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Dynamic Federalism in Human Rights Treaty Implementation

Johanna Kalb*

In response to the growing academic and political movement that opposes the direct incorporation of treaties into domestic federal law, numerous scholars have proposed that states take on an increased role in the domestic interpretation and implementation of international human rights treaties. The focus of this scholarship to date has been to locate doctrinal gaps where state legislatures and courts may act without intruding in areas of traditionally federal jurisdiction. Thus far, however, little effort has been directed towards modeling an affirmative obligation for state participation in treaty implementation, despite the fact that state action is arguably required, both pragmatically and doctrinally, if the United States is to comply with its commitments under international human rights law. In this Article, I argue that reframing treaty implementation through a dynamic federalist model could be productive and even necessary, if the United States is going to meet its existing international obligations. As an example, I discuss the ongoing litigation over the United States' failure to honor its obligations under the Vienna Convention on Consular Relations (VCCR). Federal actors have relied on federalism concerns to avoid forcing states to remedy violations of Convention rights, thus leaving the question of whether the United States will reach compliance entirely in the hands of the states, which have generally been slow to take up the call. Drawing on a model proposed by Justice Breyer, I contend that adopting a dynamic federalist model to implement and enforce the VCCR could help to move beyond this impasse, and perhaps more importantly, could help realize the benefits of federalism within the context of human rights treaty implementation.

I.	INTRODUCTION.....	1026
II.	PARALYSIS IN TREATY IMPLEMENTATION	1031
	A. Breard <i>and</i> LaGrand.....	1036
	B. Medellín <i>and</i> Sanchez-Llamas	1040
III.	RESOLVING THE IMPASSE	1049
IV.	EXTENDING THE MODEL.....	1059
V.	CONCLUSION	1066

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I. INTRODUCTION

Several recent United States Supreme Court decisions incorporating international human rights law into constitutional interpretation have provoked an outpouring of scholarship and popular debate about the appropriate role of foreign and international law in our courts and jurisprudence.¹ The battle lines in these debates are drawn between the nationalists who “believe that treaties have domestic effect superseding inconsistent domestic law . . . unconstrained by most constitutional limitations” and “revisionist scholars [who] argue[] that treaties should be subject to strict political and constitutional constraints, drastically limiting the effect that treaties have within the domestic legal system.”² This dispute has significant consequences for domestic governance, because “the subjects of these treaties have increasingly turned toward areas of law that have been traditionally governed exclusively by domestic law.”³

In no area, perhaps, is this dispute more meaningful than in international human rights law. The major international human rights treaties regulate fundamental aspects of the relationship between the individual and the nation and impose affirmative obligations on the signatory nations with respect to the treatment of their citizens. The treaties address issues such as racial and gender equality, criminal procedure and punishment, and religious freedom. The International Covenant on Civil and Political Rights,⁴ for example, which has been signed and ratified by nearly 100 nations, including the United States, requires signatories to extend certain individual rights and protections to all persons within their jurisdiction, regardless of whether other signatories offer reciprocal recognition.⁵ In sum, “There is now general agreement ‘that how a [nation] state treats individual human beings, including its own citizens, in respect of their human rights, is

1. See *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005) (citing foreign law in the course of holding that execution of juveniles violates the Eighth Amendment); *Lawrence v. Texas*, 539 U.S. 558, 572-73, 578 (2003) (citing foreign law in holding that the criminalization of same-sex sodomy violates privacy interests protected by the Due Process Clause); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing foreign law to hold that the execution of the mentally retarded violates the Eighth Amendment).

2. Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 323 (2005).

3. *Id.* at 323-24.

4. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

5. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 396-97 (1998).

not the state's own business alone . . . but is a matter of international concern and a proper subject for regulation by international law.”⁶

In the United States, many of the areas addressed by these treaties have often, although not exclusively, been regulated by the states. Thus, one of the primary concerns raised by the revisionists has been one of federalism. More specifically, they argue that because international human rights treaties often intersect with those areas of law that have historically been reserved to the states, adopting them as part of federal law will significantly infringe on state sovereignty and state norms.⁷

A certain conventional wisdom has taken hold, which sees some significant tension between international law and institutions on the one hand, and the demands of U.S. federalism on the other. In [the revisionist] account, international law at least stifles, if it does not silence, domestic voices beyond those of a narrow set of national actors responsible for the foreign affairs of the United States.⁸

One response to the revisionists has been to suggest a greater role for the states in international treaty development and interpretation.⁹ Since the 1980s, commentators have suggested that state courts take up the lead in using international human rights standards to inform state constitutional interpretation, pushing state protections beyond those provided by the United States Constitution.¹⁰ This is not an

6. *Id.*

7. See generally Bradley, *supra* note 5, at 401-09 (discussing the ways in which the treaty power could be used to overcome federalism restraints in the areas of human rights, criminal law and punishment, commerce and trade, and environmental protection).

8. Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185, 1205 (2008).

9. See generally Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359 (2006) (describing methods by which state courts may implement international treaty obligations through state constitutional construction).

10. In the late 1970s, Justice Brennan called upon states to interpret their own constitutions more expansively than the federal Constitution with respect to the protection of individual liberties. See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Since then, numerous commentators have encouraged state courts to rely on international human rights treaties as persuasive authority in thinking about how these broader rights should be construed. See, e.g., Elizabeth F. Defeis, *Universal Declaration of Human Rights: A Standard for States*, 28 SETON HALL LEGIS. J. 259, 260 (2004); Robert Doughten, *Filling Everyone's Bowl: A Call To Affirm a Positive Right to Minimum Welfare Guarantees and Shelter in State Constitutions To Satisfy International Standards of Human Decency*, 39 GONZ. L. REV. 421, 437-42 (2003); Alan Jenkins & Sabrineh Ardalan, *Positive Health: The Human Right to Health Care Under the New York State Constitution*, 35 FORDHAM URB. L.J. 479, 514-15 (2008); Bert Lockwood Jr., R. Collins Owens III & Grace A. Severyn, *Litigating State Constitutional Rights to*

entirely new idea. State courts have historically shared the responsibility for interpreting and applying international law.¹¹ They have also been seen as a possible site for other legal innovation, including the development of greater constitutional protections and other progressive reforms.¹²

This increased focus on states as a possible site for experimentation and innovation is not unique to the context of international human rights law. In the past few years, as certain states have demonstrated more openness than the federal government to opportunities for progressive reform, numerous scholars have proposed new models of state-federal interaction that are designed to take advantage of the possibilities of jurisdictional redundancy and dialogue. Various called “interactive,”¹³ “dialogic,”¹⁴ or “polyphonic”¹⁵ federalism,¹⁶ these models focus less on divvying up areas of jurisdictional authority and more on the “protection of the institutional integrity of multiple sources of power and the promotion of the dynamic interaction of those centers of authority.”¹⁷ These models have been applied to a variety of contexts, from education,¹⁸ to environmental protection,¹⁹ to corporate law.²⁰

Happiness and Safety: A Strategy for Ensuring the Provision of Basic Needs to the Poor, 2 WM. & MARY BILL RTS. J. 1, 19-24 (1993).

11. See Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 531-32 (2004).

12. See, e.g., Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 24 (1993); Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 896-99 (1989).

13. See generally Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005).

14. Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 250 (2001).

15. See generally Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409 (1999).

16. I will adopt Kirsten Engel’s practice of referring to this collection of theories as models of “dynamic federalism.” See Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 176 (2006).

17. Schapiro, *supra* note 13, at 285.

18. See, e.g., *Schaffer v. Weast*, 546 U.S. 49, 52 (2005) (quoting *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 830 (8th Cir. 1999) for the proposition that the Individuals with Disabilities Education Act presents a model of “cooperative federalism”). See generally Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653 (2007).

19. See generally Engel, *supra* note 16; William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108 (2005).

20. See generally Robert B. Ahdieh, *From Federal Rules to Intersystemic Governance in Securities Regulation*, 57 EMORY L.J. 233 (2007).

