 14, at 12.

2. Ratifying the CRC is in the Interest of Children

Children's rights advocates can leverage the political majority's adherence to transnational legal processes and their interest in a foreign affairs boost to form a single-issue coalition to ratify the CRC. The case for CRC ratification from the standpoint of children's rights is straightforward: it would facilitate the expansion of rights-protective measures for children in the United States and abroad. There has been a false tendency in the United States to presume that the nation furnishes adequate protection to children. Two explanations for this presumption come to mind. The first is that the United States played a central role in the adoption of the 1948 Universal Declaration of Human Rights and directed the development of "soft law" instruments such as the U.N. General Assembly Resolutions.¹⁴³ The soft law instruments formed a backdrop for the international community to embrace "principles for decent and humane societies."¹⁴⁴ Having established itself as a pioneer in human rights, the United States could comfortably—for a while—fall back on its reputation, and so it has.

The second reason for the inertia on the children's rights front owes something to so-called "American exceptionalism." U.S. military and economic dominance tends to be conflated with strength in other areas. Therefore, the intuition runs that the nation is also making fundamental investments in its human infrastructure and particularly its children. The combination of these two factors has created a remarkable blind spot in the United States' approach to child welfare. Evidence has been mounting that the United States is not doing enough for children. A recent peer-review study conducted by *Health Affairs* calculated that children in the United States are fifty-five percent more likely to die than children in other rich countries.¹⁴⁵ On the basis of child mortality data between 1961 and 2010 from the United States and other comparable countries, Dr. Ashish Thakrar, the lead author of study, concluded that "[t]he

143. See, e.g., Cordero et al., *supra* note 9, at 493.

144. *Id.*

145. Ashish P. Thakrar et al., *Child Mortality in the U.S. and 19 OECD Comparator Nations: A 50-Year Time-Trend Analysis*, 37 HEALTH AFF. 140, 143 (2018); see also KRISTOF & WUDUNN, *supra* note 35, at 13 ("America ranks number 41 in child mortality, according to the Social Progress Index, which is based on research by three Nobel Prize-winning economists and covers 146 countries for which there is reliable data.").

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U.S. is the most dangerous of wealthy, democratic countries in the world for children.”¹⁴⁶

The child welfare system in the United States draws low marks even when compared to developing countries. Pulitzer Prize-winning journalists Nicholas Kristoff and Sheryl WuDunn have commented on this point:

The United States has about 13 million children living in poverty. Of those, about 2 million may live in ‘extreme poverty’ by global definitions (in households earning less than about \$2 per person per day), when looking at the cash incomes. These kids would be considered extremely poor if they lived in Congo or Bangladesh, yet they’re here in the United States. We don’t want to overstate the comparison—Congolese kids can’t typically access food stamps, hospital emergency rooms or church pantries and soup kitchens—but it is still staggering that by formal definition some American children count as extremely poor even by Bangladeshi standards.¹⁴⁷

Kristoff and WuDunn summed up the situation in this way: “Let’s be honest: America has been guilty of child neglect.”¹⁴⁸

Nowhere is the nation’s vulnerability on the children’s rights front more apparent than “our unique insistence on subjecting juveniles to . . . extraordinarily harsh punishment.”¹⁴⁹ In 2005 the United States became the last country to outlaw the practice of sentencing children to die.¹⁵⁰ Even though the Supreme Court’s recent child sentencing cases have moved U.S. courts away from imposing the most extreme punishment on children,¹⁵¹ changes in penological practices have yet to be attained. For example, the

146. Jacqueline Howard, *Among 20 Wealthy Nations, US Child Mortality Ranks Last, Study Finds*, CNN (Jan. 18, 2018), <https://www.cnn.com/2018/01/08/health/child-mortality-rates-by-country-study-intl/index.html> [<https://perma.cc/RX3J-6YRB>].

147. KRISTOFF & WUDUNN, *supra* note 35, at 220.

148. *Id.*

149. Elizabeth Bartholet, *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child’s Rights Perspective*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 80, 86 (2011).

150. *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (“Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”).

151. *Roper*, 543 U.S. at 575; *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012) (expanding legal protection for juvenile offenders). Taken together, *Roper*, *Graham*, and *Miller* emphasize that juveniles are categorically less culpable than adults such that sentencing determinations must take into consideration the mitigating factors that are the hallmark features of youth.

United States is the only nation that sentences children to life without parole (LWOP),¹⁵² a practice that is categorically prohibited by Article 37(a) of the CRC.¹⁵³ The CRC would serve as an instrument to apply pressure against this sentencing practice and reform other defects in our problematic child welfare system.

