

State Execution of the International Covenant on Civil and Political Rights

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INTRODUCTION

In 1992, the United States ratified the International Covenant on Civil and Political Rights¹ (ICCPR or Covenant), one of the central treaties in international human rights law. The ICCPR shares much of the substance of its well-known precursor, the 1948 Universal Declaration of Human Rights,² but the two instruments differ in one crucial respect: while the Declaration enumerates fundamental rights that *ought* to be enjoyed by all human beings, the Covenant actually binds governments that ratify it under international law.³ Moreover, as a

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1. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

2. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

3. This may be self-evident in the titles of the instruments. As Vratislav Pechota put it, “A covenant leaves no doubt about the legal nature of the provisions it contains, whereas a declaration is often deemed to enunciate moral roles only.” Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON*

treaty ratified by the United States, the Covenant enjoys status under the U.S. Constitution as “supreme law of the land.”⁴

Despite its status as a treaty in U.S. law, the Covenant enjoys a tenuous foothold in American law. American courts from time to time refer to the rules codified by the Covenant, even with approval, but they have repeatedly held the Covenant to be unenforceable domestically, unavailable to litigants as a legal basis for causes of action. This is largely the result of the U.S. understanding, at the time of ratification, that the Covenant is non-self-executing, requiring legislation to give it legal effect in U.S. courts. Since then, however, neither Congress nor state legislatures has incorporated the ICCPR into federal or state law. As a result, no domestic legal mechanism exists to test whether the United States complies with its obligations under the ICCPR.

The Covenant and much of international human rights law have had limited impact in American courts.⁵ But might it be possible to imagine a time when individuals claiming a violation of the ICCPR or other human rights treaties may seek to enforce these treaties in the United States? A prison inmate, repeatedly raped without intercession by authorities, claims that the state failed to protect him from “cruel, inhuman or degrading treatment or punishment.”⁶ A victim of forced labor trafficking claims that the state failed to protect her from slavery and servitude.⁷ A municipality adopts zoning regulations making it onerous for a neighborhood religious community to build a new facility, and clergy bring a claim.⁸ Students at a state university claim that their right to peaceful assembly is impaired when the school restricts student protests.⁹ All of these hypothetical

CIVIL AND POLITICAL RIGHTS 32, 35 (Louis Henkin ed., 1981). The U.S. Supreme Court has recognized the binding nature of the Covenant under international law. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) (noting that “the Covenant does bind the United States as a matter of international law”).

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

5. *See, e.g.,* Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 259 (2001) (“[M]ost courts refuse to view international law claims as relevant to the resolution of specific cases.”); Brad R. Roth, *Understanding the “Understanding”: Federalism Constraints on Human Rights Implementation*, 47 WAYNE L. REV. 891, 893 (2001) (“[I]t is difficult to identify with certainty a legal difference that the U.S. ratification of the ICCPR has made, on either the international or the domestic plane.”); Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 567 (1997) (stating that the U.S. ratification conditions “limit[] the scope of ratification to existing U.S. practice, rendering acceptance a largely hollow, falsely symbolic act”). It goes too far to say that the Covenant has had no impact at the federal level, if only because of U.S. participation in the Human Rights Committee. *See also* Cuban Obligation to Accept Returning Nationals, 4b Op. O.L.C. 677, 678 (1980) (referring to the Covenant in analysis of the 1980 Cuban refugee crisis).

6. ICCPR, *supra* note 1, art. 7 (prohibiting “cruel, inhuman or degrading treatment or punishment”).

7. *Id.* art. 8.

8. *Id.* art. 18.

9. *Id.* art. 21.

situations implicate rights inhabitants of the United States cannot enforce under the Covenant.

Perhaps change is possible. One organization that closely follows human rights implementation in the United States notes that “international human rights laws have not played a major role in legal efforts to pursue fundamental rights, justice, and equality in the United States,” but, it continues, “[t]hat trend has begun to change.”¹⁰ In the Supreme Court over the past decade, international human rights law and practice have informed the outcomes of cases involving the trial of terrorism suspects at Guantánamo Bay,¹¹ the application of capital punishment,¹² and sexual activity among same-sex couples.¹³ State cases have also referred to human rights norms from time to time.¹⁴ Still, despite this increasing reference in high courts, individuals in the United States may not rely on ratified human rights treaties to limit or remedy state behavior that is inconsistent with human rights law.

Absent a formal foothold in American legal institutions, the ICCPR will continue to play a secondary role, at best, in the enforcement of human rights law in the United States. At the same time, the United States will remain more an observer than a participant in the development of human rights jurisprudence worldwide. Congress will not implement the ICCPR, in all likelihood, and state and federal courts are unlikely to give the Covenant legal effect in the absence of legislative reform to bring ratified human rights treaties within the universe of enforceable international rules. Unless there is some change at the federal or state level, the Covenant will continue to be consigned to a twilight status in the United States, a body of law to which the nation is bound but that has no domestic effect.

This Essay proposes rethinking the implementation of the Covenant by concentrating not on federal measures but on incorporation at the state level. Instead of encouraging Washington to adopt law applicable at the federal and state

10. THE OPPORTUNITY AGENDA, HUMAN RIGHTS IN STATE COURTS 2011, at 2 (2011), available at http://opportunityagenda.org/files/field_file/2011.08.25%20Human%20Rights%20in%20State%20Courts%202011%20FINAL.pdf.

11. Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006) (plurality opinion looking to the ICCPR to interpret fair trial obligations under the Geneva Conventions).

12. Roper v. Simmons, 543 U.S. 551, 576 (2005) (referring to the Convention on the Rights of the Child and ICCPR prohibitions of capital punishment for juveniles under eighteen years old at the time of their offense).

13. Lawrence v. Texas, 539 U.S. 558, 573 (2003) (referring to the jurisprudence of the European Court of Human Rights).

14. See THE OPPORTUNITY AGENDA, *supra* note 10, at 7–56 (reviewing state court uses of international human rights law). For a prominent example of state court citation to human rights law, see *In re Marriage Cases*, 183 P.3d 384, 426 n.41 (Cal. 2008) (“It is noteworthy that the California and federal Constitutions are not alone in recognizing that the right to marry is not properly viewed as simply a benefit or privilege that a government may establish or abolish as it sees fit, but rather that the right constitutes a *basic civil or human right of all people*.”).

levels, a rather quixotic venture, advocates should look to the states¹⁵ not only as a partial solution to non-implementation of the ICCPR but also as the principal institutions that can test state practice according to the standards of human rights law.¹⁶ Others have urged and reflected on state and local engagement in human rights issues.¹⁷ Rather than focus on issue-specific legal change or narrow administrative efforts, which have limited impact, states should directly incorporate human rights treaties as a matter of state law, giving litigants the opportunity to rely upon the provisions of treaty law to supply human rights causes of action or to legitimize interpretive guidance in cases arising from state or federal causes of action. I take the example of the ICCPR as the avatar for incorporation of human rights law at the state level, but the same arguments could be made for other ratified treaties.¹⁸

Part I of this Essay introduces the problem of human rights treaty enforcement in the United States. It begins with an overview of the Covenant, followed by an examination of the U.S. ratification of the ICCPR, drawing especially from the exchanges between the executive branch and the Senate in 1979 and 1991, when the Covenant was under Senate consideration for advice and consent to ratification. I focus especially on how federalism concerns shaped the ratification instrument. I also look at how the ratification process demonstrates the competing desires of the United States to take advantage of the political

15. This Essay uses two meanings of “state” or “states”—either the constitutive elements of the American federal system (the fifty states) or as the principal subjects of international law, the nation-state. The former, of course, do not formally ratify treaties under international law, though they may be involved in their implementation. The latter do and, when they do, bear obligations to adhere to the terms of the treaties. These are obviously different uses of the terms and should be evident according to the context in which they are used.

16. This would be a partial solution because I do not propose a federal initiative to enable individuals to enforce ICCPR claims against the federal government. I am focusing solely on state-level implementation in this Essay, acknowledging that testing U.S. compliance with the ICCPR depends upon implementation at the federal level as well.

17. See *infra* notes 92, 95. The furthest reaching argument in the field of state implementation of human rights law, as far as I am aware, is Peter Spiro’s 1997 proposal that states, as subnational actors, become parties to human rights treaties. Spiro, *supra* note 5, at 590–95. I am unaware of any state actor taking up the suggestion.

18. Among other human rights treaties, the United States has also ratified the Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, S. EXEC. DOC. O, 81-1 (1949), 78 U.N.T.S. 277, the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195 [hereinafter CERD], and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT]. The United States has not ratified other such treaties, such as the ICCPR’s sibling treaty, the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR], the Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW], the Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 25 U.N.T.S. 3 [hereinafter CRPD], and the Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

benefits of ratification internationally, while not allowing treaties to become a tool for national legislation by imposing their direct obligations on the states.

Part II looks at federal and state treatment of the ICCPR in the United States. There may be some bright spots in both federal and state courts. However, the federal government and state and local actors have been more eager to deploy human rights law to change behavior of “bad actors” abroad than to enforce human rights norms domestically.

In Part III, I focus on the suggestion originally made in the Senate but echoed by scholars in the years since: while the United States has international obligations under the ICCPR and other human rights treaties, it is “up to the states” to determine how to implement the provisions of the Covenant.¹⁹ I lay out the broad outlines of an approach in which the states incorporate the ICCPR as a matter of state law and provide litigants with the opportunity to rely upon its provisions as binding law in state courts. I identify some of the likely arguments for and against such incorporation, concluding that it would advance human rights protection domestically and U.S. policy internationally.