Recently, scholars have begun to think about the role of dynamic federalism in foreign affairs and international human rights law. Catherine Powell has argued for a model of “dialogic federalism” in the adoption of international human rights law.²¹ She points to efforts by state and local governments to adopt international human rights standards even where the federal government has failed to sign or ratify that treaty and to supplement measures taken by the federal government to comply with ratified treaties.²² Judith Resnik has critiqued the growth of foreign affairs preemption rules that seek to limit these kinds of local initiatives.²³ Resnik argues that “[b]efore finding that national action is the exclusive means of interacting with ‘the foreign,’ judges ought to require specific national legislative directives as well as the presentation of detailed factual information about how concurrent or overlapping rules (federal and state) do harm national interests.”²⁴

To date, this scholarly attention has generally been focused on identifying jurisprudential gaps for state innovation. In essence, the goal has been to locate spaces where state involvement with foreign affairs or with the adoption of treaty-based norms is not preempted. However, little effort has been directed thus far towards modeling an *affirmative* obligation for state participation in treaty implementation—notwithstanding that state action is arguably required, both pragmatically and doctrinally, if the United States is to comply with its international human rights treaty obligations. The absence of this discussion in the scholarship represents a missed opportunity, given that these treaties epitomize the tensions in the dualist model. In this Article, I begin to set out my argument that reframing treaty implementation through a dynamic federalist model could be productive and even necessary, if the United States is going to meet its existing international obligations. I use as an example the United

21. Powell, *supra* note 14, at 250-52.

22. Significantly, Powell notes that she is unaware of any efforts involving her third track of dialogic federalism, which involves “state and local efforts to apply [international] human rights principles contained in treaty provisions for which the United States has entered a reservation.” *Id.* at 274. It is this possibility that I will take up in more detail in my final part.

23. See Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland*, 73 MO. L. REV. 1105, 1142-43 (2008); see also Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 67-68 (2007).

24. Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 41-42 (2007).

States' experience with the Vienna Convention on Consular Relations (VCCR).²⁵

In Part II, I begin with a brief discussion of the current barriers to human rights treaty implementation in the United States. For decades, a heated debate has raged in the scholarly literature as to what extent the federal government may rely upon the treaty power to legislate in areas otherwise reserved to the states. In recent decades, these academic disputes have translated into a growing political movement that seeks to protect the structure of U.S. federalism from treaty-based federal incursions. As a doctrinal matter, federalism constraints do not currently place significant limits on the treaty power, but the strength of the political opposition has changed the way federal actors seek to exercise this authority, creating *de facto* boundaries.

As an example, I explain how this political movement has played out in the context of the United States' obligations under the VCCR. Despite the strong likelihood that the VCCR is a constitutional exercise of the treaty power as currently defined, federal actors have relied on principles of federalism to avoid requiring states to remedy violations of VCCR rights. As a result, the executive now *lacks* the authority to remedy VCCR violations, and thus the ability of the United States to meet its international obligations is determined by the actions of the states, many of which have failed to take the affirmative steps necessary to ensure that VCCR rights are honored and that violations are remedied. Congressional action could force state participation in VCCR implementation, but federalism concerns mean that Congress is unlikely to legislate so deeply and specifically in areas of state control.

In Part III, I propose that applying a dynamic federalist model to VCCR implementation could provide the beginning of a path through the impasse. Given that the VCCR remains binding on the United States, and that the federal government is unlikely or unable to take actions that intrude deeply into areas of state jurisdiction to enforce it, the states must take an affirmative role in implementation if the United States is to meet its obligations. Because enforcement of the VCCR crosses traditional notions of state and federal jurisdictional boundaries, a model of treaty implementation that provides the states with a primary role in interpretation and enforcement could very well be the way that the United States can most effectively meet its VCCR

25. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].

obligations, while acknowledging some state authority and autonomy in the area of criminal justice. I draw on Justice Breyer's dissent in a recent VCCR case, *Sanchez-Llamas v. Oregon*,²⁶ and some of the federalism scholarship on "ceilings" and "floors" in other areas of the law to explain how this model could work. I argue that this less invasive strategy could be both normatively beneficial and more politically feasible to federal and state actors, and could lead to more effective internalization and implementation of the United States' international human rights commitments.

Finally, in Part IV, I extend this model to other international human rights treaties. Due to the way in which many of these treaties have been adopted, states arguably have the primary obligation to interpret and implement them. Nonetheless, most have failed to take up the mantle of enforcement. I contend that a dynamic federalist model of treaty implementation could help motivate state involvement and legitimate the resulting activity.