IV. OBJECTIONS

There is room for argument that the interest-convergence thesis does not provide a compelling justification for the United States to ratify the CRC. Three anticipated objections to the argument advanced in this article follow. The first concerns the constraints of interest-convergence as a normative tool. As a normative tool, interest-convergence runs the risk of generating what Derrick Bell termed “contradiction-closing cases.”¹⁵⁴ According to Professor Bell, contradiction-closing cases “serve as a shield against excesses in the exercise of white power, yet they bring about no real change in the status of blacks.”¹⁵⁵ In other words, Professor Bell suggests that contradiction-closing cases create a false impression that the underlying conditions giving rise to action have been adequately addressed, obviating the need for further reform.¹⁵⁶ At best such cases are hollow victories. *Brown* is a case in point.¹⁵⁷ More than sixty-five years after *Brown* was decided, it is fair to say that in some parts of the United States segregation in public schools persists to a degree similar to or worse than the status quo ex ante.¹⁵⁸ Given this predicament, the objection goes, it is not obviously clear why interest-convergence should be utilized as a framework for progressive policies in the first instance. This article has no general disagreement with such arguments. The tension is not easily resolved, and this article will not intend to do so here. Instead, it will suggest that those who lean towards the view that groups are largely amoral and

152. Brief for Amnesty Int'l et al. as Amici Curiae Supporting Petitioners at 2, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647), 2012 WL 174238.

153. CRC, *supra* note 23, at art. 37(a).

154. Bell, *supra* note 18, at 32.

155. *Id.*

156. *Id.*

157. See Derrick A. Bell Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053, 1060 (2005) (“The *Brown* decision’s rejection of the racial barriers imposed by segregation . . . reinforced the fiction that the path of progress was clear. Everyone could and should succeed through individual ability and effort.”).

158. See, e.g., Lockhart, *supra* note 82.

that the function of law is to reshape the norms of society will find more utility in an interest-convergence framework.

The second objection involves questions about the substantive impact of the United States ratifying the CRC. An argument could be entertained that, even if we set the concerns about contradiction-closing cases aside, ratifying the Convention would not provide additional protection to children in the United States. The basis for this argument is that the Senate would likely attach reservations and federalism understandings to implement the CRC (as it has with other treaties the United States has ratified) and address concerns about stepping on the toes of individual states. The implementing legislation would, therefore, effectively delegate the enforcement of the treaty back to the states because the CRC covers areas of the law that are traditionally the jurisdiction of state governments. As a consequence, ratifying the CRC would do no more than the status quo because the executing legislation would flatten the robust protections of the treaty to fit within the parameters of state law.

Even accepting this premise, the benefits of ratification would accrue to the global community by virtue of each U.N. member states' participation in the Convention. Parties to the Convention are required to submit reports to the Committee on the Rights of the Child, describing their efforts to comply with the CRC.¹⁵⁹ The Committee—comprised of eighteen experts selected from member-states—makes recommendations for best practices to protect children's rights.¹⁶⁰ Non-participation by the United States is a missed opportunity for children's rights reform because the "United States has so much expertise to potentially share through promotion of CRC reforms in areas where our country has developed model laws, policies, and practices."¹⁶¹ As the efforts to mitigate the negative impact of climate change have shown, it takes collaboration from *all* nations to effectively address issues with implications for present and future generations.

Finally, Trump's disregard for transnational legal processes casts doubt on whether or not global discontent with his administration's border policy could truly serve as a catalyst for rights-protective measures for children. And because ratification has not been contemplated as a serious possibility under past administrations, some might argue that this proposal is magical thinking. As

159. *Committee on the Rights of the Child*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx> [<https://perma.cc/8EGC-S89X>] (last visited May 26, 2020).

160. *Id.*

161. Davidson, *supra* note 33, at 520.

James Baldwin observed, “[I]n our time, as in every time, the impossible is the least one can demand.”¹⁶² Should ratification prove impossible under the Trump administration and the nation continues to backslide on human rights, transnational actors can still use this framework to engage the subsequent administration to pick up the pieces when the White House changes hands.

CONCLUSION

As Trump continues to batter the guardrails that have kept U.S. foreign policy aligned with the global human rights framework, ratification becomes doubly urgent. The corrective possibilities of the interest-convergence thesis suggest that the Trump administration’s mistreatment of migrant children at the U.S.-Mexico border—perhaps the most visible face of the administration’s abandonment of human rights norms—is an area where a single-issue coalition around improving the nation’s human rights record can emerge from groups with typically divergent interests. This article argues that the United States’ ratification of the CRC would join the interests of children and the political majority. The message is not that ratification will provide immediate relief to migrant children at the U.S.-Mexico border. Rather, ratification may help to recuperate the United States’ soft-power, which *had* been the backbone of the nation’s foreign policy and essential to its ability to construct and lead global institutions.

162. BALDWIN, *supra* note 80, at 104.