Simply to posit that state execution of the Covenant advances U.S. human rights commitments will not be enough to make it happen. State legislators will need to be persuaded that the ICCPR can advance the state’s own commitment to human rights principles in ways that are consistent with other state policies. Advocates from state to state will need to evaluate the likely impact of state execution on key areas of state law. And many areas of state governance could be implicated, from prison conditions to capital punishment, police behavior to family law, nondiscrimination and equality to profiling, rights to political participation, and many areas beyond—all areas, in any event, under the jurisdiction of the states and subject to their enforcement. It is beyond the scope of this Essay to lay out how the ICCPR could implicate state policies across the board, but any steps taken to execute the Covenant at the state level will have to begin with that kind of careful assessment. This Essay instead looks at the framework of the Covenant and its ratification by the United States in order to show that state execution should be considered a viable path toward U.S. implementation of the ICCPR.²⁰

19. See, e.g., Ex. C, D, E, and F, 95-2—*Four Treaties Related to Human Rights: Hearing Before the S. Comm. on Foreign Relations*, 96th Cong. 54 (1979) [hereinafter *1979 Hearing*] (“The Departments of State and Justice recommended reservations in these few instances [where human rights treaties diverged from U.S. law] so as to leave to the federal and state legislatures decisions as to whether such legislative changes should be undertaken. At a time of concern that the executive branch excessively encroaches upon legislative prerogatives, it was felt that these issues of domestic policy were best left in the hands of both Houses of Congress and the state legislatures.”). Julian Ku and John Yoo echo this point. See JULIAN KU & JOHN YOO, *TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER* 175 (2012).

20. Even state execution would leave open application of the ICCPR to federal actors. Federal execution should remain on the agenda of human rights organizations, but given the Senate’s repeated

I. THE ICCPR AND FEDERALISM

A. Obligations Under the ICCPR

The Covenant is one of the most widely ratified instruments in international law, with 167 states parties.²¹ It provides “a common, minimum standard” across a range of substantive norms, and a ratifying state “assumes international legal obligations to other states, undertaking to respect and ensure the human rights of its inhabitants through its own constitutional-legal system.”²² As with other multilateral human rights treaties, the ICCPR contains substantive provisions, some of which detail treaty purposes and principles of interpretation, while others specify particular rules: structural provisions related to monitoring and enforcement, and procedural rules pertaining to application, relationship to other international legal norms, entry into force, and related subjects.

Part I of the Covenant, consisting only of Article 1, is the sole provision to deal with the rights of “peoples” (not of individuals), providing for the right to self-determination and the right of sovereignty over natural resources.²³ As a collective right, it does not fit the model of individual guarantees, which are the principal object and purpose of the Covenant. The preamble of the Covenant, for instance, deals only with “the inherent dignity of the human person,” “the ideal of free human beings enjoying civil and political freedom,” and “the individual” relationship to other persons and the community.²⁴ In this context, Article 1 appears out of place and, in any event, not a natural fit for state incorporation.

Part II, consisting of Articles 2 through 5, provides basic principles to guide interpretation and application of the Covenant. Three are particularly important to identify. First, Article 2(1) and Article 3 enshrine principles of nondiscrimination and gender equality in the application of the rights under the Covenant, consistent with equal protection provisions of U.S. Constitutional law.²⁵

resistance to human rights treaty implementation, I imagine that such a process is unlikely to bear fruit for quite some time.

21. Up-to-date ratification numbers may be found on the U.N. Treaty Series website at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV4&chapter=4&lang=en. It also bears noting that, of course, ratification itself does not indicate whether a state actually complies with the treaty. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1940 (2002).

22. Louis Henkin, *International Human Rights Standards in National Law: The Jurisprudence of the United States*, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 189, 189 (Benedetto Conforti & Francesco Francioni, eds., 1997).

23. An illuminating discussion of the history of this provision and its development as a collective right, as opposed to the individual rights detailed throughout the Covenant, may be found in MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 6–25 (1993).

24. ICCPR, *supra* note 1, pmb1.

25. Article 2(1) provides,

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the

Second, Article 2(2) obligates states parties to ensure that, “[w]here not already provided for by existing legislative or other measures,” they “give effect to the rights recognized in the present Covenant.” Article 2(3) goes a step further and obligates states parties to provide a remedy in the case of violations of rights under the Covenant, whether that remedy be provided by “judicial, administrative, or legislative authorities.” Steiner, Alston, and Goodman argue, “How states fulfil [sic] these obligations lies within their discretion; they are not obligated to incorporate the treaty *as such* within their domestic legal order”²⁶ Stated another way, states parties must provide individuals within their jurisdictions with an “effective remedy,” but they may decide whether that remedy takes a judicial, administrative, or legislative character, or some combination of those approaches. Failure to provide any effective remedy, in any form, would amount to a violation of the Covenant.²⁷

Third, Article 4 enables states parties to derogate from certain provisions of the Covenant “in time of public emergency which threatens the life of the nation.”²⁸ Such derogations must nonetheless comply with the nondiscrimination principles of the Covenant and must be strictly tailored to the exigency.

Part IV (Articles 28 through 45) deals with the creation of the Covenant’s monitoring body, the Human Rights Committee.²⁹ The Committee’s eighteen experts, elected from among candidates put forward by ICCPR states parties, review government reports and complaints on the implementation of (or noncompliance with) the Covenant. They also review individual claims of noncompliance in situations where a state party has accepted the jurisdiction of the Committee to do so under an Optional Protocol.³⁰

Part V (Articles 46 and 47) deals with the relationship of the Covenant to the United Nations and the principle of sovereignty over natural resources (the latter seeming out of place in this Covenant, and perhaps a more natural fit for the ICESCR).

present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Id. art. 2. It thus also indicates the jurisdictional scope of the treaty. Article 3 provides, “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.” *Id.* art. 3.

26. HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 1135 (3d ed. 2008).

27. See David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 *YALE J. INT’L L.* 129, 142–43 (1999).

28. ICCPR, *supra* note 1, arts. 2–5.

29. *Id.* arts. 28–45.

30. See Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302. The United States is not a party to the Optional Protocol and thus does not accept the Committee’s jurisdiction over individual communications alleging U.S. noncompliance with the Covenant.

Part VI (Articles 48 through 53) deals with basic principles concerning the entry into force, amendment, and other procedural elements of the Covenant.³¹ It does contain one provision relevant to state execution: Article 50 provides, “The provisions of the present Covenant shall extend to all parts of federal States without limitations or exceptions.” Article 50 was the subject of debate during the Covenant’s negotiations, when the United States advocated for language that would require the federal government merely to bring the Covenant’s obligations to the attention of state authorities.³² In response to this provision as adopted, however, the United States instead ratified on the understanding that implementation would be accomplished according to principles of American federalism.³³

Part III (Articles 6 through 27) contains the heart of the Covenant. Most of the substantive obligations under the Covenant implicate behavior at all levels of government, federal, state, and local. While a review of the provisions in significant detail is beyond the scope of this Essay, key guarantees include the following:

Three provisions deal with basic, peremptory rights under international human rights law. Article 6 protects the right to life, focusing in particular on arbitrary deprivation of life. It does not prohibit capital punishment but seeks to assert boundaries so that the death penalty is applied narrowly according to well-understood rules of law.³⁴ Article 7 protects individuals from being “subjected to torture or to cruel, inhuman or degrading treatment or punishment,” including nonconsensual “medical or scientific experimentation.” Yoram Dinstein noted that the torture prohibition, widely found in international law, “may even have acquired the lineament of a peremptory norm of general international law, i.e., *jus cogens*.”³⁵ While the elements of torture are “beyond dispute,” however, there may be less agreement concerning the precise dividing point between torture and cruel, inhuman, or degrading treatment.³⁶ Among other peremptory norms, the Covenant also provides, in Article 8, for the freedom from slavery and other forms of servitude. This prohibition includes “forced or compulsory labor.”³⁷

31. ICCPR, *supra* note 1, arts. 46–53.

32. See NOWAK, *supra* note 23, at 636–37; Pechota, *supra* note 3, at 49–50.

33. I discuss the “federalism understanding” *infra* Part I.B.

34. See Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 3, 114, 114–37. Under the Covenant, the “right to life” is not understood to refer to the political term used to signify opposition to abortion, as it does in the United States. See *id.* at 122. Instead, “right to life” generally refers to killings authorized by official actors. See, e.g., SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 154–93 (2nd ed. 2004); see also *id.* at 193 (“The [Human Rights Committee] has confirmed that abortion is compatible with article 6 . . .”).

35. Dinstein, *supra* note 34, at 122.

36. *Id.* at 123–24.