II. PARALYSIS IN TREATY IMPLEMENTATION

In recent years, the academic debate over the implementation of international human rights treaties has heightened, prompted by the revival of federalism in other contexts.²⁷ The debate has focused in large part on the extent of that treaty power as expressed by the Supreme Court's decision in *Missouri v. Holland*.²⁸ In *Holland*, Justice Holmes rejected Missouri's position that the treaty power is subject to the same constitutional constraints as Congress's domestic authority,

26. 548 U.S. 331, 365-98 (2006).

27. This is not to say, however, that this debate is entirely new. "A long line of critics, starting with Thomas Jefferson, have advocated sharp limits on the use of the treaty power out of a belief that automatically incorporating treaty law into domestic law via the Supremacy Clause is inconsistent with the Constitution's general scheme for a federal government of limited powers." Laura Moranchek Hussain, Note, *Enforcing the Treaty Rights of Aliens*, 117 YALE L.J. 680, 683 (2008) (citing Thomas Jefferson, *Manual of Parliamentary Practice for the Use of the Senate of the United States*, in JEFFERSON'S PARLIAMENTARY WRITINGS 353, 420-21 (Wilbur Samuel Howell ed., 1988)). Jefferson wrote:

To what subjects this [treaty] power extends, has not been defined in detail by the constitution; nor are we entirely agreed among ourselves. . . . It must have meant to except out of these the rights reserved to the states; for surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way. . . . And also to except those subjects of legislation in which it gave a participation to the House of Representatives. This last exception is denied by some, on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others.

Jefferson, *supra*, at 420-21.

28. 252 U.S. 416 (1920).

noting that the treaty power is enumerated and the Tenth Amendment reserves to those states only those powers not given to the federal government by the Constitution.²⁹ Justice Holmes did acknowledge that the treaty power is not unlimited, but concluded that because the treaty in question “[did] not contravene any prohibitory words to be found in the Constitution,”³⁰ the only question remaining was whether the treaty’s provisions were “forbidden by some invisible radiation from the general terms of the Tenth Amendment.”³¹

The nationalist view of *Holland* is that the case stands for the powerful proposition that the treaty power was fully delegated by the founders to the federal government.³² This view has survived for decades, has been affirmed in subsequent decisions of the Supreme Court,³³ and has provided the basis for lower federal court decisions upholding legislation that implements U.S. obligations under the Hostage-Taking Convention.³⁴ Moreover, political attempts to overturn this holding directly have been unsuccessful. The most significant attempt occurred in the 1950s when Senator Bricker of Ohio pushed for a constitutional amendment to overrule *Holland*. The Bricker Amendment, as it was called, would have provided that “[a] treaty shall become effective as internal law in the United States only through . . . appropriate legislation,” which would be valid in the absence of a

29. *Id.* at 432.

30. *Id.* at 433.

31. *Id.* at 433-34.

32. Louis Henkin has said that as a result:

[W]hatever is within its scope is not reserved to the states: the Tenth Amendment is not material. Many matters, then, may appear to be ‘reserved to the States’ as regards domestic legislation if Congress does not have power to regulate them; but they are not reserved to the states so as to exclude their regulation by international agreement.

LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 191 (2d ed. 1996).

33. *See, e.g., Reid v. Covert*, 354 U.S. 1, 18 (1957) (“There is nothing in State of Missouri v. Holland which is contrary to the position taken here. . . . To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.” (citations omitted)); *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (“The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend ‘so far as to authorize what the Constitution forbids,’ it does extend to all proper subjects of negotiation between our government and other nations.” (quoting *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890))).