37. See NOWAK, *supra* note 23, at 143–57; Dinstein, *supra* note 34, at 126–28.

Several provisions guarantee minimum standards within the law enforcement and justice systems of a state. For instance, Article 9 protects against “arbitrary arrest or detention,” and seeks to ensure that arrests are undertaken in accordance with basic principles of due process.³⁸ Article 10 deals with humane conditions of detention,³⁹ and Articles 14 and 15 deal with minimum fair trial guarantees.⁴⁰ Related provisions deal more generally with rights of recognition in courts of law (Article 16)⁴¹ and equal protection and non-discrimination (Articles 24 and 26).⁴²

While the preceding rights serve to protect the individual’s physical integrity, another set of provisions guarantees rights of self-expression, conscience, and political engagement. For example, Article 17 protects privacy in the home and family,⁴³ Article 18 protects freedom of “thought, conscience, and religion,”⁴⁴ and Article 19 protects the right to hold opinions and to give them voice through free expression.⁴⁵ Article 20 prohibits “any propaganda for war” and “advocacy of national, racial or religious hatred,”⁴⁶ but the United States adopted a reservation since the provision regulates speech protected under the First Amendment of the U.S. Constitution.⁴⁷ Articles 21 and 22 protect rights of association and assembly.⁴⁸ Article 25 provides for a right to participate in the political life of one’s country.⁴⁹ Article 27 aims to protect the right of members of minorities to express themselves through cultural, linguistic, and religious means.⁵⁰

Finally, the Covenant contains a set of provisions relating to family, spousal, and children’s rights.⁵¹ Article 23 provides that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” As Manfred Nowak explains, however, this provision gives states “broad

38. ICCPR, *supra* note 1, art. 9. *See generally* Haji N.A. Noor Muhammad, *Due Process of Law for Persons Accused of Crime*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 3, 138, 147–65.

39. ICCPR, *supra* note 1, art. 10.

40. *Id.* arts. 14–15.

41. *Id.* art. 16.

42. *Id.* arts. 24, 26.

43. *Id.* art. 17.

44. *Id.* art. 18.

45. *Id.* art. 19.

46. *Id.* art. 20.

47. *International Covenant on Civil and Political Rights: Hearing on S. 478 Before the Comm. on Foreign Relations*, 102nd Cong. 1, at 8 (1991).

48. ICCPR, *supra* note 1, arts. 21–22.

49. *Id.* art. 25. *See generally* Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 3, 209; *see also* NOWAK, *supra* note 23, at 336 (“Freedom of opinion and expression is not infrequently termed the core of the Covenant and the touchstone for all other rights guaranteed therein. . . . It unites civil and political rights into a harmonious whole.”).

50. ICCPR, *supra* note 1, art. 27.

51. ICCPR, *supra* note 1, arts. 23–24.

discretion in regulating the law of marriage and family in accordance with the respective social and cultural concepts.”⁵²

The substantive provisions of the Covenant do not comprise a code of specific rules to guide the conduct of official authorities. The ICCPR provides a floor below which states parties may not go in their protection of individual rights, subject to reservations that ratifying states may attach, provided that they do not contradict the object and purpose of the treaty. In this context, the Human Rights Committee, regional human rights courts, and domestic courts around the world interpret these provisions in accordance with specific cases set before them. None of these parties binds another to a particular interpretation, but the process of transnational judging, in which interpreters look beyond their jurisdictions to understand specific rules, means that the participants in that process have the opportunity to influence and to be influenced by one another.⁵³ Undoubtedly such a process leads to common understandings of the meaning of the provisions among those participating in ICCPR interpretation, or at least to common understandings of the terms of the debate over such rules.

B. Federalism and the Ratification of the ICCPR

Governments concluded the negotiations of the ICCPR under the auspices of the United Nations in 1966. Twenty-five years later, in 1991, a unanimous Senate Foreign Relations Committee—including well-known liberals and conservatives, such as Alan Cranston and Joe Biden on the left and Mitch McConnell and Jesse Helms on the right—recommended that the Senate provide its advice and consent to the ratification of the Covenant.⁵⁴ In the words of President George H.W. Bush when his administration submitted the treaty to the Senate for its approval, the ICCPR “codifies the essential freedoms people must enjoy in a democratic society” and, apart from several exceptions to which the United States entered reservations or understandings, “is entirely consonant with the fundamental principles incorporated in our own Bill of Rights.”⁵⁵ The Senate ultimately approved the ICCPR in executive session without objection.⁵⁶

52. NOWAK, *supra* note 23, at 402–03; *see also* JOSEPH ET AL., *supra* note 34, at 587 (noting that the Human Rights Committee “clearly gives States a certain cultural leeway in determining the definition of ‘family’ for the purposes of article 23”).

53. *See* Lawrence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 358–59 (1997).

54. S. EXEC. REP. NO. 102-23, at 3 (1992).

55. S. EXEC. COMM. REP., 102D CONG., S. COMM. ON FOREIGN RELATIONS REP. ON INT’L LAW, APP. A, TRANSMITTAL LETTER FROM PRESIDENT GEORGE BUSH (Aug. 8, 1991) (1992), *reprinted in* 31 I.L.M. 645, 660 [hereinafter BUSH TRANSMITTAL LETTER].

56. 138 CONG. REC. 8068–71 (1992); *see also* David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1184 (1993).

Embedded within the ratification of the ICCPR is this important question for the United States: In a treaty designed to protect individuals against the abuses or excesses of governmental authorities at all levels, how should its provisions be implemented by state and local governments, where individuals arguably have the most contact with officials? The ICCPR itself demands an answer, since Article 50 extends its provisions to “all parts of federal States”⁵⁷ and Article 2 obligates states parties “to give effect to the rights recognized in the present Covenant.”⁵⁸ States parties have discretion to determine the best domestic legal form “to give effect” to the provisions of the ICCPR.⁵⁹ The Covenant does not, however, countenance doing nothing.

When the Covenant first appeared before the Senate in 1979, the administration of President Jimmy Carter approached federalism issues delicately and preemptively. A representative of the Department of Justice noted in a hearing before the Senate Foreign Relations Committee that the administration “did not want to be inadvertently federalizing additional subjects through the treaty process.”⁶⁰ The Carter administration thus proposed a series of reservations, understandings, and declarations (RUDs) that would make clear to the Senate that ratification would not require any change in existing U.S. law, either because U.S. law was already in conformity with the Covenant or because the RUDs would limit the extent to which the United States was accepting Covenant obligations.⁶¹ The Carter administration, and later the Bush administration, also proposed RUDs to assure conservative skeptics that existing law need not be changed in several areas. For instance, both administrations proposed reservations in the area of capital punishment so as to preserve the practice of the juvenile death penalty. They also proposed a reservation to the provision prohibiting cruel, inhuman or degrading treatment or punishment in order to equate the terms with “cruel and unusual punishment” under the U.S. Constitution. The administration proposed

57. ICCPR, *supra* note 1, art. 50.

58. *Id.* art. 2.

59. Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS*, *supra* note 3, 311, 313–15.

60. *See 1979 Hearing, supra* note 19, at 37 (statement of Jack Goldklang, Attorney Adviser, Office of Legal Counsel, Department of Justice).

61. Presidential Statement on Human Rights Treaties 1978, 13 WEEKLY COMP. PRES. DOC. 395 (Feb. 23, 1978) [hereinafter Carter Transmittal]. As noted above, for instance, in the case of First Amendment protections of expression, a reservation was required to preclude legal effect for Covenant Article 20’s prohibition of “propaganda for war” and forms of incitement of discrimination. A key difference between the ICCPR and U.S. law is that Article 20 of the ICCPR prohibits “propaganda for war” and “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.” ICCPR, *supra* note 1, art. 20. The First Amendment of the U.S. Constitution would clearly prohibit the adoption and enforcement of laws designed for these purposes. U.S. CONST. amend. I. As a result, the United States ratified the ICCPR subject to a reservation that precluded implementation of Article 20. S. EXEC. REP. NO. 102–23, at 10–11 (1992).

other RUDs to preserve U.S. law in the areas of post-offense reductions in penalties, treatment of juveniles as adults where deemed warranted, equal protection law, right to compensation, segregated treatment of the accused, and right to counsel.⁶² The reservations have had a definite impact. For instance, the Supreme Court of Nevada disallowed a death row inmate from invoking the ICCPR on the grounds that “the Senate’s express reservation of the United States’ right to impose a penalty of death on juvenile offenders negates [the petitioner’s] claim that he was illegally sentenced.”⁶³

When the Senate took up the ICCPR fourteen years later, having failed to complete the process of advice and consent in 1979, Senator Jesse Helms, among the leading conservatives in the Senate at the time,⁶⁴ expressed concern not only about the substantive provisions of the Covenant and the possibility of its political use against the United States.⁶⁵ He also argued that the ICCPR “calls into question . . . even the Federal/State structure of our legal system.”⁶⁶

The Bush administration urged ratification on the basis of the same sets of RUDs proposed by the Carter administration, hoping to bring Senator Helms and his allies aboard the ratification train. It also proposed, following again from the Carter submission, that the Senate provide advice and consent on the basis of an understanding that

this Convention 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

62. See Carter Transmittal, *supra* note 61.

63. *Domingues v. Nevada*, 961 P.2d 1279, 1280 (Nev. 1998).

64. See generally WILLIAM LINK, *RIGHTEOUS WARRIOR: JESSE HELMS AND THE RISE OF MODERN CONSERVATISM* (2008). It is not precise enough to put the label of conservative on those who, like Helms, opposed human rights treaties. As Michael Ignatieff has put it most succinctly, “The same politicians who wielded states’ rights arguments against the use of federal power to desegregate the South invoked national sovereignty arguments to resist adoption or implementation of international rights regimes.” Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 1, 19 (Michael Ignatieff ed., 2005).

65. See *International Covenant on Civil & Political Rights: Hearing Before the S. Comm. on Foreign Relations*, 102nd Cong. 1 (1991) [hereinafter *1991 Hearing*] (statement of Sen. Helms). The interruption of the treaty ratification process during the Carter Administration resulted from major foreign distractions in late 1979. The hearings for the Covenant, for instance, took place less than two weeks after the Iranian takeover of the American Embassy in Tehran and subsequent hostage crisis. Soon after, the Soviet invasion and occupation of Afghanistan triggered a major Cold War crisis. As a result, ratification was undoubtedly not among the Senate’s key priorities. Regardless, the Reagan administration did not pursue ratification once it came into office in January of 1981.

66. *Id.* at 7.

local governments may take appropriated [sic] measures for the fulfillment of the Convention.⁶⁷

This “federalism understanding,” as it came to be known, became part of the U.S. instrument of ratification. The Committee’s explanation of the understanding notes that it means “to emphasize domestically that there is no intent to alter the constitutional balance of authority between the State and Federal governments or to use the provisions of the Covenant to ‘federalize’ matters now within the competence of the States.”⁶⁸

As Brad Roth explains, the understanding was “intended to disable the ratification from enhancing federal power at the expense of the states, thereby to overcome some of the qualms that for fifteen years denied the treaty the needed margin in the Senate.”⁶⁹ However, nothing in the ratification instrument clarifies what state or local measures may be appropriate in implementation of the Covenant. One way to interpret such silence is that the President and Senate believed that states enjoy broad discretion to define what steps would be appropriate. There is a hint that the federal government would take some steps to encourage implementation at the state level, but the overall thrust of the understanding is that Washington would not seek to influence state consideration of how to implement the Covenant.

The ratification of the ICCPR advanced a contested brand of federalism in which the treaty power may not extend to state law,⁷⁰ but it did not respond to the substantive requirements of the treaty, since there was no articulation of what measures might have been “appropriate” in a federal system. Nor has the federal government adopted measures to encourage states to take action to implement the obligations under the ICCPR.⁷¹ The apparent disingenuousness of the federalism understanding seems to be by design, as the United States declared upon ratification that “existing U.S. law generally complies with the Covenant” and that “implementing legislation [was] not contemplated.”⁷² It also declared the ICCPR to be non-self-executing, noting that “the Covenant will not create a private cause

67. S. EXEC. REP. NO. 102-23, at 23 (1992). A virtually identical understanding was adopted with respect to the CAT, *supra* note 18, S. TREATY DOC. NO. 100-20, at 2–3, and the CERD, *supra* note 18, S. EXEC. REP. NO. 103-29, at 25.

68. 1991 *Hearing*, *supra* note 65. The Committee added that an understanding was preferable to a reservation to Article 50 of the Covenant, “since the intent is not to modify or limit U.S. undertakings under the Covenant but rather to put our future treaty partners on notice with regard to the implications of our federal system concerning implementation.” *Id.* at 125.

69. Roth, *supra* note 5, at 907.

70. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. INT’L LAW J. 341, 345–46 (1995).

71. As Julian Ku and John Yoo put it, “The federalism understandings suggest that the states are responsible for treaty obligations that are beyond the scope of Congress’s Article I powers.” KU & YOO, *supra* note 19, at 175. But, they continue, “no state appears to have expressly passed legislation for the purpose of implementing U.S. international human rights treaty obligations.” *Id.*

72. S. EXEC. REP. NO. 102-23, at 19 (1992).

of action in U.S. courts.”⁷³ Thus, the federalism understanding offers no mechanism to encourage state implementation.

Soon after President Carter submitted the Covenant to the Senate for advice and consent, along with the package of RUDs that would ultimately attach to the U.S. ratification, Professor Oscar Schachter argued that the U.S. RUDs as a whole undermined the Covenant. He wrote,

The critical legal issue raised is not whether specific reservations are admissible. It is rather whether a whole series of reservations admittedly designed to avoid any need to modify United States law can be regarded as in conformity with the object and purpose of the Covenant, especially with the “obligation of means” assumed in Article 2. The object of Article 2 was to require all parties to adopt measures wherever necessary to give effect to the Covenant. The proposed U.S. bundle of reservations is intended to deprive that requirement of any effect whatsoever for the United States. It would do so by reducing the obligations of the United States under the Covenant to the level of existing United States law so that it would be under no requirement to adopt any measures to modify existing domestic law.⁷⁴

This all begs the question: If the United States intended the ICCPR to have no effect on U.S. law and not to enable individuals to test the proposition that U.S. law was already in conformity with the Covenant, why ratify? One possibility is that ratification would provide a tool for federal, state, and local actors to ensure compliance with human rights law at an administrative level. The willingness of the United States to report to the Human Rights Committee on U.S. practice under the ICCPR may provide some support for that notion, as reporting involves substantial engagement with state and local actors to assess the steps they are taking in conformity with the Covenant.⁷⁵ There is, however, little evidence in the ratification record itself to support this as a principal, or even incidental, objective of ratification.

Rather, the Carter and Bush administrations supported ratification specifically to enhance the influence the United States might exercise internationally as a party to the Covenant. When submitting the Covenant to the Senate, President Carter, who had made human rights a central element of his foreign policy rhetoric,⁷⁶ bemoaned the fact that America’s non-party status

73. 1991 *Hearing*, *supra* note 65, at 14. For an insightful analysis of the meaning of non-self-execution in the human rights context, see Sloss, *supra* note 27, at 148, 153–69.

74. Schachter, *supra* note 59, 321–22.

75. See U.S. DEP’T OF STATE, ANNEX A TO THE COMMON CORE DOCUMENT OF THE UNITED STATES STATE, LOCAL, TRIBAL, AND TERRITORIAL HUMAN RIGHTS ORGANIZATIONS AND PROGRAMS (2011), available at <http://www.state.gov/j/drl/rls/179782.htm> (Annex submitted to the Human Rights Committee of the ICCPR).

76. See JULIE A. MERTUS, *BAIT AND SWITCH: HUMAN RIGHTS AND U.S. FOREIGN POLICY* 29–31 (2d ed. 2008).

“prejudices United States participation in the development of the international law of human rights.”⁷⁷ Later, following the Iranian assault on the American Embassy in Tehran and the holding of American hostages there, President Carter added, “Regimes with whom we raise human rights concerns will no longer be able to blunt the force of our approaches or question the seriousness of our commitment by pointing to our failure to ratify.”⁷⁸ President Bush updated this purpose, situating ratification in the context of U.S. assistance to countries emerging from communist rule in the Eastern bloc. Bush said that ratification “would underscore our natural commitment to fostering democratic values through international law.”⁷⁹ The Senate Foreign Relations Committee echoed President Bush but took the argument further. For one thing, the Committee noted that by accepting the competence of the Human Rights Committee to hear state-to-state complaints of noncompliance, the United States would enjoy “an opportunity to play a more aggressive role in the process of enforcing compliance with the Covenant.”⁸⁰ Even beyond such concrete influence, the Committee members believed that ratification would offer the United States “greater effectiveness in the process of shaping international norms and behavior in the area of human rights.”⁸¹

The possibility of external influence may provide a valid reason for ratification of the Covenant and other human rights treaties. U.S. ratification and participation in the Human Rights Committee may advance the U.S. human rights role globally, as it suggests that the United States is willing to be monitored by the Committee even as it challenges others’ human rights violations. However, in the years since Senate consideration of the Covenant, other institutions and actors have emerged to compete for human rights influence with the United States, which played a key role during the Cold War.⁸² Since the early 1990s, for instance, the European Union has exercised its substantial economic power to condition relationships and EU membership on human rights behavior of other governments.⁸³ At the same time, regional human rights courts—especially the European and Inter-American courts of human rights—strongly shape the

77. Carter Transmittal, *supra* note 61.

78. 1979 Hearing, *supra* note 19, at 453 (letter from President Carter to Senator Frank Church, Chairman, Senate Committee on Foreign Relations, Nov. 30, 1979).

79. BUSH TRANSMITTAL LETTER, *supra* note 55.

80. S. EXEC. REP. NO. 102-23, at 3 (1992).

81. *Id.* at 4.

82. See John Gerard Ruggie, *American Exceptionalism, Exemptionalism, and Global Governance*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS*, *supra* note 64, 304, 307.

83. See, e.g., LORAND BARTELS, EUR. PARLIAMENT’S COMM. ON INTERNATIONAL TRADE, *THE APPLICATION OF HUMAN RIGHTS CONDITIONALITY IN THE EU’S BILATERAL TRADE AGREEMENTS AND OTHER TRADE ARRANGEMENTS WITH THIRD COUNTRIES 1–10* (2008); see also Frank Schimmelfennig et al., *Costs, Commitment and Compliance: The Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey*, 41 J. COMMON MKT. STUD. 495, 495–99 (2003).

interpretation of the norms under the ICCPR.⁸⁴ Even though American law continues to have influence overseas, the United States has a limited ability to add to the interpretation of human rights norms because of their limited use at the federal and state levels.⁸⁵

As a result, even with respect to the key argument for ratification of the ICCPR, times have changed in such a way as to limit American influence. One possible way to insert American experience back into the human rights mainstream—with the likelihood not only of having our law influenced by the norms under the Covenant but also of having our courts influencing the interpretation of those same norms—would be to open up pathways toward significant U.S. engagement with human rights norms in American courts.

II. LIMITED FEDERAL AND STATE ACTION UNDER THE ICCPR

At the time of U.S. approval of the Covenant, Michael Posner and Peter Spiro argued that ratification “marked a milestone in this country’s long history as a guardian of human rights,” but its domestic reach would be limited.⁸⁶ The subsequent history of federal and state treatment of the ICCPR has proven their prediction to be correct.