34. *See, e.g., United States v. Ferreira*, 275 F.3d 1020, 1027-28 (11th Cir. 2001); *United States v. Lue*, 134 F.3d 79, 82 (2d Cir. 1998). A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty. *Id.* at 84-85.

treaty.³⁵ Despite repeated attempts, the Bricker Amendment was defeated, although the margin was only one vote in its last incarnation.³⁶

Despite the continuing precedential validity of the *Holland* doctrine, however, it has come under increasing scholarly attack in recent decades. In the 1990s, emboldened by the Supreme Court's "New Federalism" cases,³⁷ revisionist scholars like Curtis Bradley began to argue that *Holland* should be overruled.³⁸ The revisionists pointed to the ever-expanding scope of Congress's use of the treaty power, as evidenced primarily by the human rights treaties, and argued that the limitations the Court has placed both on the subject matter and the structure of Congress's legislative ability domestically should be translated into the treaty context to prevent Congress from using the treaty power to circumvent its domestic limitations.³⁹

Although thus far unsuccessful in changing the doctrine, these academic arguments have taken hold politically. Despite the failure of the Bricker Amendment as a formal matter, many have argued that its

35. 99 CONG. REC. 6777 (1953).

36. Moreover, its proponents were mollified with an agreement from the Eisenhower administration that the United States would not sign the international human rights conventions that were being proposed. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 348-49 (1995).

37. Much ink has been spilled in analyzing the "New Federalism" cases. See, e.g., Jack M. Balkin & Sanford Levison, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1052-53 (2001); Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 7-8 (2001); Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 618-19 (2003). These cases began with the Rehnquist Court's 1995 decision in *United States v. Lopez*, 514 U.S. 549 (1995), limiting congressional authority under the Interstate Commerce Clause, which was extended in its decision in *United States v. Morrison*, 529 U.S. 598 (2000). In these cases, the Court emphasized the need to define limitations on the authority of the federal government by drawing a distinction between "what is truly national and what is truly local." *Morrison*, 529 U.S. at 608. Reinforcing this apparent trend toward limiting federal power and protecting areas of state autonomy, the Court subsequently decided several other significant cases "restricting Congress's power to regulate state government officials, Congress's power to abrogate state sovereign immunity, and Congress's power to legislate pursuant to its Fourteenth Amendment enforcement power." David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 46 (2006).

As Robert Ahdieh has noted, "[N]o great consistency has been evident in the renewed embrace of federalism." Ahdieh, *supra* note 8, at 1191. The Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), for example, caused commentators to wonder whether an end had come to the federalism revolution. See, e.g., Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507, 508 (2006). Nonetheless, "The broad trajectory of the last twenty years, however, is fairly clear. The federalism revolution has continued its onward march." Ahdieh, *supra* note 8, at 1992.

38. See, e.g., Bradley, *supra* note 5, at 460; Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1868 (2005).

39. Bradley, *supra* note 5, at 456.

“ghost” lives on.⁴⁰ Since the 1980s, the Senate has adopted the practice of attaching reservations, declarations, and understandings when ratifying human rights treaties in order to cabin their impact.⁴¹ The Senate has also refused to ratify signed international human rights treaties in response to domestic political pressure.⁴² Further, “[T]he judiciary has shown an increasing reluctance to allow treaties to be enforced in court as part of domestic law, often declaring treaties to be non-self-executing . . . even when the Senate did *not* express a reservation against its enforcement.”⁴³ Thus, despite the continuing precedential validity of *Holland*, federal actors have expressed their unwillingness to rely on it in numerous ways, imposing de facto federalism boundaries on the treaty power. These boundaries have prevented the United States from reaching compliance with its treaty obligations.

The VCCR litigation history demonstrates how federal actors’ evolving views of the treaty power have been shaped by the federalism debate. Article 36 of the VCCR requires that a foreign national be notified at the time of his arrest that he has the right to request that the consular officials of his home country be notified of his detention or arrest.⁴⁴ The United States signed the VCCR with a view towards affording these rights to foreign nationals caught up in the criminal justice system while on U.S. soil and securing these rights for American nationals traveling abroad.⁴⁵ The United States also adopted

40. HENKIN, *supra* note 32, at 193 n.** (suggesting that “Senator Bricker lost the constitutional battle but perhaps not his political war,” given U.S. treaty practices thereafter); Bradley, *supra* note 5, at 426-29 (noting that the Bricker Amendment controversy was resolved in part because the federal government exercised self-restraint in imposing burdens on the states).