The ratification instrument all but guaranteed two results: first, because the ICCPR is non-self-executing under American law, federal and state courts do not entertain private rights of action that may arise under it. This is not to say that the Covenant has been of no value to litigants in domestic cases. The Supreme Court and domestic courts have referred to the principles of the Covenant (and other human rights treaties) in the context of constitutional adjudication.⁸⁷ Even in those cases, however, the Court has emphasized that the rules of international law themselves provide only secondary support in constitutional interpretation. As the Court put it in *Graham v. Florida*, a case concerning the application to a juvenile defendant of a mandatory sentence of life imprisonment without parole, “The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. . . . [However,] [t]he Court has looked

84. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; see also American Convention on Human Rights art. 33, Nov. 22, 1969, 1144 U.N.T.S. 123.

85. For an interesting analysis of diminishing U.S. constitutional influence, see David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).

86. Michael H. Posner & Peter J. Spiro, *Adding Teeth to United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209, 1209 (1993); see also John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1297–98 (1993).

87. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 633 (2006); *Roper v. Simmons*, 543 U.S. 551, 576 (2005); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003); see also *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (holding application of death penalty to be unconstitutional as applied to a defendant who was fifteen years old at the time of the killing); *Ma v. Reno*, 208 F.3d 815, 830 (9th Cir. 2000) (referring to ICCPR prohibition on arbitrary arrest and detention).

beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual.”⁸⁸ Yet conservative justices strongly resist such uses of international law, arguing that international human rights treaties may not be used as an instrument of constitutional interpretation in any way.⁸⁹ The future of even such secondary uses of the ICCPR, therefore, is highly contingent on the makeup of the Court.

Second, the Senate approved the ICCPR on the understanding, noted above, that U.S. law already complied with the Covenant's provisions—and that where it did not, the United States attached RUDs. As a result, with some marginal exceptions, the United States has not implemented the Covenant domestically in any meaningful way. At the international level, U.S. participation in the Human Rights Committee has been robust, and key principles in human rights law frame the annual human rights report of the State Department.⁹⁰ The Clinton administration adopted an executive order on the implementation of human rights treaties, creating an interagency federal working group to promote the ICCPR and other ratified instruments.⁹¹ The group's role appeared limited to interagency discussions of human rights issues “and the preparation of reports to international monitoring bodies,” but even so, the George W. Bush administration, soon after coming into office in 2001, abolished it.⁹²

Advocates of the ICCPR and other treaties in the United States have made efforts to change the domestic narrative of resistance to human rights treaty enforcement to one of implementation. They can claim some successes. For instance, at the federal level, legislative initiatives have resulted in such laws as the Torture Victim Protection Act, which enforces elements of the Convention Against Torture, the Genocide Convention Implementation Act of 1987, and the War Crimes Act of 1996, which implements obligations under certain international humanitarian law treaties.⁹³ Since the landmark Second Circuit Alien Tort Statute (ATS) decision in 1980, *Filártiga v. Peña-Irala*,⁹⁴ advocates on behalf of the victims

88. *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010).

89. *See id.* at 2045 (Thomas, J., dissenting).

90. The annual Human Rights Reports of the U.S. State Department, for instance, are structured country-by-country around the basic norms of international human rights law. Thus, they include sections on the protection of the integrity of the person (including torture, detention, and fair trial), respect for civil liberties (including expression and association rights), political rights, and discrimination, among other headings. *See Human Rights Reports*, U.S. DEP'T ST., <http://www.state.gov/j/drl/rls/hrrpt/index.htm> (last visited Dec. 29, 2012).

91. Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998).

92. LOUIS HENKIN ET AL., *HUMAN RIGHTS* 971 (2d ed. 2009).

93. *See* War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (1996) (codified as amended at 18 U.S.C. § 2441 (2006)); Torture Victims Protection Act of 1992, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2006)); Genocide Convention Implementation Act of 1987 (the Proxmire Act), Pub. L. No. 100-606, 102 Stat. 3045 (1988) (codified as amended at 18 U.S.C. §§ 1091–1092 (2006)). For other federal statutes implementing human rights norms, see HENKIN ET AL., *supra* note 92, at 979–81.

94. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

of serious human rights abuses have sought, with considerable success, to bring the human rights claims of aliens under federal court jurisdiction.⁹⁵

Yet even with the success of ATS litigation in bringing human rights claims to U.S. courts, American citizens cannot rely on human rights treaties or customary international human rights law to pursue claims in federal court against American governmental authorities. If a customary norm were to be codified as a matter of U.S. law, litigants might then be in a position to rely on such a norm in U.S. courts. In other words, legislative incorporation could change the international law dynamic in the United States, whereas the judiciary is unlikely to effect change in this area on its own.⁹⁶ A number of scholars and activists continue to seek to remedy the nonapplication of human rights treaties at the federal level. Some propose that the federal government change its law and policy to improve the treatment of human rights treaties in federal courts or even permit human rights litigation at the federal level.⁹⁷

Echoing the treatment of human rights treaties at the federal level, some state courts refer positively to international human rights law.⁹⁸ By and large, however, states have given human rights treaties a limited profile and impact. One survey found that, as of June 2010, only 187 opinions in state courts have ever cited to the eight leading human rights instruments.⁹⁹ The opinions, moreover, show that state courts “have generally been dismissive of the claim that they are bound by even the ratified instruments.”¹⁰⁰ Similarly, the Court of Appeal of

95. Success under the ATS has become more difficult over the years, particularly in the wake of the Supreme Court’s decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2003). See *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-01491, 132 S. Ct. 1738 (U.S. Mar. 5, 2012) (additional arguments set for Oct. 1, 2012). The ATS cases have provided the principal arena for discussion of human rights norms in U.S. courts and thus attract substantial attention in the literature. They generally address different sorts of questions than would be posed by ICCPR litigation in state court. ATS litigation has triggered a debate over the role of customary international law in federal courts; by contrast, ICCPR litigation would require interpretation of conventional law (i.e., a ratified U.S. treaty).

96. Bradley and Goldsmith suggest this result. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 827–31 (1997).

97. See, e.g., Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L L. 51, 54 (2012) (offering “three proposals for how each of the branches of the federal government can strengthen the enforcement of international law”); Penny M. Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 ALA. L. REV. 97, 148 (2011) (proposing congressional action to remove reservations, understandings and declarations under ratified human rights treaties and enabling litigation under them in federal courts). See generally Posner & Spiro, *supra* note 86, for a concrete proposal to implement the ICCPR at the federal level.

98. THE OPPORTUNITY AGENDA, *supra* note 10, at 1; *In re Marriage Cases*, 183 P.3d 384, 426 n.41 (Cal. 2008).

99. Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism after Medellín*, 115 PENN. ST. L. REV. 1051, 1056 n.23 (2011) (referring to the ICCPR, CAT, CRC, Genocide Convention, CEDAW, ICESCR, CERD, and Convention on the Rights of Persons with Disabilities (CRPD)).

100. *Id.* at 1059.

Florida said of the ICCPR in *Graham*, “Until the treaty is implemented through congressional action, it cannot act as a limitation on the powers of the Florida Legislature to determine the appropriate penalties for violations of the law.”¹⁰¹ A California court found the Florida opinion in *Graham* persuasive when it disallowed petitioners from claiming that their life sentences without the possibility of parole violated the ICCPR.¹⁰² Even when state courts cite human rights law approvingly, they do so not as a matter of binding authority but as secondary support for a domestic legal argument.¹⁰³

In the face of federal and state court resistance, a handful of states and municipalities have sought to integrate human rights norms in concrete ways. The City of San Francisco, for instance, requires municipal entities to operate in accordance with the principles of the unratified Convention on the Elimination of Discrimination Against Women (CEDAW).¹⁰⁴ Other municipal bodies around the country have followed San Francisco’s suit, with many calling for ratification of treaties such as CEDAW.¹⁰⁵ Pennsylvania’s House of Representatives established a standing committee on the integration of human rights standards in state law and policy, though its impact on policy is uncertain, and Massachusetts’s legislature considered a similar bill.¹⁰⁶ Several scholars have noticed that these moves bring international norms to the local level, building arguments about the value of local engagement with norms codified at the global level.¹⁰⁷

Generally, however, state legislatures and municipalities have not done much better than state courts in implementing human rights treaties. To be sure, entities

101. *Graham v. Florida*, 982 So. 2d 43, 54 (Fla. Dist. Ct. App. 2008). The Supreme Court later overturned the state court’s decision in *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

102. *People v. See*, No. F055800, 2009 Cal. App. Unpub. LEXIS 10015, at *45 (Cal. Ct. App. Dec. 18, 2009).

103. *In re Marriage Cases*, 183 P.3d 384, 426 n.41 (Cal. 2008).

104. See the discussions at Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1641–43 (2006), and Gaylynn Burroughs, *More Than an Incidental Effect on Foreign Affairs: Implementation of Human Rights by State and Local Governments*, 30 N.Y.U. REV. L. & SOC. CHANGE 411, 416–17 (2006).

105. Peggy Simpson, *Chances Improve for Ratification of CEDAW*, WOMEN’S MEDIA CENTER (Mar. 30, 2009), <http://www.womensmediacenter.com/blog/entry/chances-improve-fo-ratification-of-cedaw>.

106. See U.S. HUMAN RIGHTS NETWORK, U.S. CERD OBLIGATIONS AND DOMESTIC IMPLEMENTATION (2008), available at <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN7.doc>. The text of the Massachusetts bill may be found at Citizens for Global Justice, *California’s CEDAW Bill; New Massachusetts Human Rights Bill*, 28 MINERVA, Feb. 2005, at 31, 32–33, available at <http://globalsolutions.org/files/public/documents/WFI-Minerva-Vol28.pdf>.

107. A number of scholars have explored the ways in which states may participate in the enforcement of international law in a wide variety of ways. Judith Resnik has trained her eye on human rights (CEDAW) and climate change (Kyoto), mapping the variety of ways in which municipal and state actors seek to integrate (or preclude) the application of international law. Resnik, *supra* note 105, at 1641–47; see also Martha Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 FORDHAM L. REV. 411, 435–38 (2009); Powell, *supra* note 5, at 262–73; see generally Kalb, *supra* note 99.

at the state and local level often monitor civil rights norms under the rubric of human rights. It is common for American states to have a “human rights” mechanism to monitor state and local behavior.¹⁰⁸ Such monitoring mechanisms, however, are based on domestic law, generally without reference to norms under the ICCPR or other U.S. treaties.¹⁰⁹ While actors at state and local levels occasionally aim to translate human rights treaty norms into concrete tools to guide governmental authority, the ICCPR and other treaties ratified by the United States are barely visible in the United States, whether to official authorities or to the individuals whom the Covenant is designed to protect.¹¹⁰

California offers two examples of legislators attempting to incorporate a human rights norm statewide. The first concerns affirmative action. In 1996, California voters approved Proposition 209, amending the state constitution so as to prohibit discrimination or preferential treatment based on “race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”¹¹¹ In purpose and effect, Prop. 209 ended state and local affirmative action programs, such as university admissions programs and municipal contracting programs benefiting minority-owned businesses. It did not, however, define “racial discrimination.”

State Assemblyman Mervyn Dymally, an opponent of Prop. 209, proposed legislation to use human rights law in an effort to “encourage outreach programs that do not provide preferential treatment” to minorities.¹¹² He found that the Convention on the Elimination of All Forms of Racial Discrimination (CERD), which the United States ratified in 1994,¹¹³ defined racial discrimination consistent with state law. But the CERD also provides a safe haven for “special measures” such as affirmative action, defining such programs as not amounting to discrimination under the treaty.¹¹⁴ Dymally maneuvered his proposal through the California legislature, and in 2003, California Governor Gray Davis signed Assembly Bill (A.B.) 703,¹¹⁵ which incorporated into state law the definition of

108. See U.S. DEP'T OF STATE, *supra* note 75.

109. Johanna Kalb, *Dynamic Federalism in Human Rights Treaty Implementation*, 84 TUL. L. REV. 1025, 1062 (2010).

110. The reasons for this are varied: for one thing, the federal government ratified the ICCPR but has made limited, if any, efforts to encourage state incorporation of its provisions. The federal entities that engage with the Covenant—principally bureaus within the U.S. Department of State—focus on promotion of human rights internationally, while the promotion of U.S. treaty obligations domestically tends to be associated only with reporting to human rights monitoring bodies such as the ICCPR's Human Rights Committee. See *Human Rights*, U.S. DEP'T ST., <http://www.state.gov/j/drl/hr/index.htm> (last visited Dec. 29, 2012).

111. CAL. CONST. art. 1, § 31.

112. See Jim Sanders, *Outreach Legislation Rekindles Race Issue*, SACRAMENTO BEE, May 22, 2003, at A1.

113. CERD, *supra* note 18, pt. I, art. 1.

114. *Id.*

115. A.B. 703, 2003 Leg. Reg. Sess. (Cal. 2003).

“racial discrimination” as found in the CERD, including the provision approving of “special measures.” Litigants challenged Prop. 209, seeking to support an affirmative action program by using the definitions of the CERD adopted by A.B. 703. They failed on the grounds of a state law principle: A.B. 703, as legislation, could not take precedence over Prop. 209, now a part of California’s constitution.¹¹⁶ As a result, state courts did not have an opportunity to interpret the CERD itself.

Shortly after A.B. 703 was adopted, the California legislature passed A.B. 358, which sought to “implement the principles underlying” CEDAW.¹¹⁷ The bill noted that CEDAW “provides a framework for governments to examine the existing rights of women and girls in areas that include employment opportunities, education, health care, and equal protection under the law.”¹¹⁸ Specifically it would have required three state agencies—the departments of corrections, education, and health services—to “conduct an evaluation of their own departments to ensure that the state does not discriminate against women”¹¹⁹ However, Governor Arnold Schwarzenegger vetoed the measure, arguing that the bill was “duplicative of existing policy and unnecessary.”¹²⁰

While A.B. 703 and A.B. 358 show that California legislators may be willing to engage with the provisions of international human rights law, neither had an appreciable, sustained impact on state policy or interaction with human rights norms. A.B. 703 had a narrow aim, and once it was found not to be an effective measure against Prop. 209, its policy purpose appears to have disappeared. A.B. 358 failed because of the assumption that additional mechanisms were not required to implement human rights law in the United States. Governor Schwarzenegger’s argument that A.B. 358 would have duplicated state programs may have merit, but the bill would have innovated by requiring the state to consider a human rights treaty, CEDAW, in assessing issues of discrimination against women in California. The examples of A.B. 703 and A.B. 358 provide glimpses into what might have been: the integration of human rights treaty norms in two areas of state governance, along with the likelihood of public engagement that would have accompanied such reform. It is that kind of innovation that the ratification of the ICCPR invited and that few state or municipal entities have taken up.

In summary, federal and state governments have not provided a basis for individuals to pursue human rights claims under the Covenant in judicial or

116. See *Coral Constr., Inc. v. City of S.F.*, 235 P.3d 947, 947, 953, 963 (Cal. 2010); *C & C Const., Inc. v. Sacramento Mun. Utility Dist.*, 18 Cal. Rptr. 3d 715, 733 (Cal. Ct. App. 2004); see also *Kalb*, *supra* note 99, at 1068.

117. A.B. 358, 2004 Leg., Reg. Sess. (Cal. 2004).

118. *Id.*

119. *Id.*

120. Governor’s Veto Message, A.B. 358, 2004 Leg., Reg. Sess. (Cal. 2004), http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0351-0400/ab_358_vt_20040929.html.

administrative settings. Enabling such litigation at the federal level would have several salutary effects, especially by involving Americans more intimately in the interpretation of human rights norms to which the United States is bound. However, federal ICCPR litigation is a pipe dream today; Congress is simply unlikely to take the kind of legislative initiative necessary to make it possible. Nor is the executive branch likely to initiate efforts to demand such action from the states.¹²¹ The federal government has shifted the responsibility for treaty implementation to the states without providing any mechanism for the federal government to encourage state implementation.¹²²

I am not suggesting that, as a result of the weak position of human rights treaties in American courts, litigants in federal or state courts have no option to seek to align U.S. behavior with such treaties; Americans often deploy federal and state constitutional provisions for the same aims.¹²³ However, even with domestic constitutional litigation, there remains the fact that the United States, through formal constitutional processes, agreed to adhere to the norms of human rights treaties. The pursuit of claims under these treaties is the only sure way to assess U.S. compliance with human rights law in specific situations.¹²⁴ International monitoring and other soft approaches have value, but they rarely if ever provide specific claimants with the opportunity to challenge U.S. adherence to its obligations under the Covenant and other instruments.

III. ICCPR EXECUTION AT THE STATE LEVEL

Given the federal government's absence from domestic implementation of the ICCPR, I propose an approach that is consistent with the federal structure of the United States and with the federalism understandings present at the time of U.S. ratification: states should implement the Covenant themselves, incorporate its core substantive provisions into state law, and allow individuals the right to

121. See *Medellín v. Texas* 552 U.S. 491, 525–26 (2008); see also Spiro, *supra* note 5, at 572.

122. One may contrast the reticence to engage the states on human rights matters with the efforts to encourage states to implement relevant provisions of the Vienna Convention on Consular Relations. See *Outreach by the State Department*, U.S. DEP'T ST., http://travel.state.gov/law/consular/consular_2244.html (last visited Dec. 29, 2012). However, the Supreme Court has limited the ability of the executive branch to require states to implement treaty obligations of the United States in those areas traditionally held to be under the jurisdiction of the states. See *Medellín*, 552 U.S. at 505.

123. Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319, 368 (1997) (“[D]omestic constitutionalism has been the primary vehicle for recognition and enforcement of human rights in this country.”); see Henkin, *supra* note 22, 195 (“To a great extent, the international human rights obligations of the United States confirm rights which U.S. inhabitants already enjoy under the U.S. Constitution and other U.S. law.”); Harold Hongju Koh, *America’s Jekyll-and-Hyde Exceptionalism*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS*, *supra* note 64, 114.

124. Upon ratification of the treaty, the United States accepted the competence of the Human Rights Committee to assess American behavior under the Covenant, S. EXEC. REP. NO. 102-23, at 3 (1992), but the Committee’s comments on state practice are nonbinding and receive little or no attention in the United States.

challenge state action under the Covenant. “State execution” would be a form of treaty implementation in recognition of the fact that the ICCPR is otherwise unavailable in American courts. Ideally, this would involve the adoption of legislation or amendment of state constitutions to provide individuals with the right in state courts to raise claims arising under the Covenant or to support state law claims with Covenant provisions.

State execution could also take alternative forms, such as requiring state agencies to take the Covenant into account in policymaking, allowing individuals to challenge state action through administrative channels, or requiring reporting by state agencies on their implementation of the Covenant. These alternatives, however, would generally be weak compared to giving individuals themselves the tools to challenge state behavior, since agencies lack the incentives of individuals to ensure compliance.