41. Hussain, *supra* note 27, at 684-85 (“These reservations have been used to define treaty-based rights as equivalent to already existing constitutional and statutory rights, to block domestic enforcement of treaty rights by courts, and to preserve the same federal-state allocation of implementation authority that exists for statutory legislation.”).

42. For example, President Jimmy Carter signed CEDAW for the United States in 1980. See 126 CONG. REC. 29, 358 (1980) (recording the signing on July 17, 1980). However, the treaty has not yet been ratified. “Opposition in the United States has been couched in the language of jurisdiction and sovereignty.” Resnik, *supra* note 23, at 1110. Similar concerns about “American ‘exceptionalism’ and . . . sovereignty blocked Senate ratification after President Jimmy Carter signed the *International Covenant on Economic, Social, and Cultural Rights*.” Robert S. Lawrence et al., “*The First Wealth Is Health*”: *The Nexus of Health, Poverty, and the Law*, 15 GEO. J. ON POVERTY L. & POL’Y 583, 587 (2008).

43. Hussain, *supra* note 27, at 685.

44. VCCR, *supra* note 25, art. 36.

45. “Article 36 was specifically cited as an essential tool for effective protection of U.S. citizens abroad, one which served as a deterrent (though by no means a perfect one) against abuse in countries with little to no protection from abuse within their criminal justice systems.” Margaret E. McGuinness, Medellin, *Norm Portals, and the Horizontal Integration*

the Optional Protocol to the VCCR, submitting itself to the jurisdiction of the International Court of Justice (ICJ) for all disputes among treaty parties arising out of the VCCR provisions.⁴⁶

While the VCCR clearly touches on matters of U.S. foreign policy, a somewhat ill-defined area in which federal predominance is generally undisputed, the rights guaranteed by the VCCR must be administered within the context of the criminal justice system, an area traditionally reserved to the states.⁴⁷ Thus, because the VCCR guarantees foreign nationals protections at the time of arrest, and because most arrests occur under state authority, implementing and enforcing the VCCR—as well as remedying any violations—often must occur at the state level, at least in the first instance.

Although the constitutionality of article 36 as an exercise of the treaty power has never been challenged, it is almost certainly valid under the *Holland* doctrine. *Holland* suggests that a treaty that does not contravene any prohibitory words of the Constitution will be valid as long as it does not conflict with any “invisible radiation” surrounding the Tenth Amendment.⁴⁸ The holding indicates that the scope of this invisible radiation must be tested in light of the national interest at stake.⁴⁹ The Court has repeatedly recognized that providing standards for the reciprocal treatment of nationals abroad is a core national interest.⁵⁰ In this way, the VCCR is quite similar to other treaties that courts have previously found to be valid.⁵¹ Thus, under

of International Human Rights, 82 NOTRE DAME L. REV. 755, 791 (2006) (citing *U.S. Citizens Imprisoned in Mexico: Hearings Before the Subcomm. on International, Political, and Military Affairs*, 94th Cong. pt. 2, at 6 (1975) (statement of Leonard F. Walentynowicz, U.S. Dep’t of State)).

46. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes (Apr. 24, 1963), 27 U.S.T. 77, 596 U.N.T.S. 487.

47. As Alexander Hamilton wrote in the *Federalist* papers, “the ordinary administration of criminal and civil justice” belongs to the states. THE FEDERALIST No. 17 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

48. *Missouri v. Holland*, 252 U.S. 416, 433-34 (1920).

49. *Id.* at 435.

50. *See Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (“Treaties for the protection of citizens of one country residing in the territory of another are numerous, and make for good understanding between nations.”).

51. *See id.* at 340-41 (referring to a reciprocal rights treaty with Japan guaranteeing citizens abroad certain enumerated rights); *Geofroy v. Riggs*, 133 U.S. 258, 266-67 (1890) (referring to a treaty addressing inheritance rights); *United States v. Lue*, 134 F.3d 79, 83-84 (2d Cir. 1998) (referring to a treaty requiring criminal penalties for foreign nationals convicted of hostage-taking activities).