States may pick up where Congress and the executive branch left off.¹²⁵ State legislators should take up the role of treaty implementation, even without the pressure of the federal government, and they can do so while being sensitive to federalism concerns and advancing U.S. objectives in the area of human rights, both at home and abroad.

A. Why State Execution?

State execution would serve a number of purposes. First, state execution would provide a compliance mechanism at a time when there is no administrative, adjudicative, or political process in the United States to assess U.S. behavior under the Covenant. The only formal assessment of U.S. compliance occurs as part of the Human Rights Committee’s monitoring of U.S. behavior (done for all states that have accepted the Committee’s competence), which occurs typically every five years and, even then, only in the context of general assessments rather than individual allegations.¹²⁶ Moreover, the Human Rights Committee has focused more on areas under federal than state jurisdiction.¹²⁷ State court adjudication under the ICCPR would implement American obligations in the context of American experience and legal culture. Unlike jurisdictions subject to the European or Inter-American courts of human rights, there would be no supranational court overseeing U.S. implementation.

125. Or, as Johanna Kalb put it in the context of the Vienna Convention on Consular Relations, states should “fill the void created by lack of federal action.” Kalb, *supra* note 109, at 1049.

126. For Human Rights Committee practice with respect to state reporting, see Office of the United Nations High Comm’r for Human Rights, *Civil and Political Rights: The Human Rights Committee* (Rev.1) 15 (2005), available at <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>.

127. See U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

Second, state execution would provide individual citizens, judges, legislators, and others with a mechanism to engage with the norms of human rights law. Americans have very little connection or experience with international law generally and human rights law specifically, even though many of its core principles are a part of U.S. law and bind the United States under the Supremacy Clause. As Catherine Powell put it, “most Americans see international human rights law as an irrelevant offshore body of law.”¹²⁸ Yet this perception of irrelevance misses the reality of an increasing dynamism of human rights discourse and litigation in Europe and the Americas that is informing American constitutional adjudication, as seen in *Roper v. Simmons*,¹²⁹ *Lawrence v. Texas*,¹³⁰ *Hamdan v. Rumsfeld*,¹³¹ and other decisions by the Supreme Court. Until litigants are provided with the tools themselves to deploy human rights treaty arguments, the ICCPR will continue to be seen as a distant, largely inapplicable body of law.¹³²

With state execution of the ICCPR, the ability of the United States to influence the development of human rights law may change as well. That influence has decreased in the years since President Carter first submitted the ICCPR to the Senate in 1978. The United States has mechanisms to influence individual state behavior, through its domestic sanctions against serious human rights violators, visa denial programs, economic and military aid conditionality requirements, actions on the United Nations Security Council, and so forth.¹³³ Yet its capacity to influence law and doctrine is weak because of its failure to engage human rights law *qua* human rights law.

The doctrinal development of human rights law has advanced significantly since U.S. ratification, mainly in the context of the European and Inter-American human rights systems. The European Court of Human Rights, implementing norms of the European Convention on Human Rights that closely mirror those in the ICCPR, has adjudicated thousands of cases that touch on all areas of civil and political rights. The United States has limited impact over human rights jurisprudence in Europe in part because our courts do not engage the language of the ICCPR and other human rights treaties. As a result, human rights norms that may influence American law—as seen, for instance, in Supreme Court jurisprudence in *Lawrence*, *Graham*, *Roper*, and other recent cases—develop without

128. Powell, *supra* note 5, at 260 (citation omitted).

129. *Roper v. Simmons*, 543 U.S. 551, 576 (2005).

130. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

131. *Hamdan v. Rumsfeld*, 548 U.S. 557, 633 (2006).

132. Frank Michelman imagined what it would be like “[i]f Americans could see their judges grappling, openly and apparently honestly, with emergent world legal opinion—world *legal* opinion, not world moral opinion—regarding the human-rights matters that divide us.” Frank Michelman, *Integrity-Anxiety*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS*, *supra* note 64, 241, 275. He concluded that they might regain “confidence in the objectivity . . . of the resulting adjudications.” *Id.*

133. See generally U.S. INST. OF PEACE, *IMPLEMENTING U.S. HUMAN RIGHTS POLICY* (Debra Liang-Fenton ed., 2004).

the input of American legal institutions. State execution provides a direct opportunity for American judges to evaluate the provisions of the ICCPR in the context of the United States. To be sure, such consideration would require state actors to ensure that their behavior conforms to the requirements of the Covenant, but it would also allow judges considerable authority to influence the development of human rights norms abroad.

Third, incorporation of the ICCPR could directly support litigation over critical problems within the states today. In areas such as prison conditions, nondiscrimination, family law and marriage equality, children's rights, political participation, and religious freedom, to name a few, the states have obligations under the ICCPR that are not being tested today.¹³⁴ It may very well be that state and federal constitutional protections adequately support rights such as these, but in the absence of litigation over the human rights obligations themselves, we can only guess.

Finally, state incorporation would serve the “dialogic” purposes identified by Catherine Powell.¹³⁵ State incorporation efforts would be seeking not to displace the federal government but rather to implement at the state level the obligations taken on by the United States when it ratified the ICCPR. Once states begin to play concrete roles as interpreters of the ICCPR at the state level, state actors could inform federal lawmaking in the area of human rights. In turn, the foreign policy arguments articulated by Presidents Carter and Bush—namely, that ratification would enable the United States to press for greater human rights implementation worldwide—would be strengthened to the extent that U.S. officials can point to implementation at the state level in the United States.

B. Elements of State Execution

Each state has its own legislative traditions and requirements, and some may find it appropriate to incorporate the ICCPR through regular legislation while others may need to do so through state constitutional change.¹³⁶ Some may even decide that softer approaches would be appropriate, such as “sense of the legislature” resolutions that indicate support for the judicial use of the ICCPR in state law cases. Rather than assessing the variety of options that might be available, I want to sketch out some of the main elements and questions that should be considered in any such effort.

134. For a critical examination of U.S. behavior under the ICCPR, see *Dimming the Beacon of Freedom: U.S. Violations of the International Covenant on Civil and Political Rights*, ACLU (June 20, 2006), <http://www.aclu.org/human-rights-womens-rights/dimming-beacon-freedom-us-violations-international-covenant-civil-politic>.

135. Powell, *supra* note 5, at 249–50.

136. This was, for instance, the hurdle faced by A.B. 703 in California, mere legislation that was trumped by the constitutional change effected by Prop 209. See *supra* text accompanying notes 108 and 112.

Cause of action or principle of interpretation? States would enjoy a variety of alternatives for the incorporation of the Covenant under state law. Under one conception, states could provide an express cause of action for alleged violations of the ICCPR. Under another, state law could authorize courts merely to take into account the relevant provisions of the ICCPR when adjudicating state law claims. In either case, the result would be to bring international human rights law directly into litigation over state action.

If a state were to authorize causes of action arising under the ICCPR, one could imagine an attempt to remove the case to federal court under federal question jurisdiction. The Supreme Court enunciated the standard for federal question removal in 2005 in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, stating that “the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.”¹³⁷ U.S. ratification may support non-removal, as the Senate and executive branch made clear that the ICCPR would not be implemented in federal courts absent legislation. Moreover, the federalism understanding suggests that states would indeed implement the Covenant as they deem appropriate. In this context, arguments for federal question removal may have much less force. Even if removal were successful, the federal court may very well apply the state law incorporating the ICCPR, thus supporting rather than undermining the effort to implement the Covenant.¹³⁸

Wholesale or provision-by-provision incorporation? The ICCPR contains substantive and structural provisions. Any incorporation should not address the provisions of the Covenant that pertain to the Human Rights Committee or other structural issues under the treaty, as these pertain to the obligations of the federal government. Instead, states should integrate the substantive provisions of the ICCPR that pertain to individual rights, those found in Part III of the Covenant, Articles 6 through 27, and the nondiscrimination provisions of Articles 2 and 3. One might also exclude provisions that fall outside the jurisdiction of the states. For instance, Article 13 of the Covenant pertains to aliens “lawfully in the territory of a state Party,” clearly implicating an area of law preempted by federal law and policy.¹³⁹ Alternatively, states could incorporate the Covenant in full with the exception of provisions governed by federal law.

At the same time, to the extent that the Covenant’s provisions might offer less protection to individual rights than state or federal constitutions, state

137. *Grable & Sons Metal Prods. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005).

138. See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 795 (5th ed. 2011) (discussing application of “federal common law choice-of-law rules” in other contexts where federal question jurisdiction exists (but where no express federal substantive statutory rules apply)).

139. ICCPR, *supra* note 1, art. 13.

execution should recognize the provision that is more protective of individual rights. This is clearly the case with respect to freedom of expression, as seen in the reservation of the United States to Article 20 of the ICCPR.¹⁴⁰ State execution might indicate such a principle explicitly in law.

Finally, Article 4 provides that states parties may derogate from ICCPR obligations “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.”¹⁴¹ Article 4 is clearly aimed at central governments, given the focus on “the life of the nation,” and state legislation should not interfere with national policy in this respect.

The treatment of the RUDs in state execution. The RUDs attached to the U.S. ratification pose a question for state incorporation efforts: Should they be given effect? Since states may adopt a law that provides greater protections for individuals than those offered under federal law, it would seem to be available to states to adopt the ICCPR without the RUDs, except to the extent that the RUD provides greater protection than under the ICCPR. This is clearly the case with respect to Article 20’s restrictions on war propaganda and incitement to discrimination, neither of which may be prohibited under U.S. constitutional law.¹⁴²

Other RUDs merely preserve U.S. federal and state interpretations that likely fall below the standards of the ICCPR. For instance, the United States reserved the right to impose capital punishment on juveniles and the right to treat juveniles as adults in the criminal justice system. States have recognized authority to maintain or eliminate the death penalty within their jurisdictions, including eliminating it for particular classes of defendants (so long as they are non-discriminatory).¹⁴³ A state’s decision to comply with the ICCPR—which does not itself abolish capital punishment—would neither be inconsistent with the U.S. reservation nor with the state-federal distribution of authority in this area. One could make the same argument with respect to the U.S. reservation of the right to apply the term “cruel, inhuman and degrading treatment” only to the extent that it is bound by the prohibition on “cruel and unusual treatment or punishment” under the U.S. Constitution. States may clearly go beyond the floor set by the Constitution in these areas.

C. Potential Arguments Against State Execution

One can imagine a number of potential arguments against such state-level integration. Those arguments might include the following:

140. See S. EXEC. REP. NO. 102–23, at 10–11 (1992).

141. *Id.* art. 4, ¶ 1.

142. *Id.* art. 20.

143. In any event, the Supreme Court found the juvenile death penalty unconstitutional in *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

A state court cause of action would require authorization from Congress. Some may argue that, since the ICCPR ratification asserted the treaty as non-self-executing, “Congress would have to pass general implementing legislation in order to make the treaty enforceable in domestic courts.”¹⁴⁴ This is clearly true with respect to claims in federal court, given the explicit and repeated nature of U.S. statements at the time of ratification. However, it is not clear why this should be a bar to state enforcement. U.S. resistance to the Covenant rested largely on the perception that it would obligate the states to take action; the Senate and the executive branch, under Presidents Carter and Bush, did not want the treaty to have that effect. By contrast, however, the federalism understanding suggests that states could implement the treaty “to the extent that State and local governments exercise jurisdiction” over matters under the Covenant. Neither the Senate nor the executive branch suggests that the states would be precluded from implementing the treaty in a way they would deem appropriate.

State court interpretations of treaty law are preempted by federal law. Rather than asserting that states are preempted from implementing the ICCPR, U.S. ratification of the Covenant provided for a predominant state role in the field. It would thus be difficult to sustain an argument that a state choosing incorporation of the Covenant as the means for implementation would be barred under principles of preemption. Nonetheless, it is worth examining the two principles that the Supreme Court looks to in considering preemption claims.

In the case of “field preemption,” “the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.”¹⁴⁵ With regard to the substantive provisions of the ICCPR, the federal government has already made clear that those principles may be implemented by the states to the extent that the provisions fall under state jurisdiction. Field preemption should not be a concern.

In the case of “conflict preemption,” “state laws are preempted when they conflict with federal law.”¹⁴⁶ Allowing state-level causes of action under the ICCPR could be seen as an implementation of federal law (i.e., a ratified treaty) and should not be seen in any way as conflicting with law at the federal level. One might take the preemption argument a step further and suggest that, as in the state sanctions struck down in *Crosby v. National Foreign Trade Council*,¹⁴⁷ so too state incorporation of the ICCPR would interfere with the federal government’s conduct of foreign affairs. Such an argument seems far-fetched. In *Crosby*, the State of Massachusetts adopted sanctions against entities doing business with Burma.¹⁴⁸ Yet shortly after the state law was adopted, Congress imposed its own

144. Kalb, *supra* note 109, at 1065.

145. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012).

146. *Id.*

147. *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000).

148. *Id.* at 366.

sanctions against Burma, some of which were mandatory while others were left to the discretion of the President.¹⁴⁹ The Court found that the federal legislative framework preempted the state law, which it held could have interfered with the discretion given to the President by law.¹⁵⁰ Nor would Congress have “intended the President’s effective voice to be obscured by state or local action” in the context of sanctions against Burma.¹⁵¹

The principles underlying *Crosby* do not apply in the context of state execution of the ICCPR. There is no federal law with which state execution would conflict. It is likely that the president’s “voice” in foreign relations, at least with respect to efforts to improve human rights worldwide, would be enhanced rather than diminished. There is nothing particularly new or radical about state engagement with international legal norms. Julian Ku has shown that states have long played a role in interpreting and integrating international law at the state level.¹⁵² The very fact of longtime state engagement with international legal norms undermines a possible, related argument that state court judges have too little familiarity with human rights law or international law to adjudicate such claims effectively.¹⁵³

The ratification of the ICCPR rested on the presumption that the Covenant would not provide litigants with a cause of action, but this statement should be seen in the context of non-self-execution. The Covenant does not provide a cause of action for two reasons: one, according to the Senate and the executive branch, the ICCPR requires legislation to bring it into effect; and two, the Senate and the executive branch did not want to “federalize” state law. Given the expectation of state-level implementation, incorporation by a state should serve to execute the Covenant for state purposes, allowing states to domesticate the ICCPR themselves.

Rosalyn Higgins, a former president of the International Court of Justice and eminent British international law professor, noted the concern about incorporating a cause of action from human rights treaties into domestic law. She answered it by comparing human rights treaties to other kinds of international agreements. She wrote,

149. *Id.* at 368–71.

150. *Id.* at 376–77.

151. *Id.* at 381.

152. *See, e.g.,* Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT’L L. 265 (2001); Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380 (2006); Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457 (2004).

153. The American Society of International Law, the leading organization of practitioner and academic international lawyers in the United States, has an active program of judicial training in international law, undermining arguments about the lack of awareness of such norms at the state level. *See Judicial Education & Training*, AM. SOC’Y INT’L L., <http://www.asil.org/judicial-education-training.cfm> (last visited Dec. 29, 2012).

[H]uman rights treaties are not characterised by inter-state reciprocity. States parties agree unconditionally to guarantee rights to individuals. Certain presumptions would seem to operate. Legal rights should be justiciable. The beneficiary of a right should be able to ensure its efficacy in law. And the easiest way for an individual to enforce his rights is before his own courts, and not before an international tribunal.¹⁵⁴

The provisions of the ICCPR are too vague to be applied in state or federal court. The Covenant includes general language intended to constrain the behavior of official authorities. It does not attempt, in the fashion of a civil or criminal code, to specify the requirements of official behavior in all possible circumstances. The Covenant balances the need for general principles with the need for specific enough guidance in particular cases. Thus,

the provisions are sufficiently definite to have real significance both as a statement of law and as a guide to practice, but they are also sufficiently general and flexible to apply to all individuals and to allow for adjustments of national laws to suit peoples at different stages of social and political development.¹⁵⁵

Judges would do as they have always done: interpret the provisions in the context of the claims arising under them, deploying the appropriate tools of construction. In the context of treaty interpretation, this would mean interpreting a provision “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁵⁶ Judges would look to state practice, negotiating history, and other courts’ interpretations, among other things, in order to clarify the meaning of particular provisions.¹⁵⁷ It is possible, and perhaps likely, that state judges will more often than not rely on state law even where provisions of the Covenant apply.¹⁵⁸ But giving litigants the tools of the Covenant provides a way to integrate U.S. obligations into state court decisions and provide an avenue for a human rights dialogue between U.S. and non-American judges.

That said, some provisions of the Covenant might be more difficult to interpret than others. For instance, Article 23 includes provisions related to family law, some of which will be clearer than others. Article 23(1), for example, merely states that “[t]he family is the natural and fundamental group unit of society and is

154. Rosalyn Higgins, *The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom*, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS, *supra* note 22, 37, 38 (citations omitted).

155. Pechota, *supra* note 3, at 44.

156. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

157. *See id.* arts. 31–32.

158. *See, e.g.*, Bruno Simma et al., *The Role of German Courts in the Enforcement of International Human Rights*, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS, *supra* note 22, 78, 114 (noting that, with the overlap of German and international human rights law, German courts applied the latter norms infrequently).

entitled to protection by society and the State.”¹⁵⁹ This may present more difficulties than Article 23(3), which requires “the free and full consent” of partners intending to marry, while Article 23(4) requires authorities “to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.”¹⁶⁰ The enforcement of such norms should present little difficulty to judges familiar with the tools of interpretation.

CONCLUSION

Particularly in an environment in which international and foreign law are broadly attacked in a number of state legislative and litigation contexts,¹⁶¹ it may seem quixotic to propose a manner of thinking about human rights treaty implementation that focuses on the state. Yet state execution follows logically from the structure of the ICCPR, which expressly applies to sub-federal units of parties to the Covenant, and perhaps more importantly from the ratification deal struck in 1991.

Even beyond the acceptability of state execution, broadly applicable initiatives at the state level would serve a crucial public purpose: highlighting that human rights norms, part of U.S. law through the treaty-making process of the Constitution, belong neither to the Right nor to the Left. They are neither liberal nor conservative. The norms of the ICCPR serve this purpose especially, reflecting an effort to guarantee the liberty of the individual worldwide and ensuring individual protections against the encroachment of governmental authorities at all levels. It may very well be that the need for the ICCPR is much less evident in the United States than in other countries where the struggle for human rights may be intense and a matter of life-and-death. But until states fill the space left by federal inaction, America’s compliance with the provisions will remain untested.

159. ICCPR, *supra* note 1, art. 23 ¶ 1.

160. *Id.*

161. See Aaron Fellmeth, *International Law and Foreign Laws in the U.S. State Legislatures*, AM. SOC’Y INT’L L. INSIGHTS, (May 26, 2011), <http://www.asil.org/insights110526.cfm>.