Holland, VCCR's article 36 is likely an acceptable exercise of the treaty power.⁵²

However, under the revisionists' view of the treaty power, the VCCR would be subject to both subject matter and structural challenges. With respect to subject matter, the question is whether Congress's domestic constitutional authority could extend to requiring states to comply with the VCCR's notification requirement and ordering state courts to provide a remedy for any violation. This is a tricky question given that it brings the well-established federal authority over immigration and foreign affairs into direct conflict with the states' "primary authority for defining and enforcing the criminal law."⁵³ Perhaps an even more significant hurdle would be a challenge to the notification requirement under the anticommandeering doctrine. Commentators are conflicted as to whether the notification provision of the VCCR would survive.⁵⁴

My purpose here is not to resolve this hypothetical, but rather to suggest that this ambivalence surrounding the VCCR—and the validity of treaty claims more generally—has translated into unwillingness by federal actors to take action to enforce its mandates, rather than a problem of constitutional interpretation. A review of the history of the article 36 litigation reveals that, through adopting a series of self-imposed limitations, federal actors have stymied their own implementation authority and ensured that without state participation, the United States will continue to violate its VCCR obligations.

A. *Breard and LaGrand*

Despite the important role the states play in administering article 36, little was done after the ratification of the VCCR to inform them of

52. *But see* Molora Vadnais, *A Diplomatic Morass: An Argument Against Judicial Involvement in Article 36 of the Vienna Convention on Consular Relations*, 47 U.C.L.A. L. REV. 307, 326 (1999).

53. *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (internal quotation marks omitted)).

54. *Compare* Cyril Robert Emery, *Treaty Solutions from the Land Down Under: Reconciling American Federalism and International Law*, 24 PENN ST. INT'L L. REV. 115, 133-34 (2005) (suggesting that application of the anticommandeering doctrine to the treaty power could prevent implementation of the VCCR), *with* Joshua A. Brook, *Federalism and Foreign Affairs: How To Remedy Violations of the Vienna Convention and Obey the U.S. Constitution, Too*, 37 U. MICH. J.L. REFORM 573, 592-94 (2004) (arguing that anticommandeering doctrine should not apply to treaties or their implementing legislation).

their treaty obligations.⁵⁵ “State and local police forces thus operated in blissful ignorance of the requirement, with the result that noncompliance was widespread.”⁵⁶ The United States’ ongoing failure to ensure that foreign nationals received their treaty rights began to be challenged in state, federal, and international courts, as other States parties protested the imposition of the death penalty on their citizens who had been denied their treaty rights while in U.S. custody.⁵⁷ For the most part, however, the federal government has taken the position that it lacks the authority to compel the states to offer any kind of remedy for their violations of the VCCR, and thus has sent the message that compliance with the treaty is optional.⁵⁸

This pattern of federal deference to the states’ authority over their own criminal prosecutions was set early on in the VCCR litigation. The first case to reach the Supreme Court was that of Angel Francesco Breard, a Paraguayan citizen, who had been sentenced to death in Virginia state courts for attempted rape and murder.⁵⁹ His petition for a writ of habeas corpus argued that the Virginia authorities had violated his rights under the VCCR by failing to inform him of his right to have the Paraguayan Consulate notified of his arrest.⁶⁰ Both the federal district court and the United States Court of Appeals for the Fourth Circuit refused to hear his claim based on the state law of procedural default—that is, the courts determined that because Breard had failed to raise his claim at trial, he had forfeited his right to raise it through habeas review.⁶¹ Paraguay then filed its own case against Virginia seeking to vacate Breard’s conviction, which was promptly dismissed on sovereign immunity grounds.⁶²

The executive was little more responsive to Paraguay’s concerns than the federal courts. While Paraguay’s case against Virginia was

55. In fact, at the time of its adoption, “Congress did not pass any legislation . . . requiring federal law enforcement agents to follow Article 36.” McGuinness, *supra* note 45, at 795.

56. *Id.* at 796.

57. *Id.* at 796-98, 840-42.

58. There is an important exception to this general pattern, a memorandum issued by President George W. Bush to the Attorney General instructing state courts to review and reconsider cases involving alleged violations of the VCCR rights of Mexican citizens. See discussion *infra* Part II.B.

59. Jonathan I. Charney & W. Michael Reisman, *Agora*: Breard, 92 AM. J. INT’L L. 666, 666-67 (1998).

60. *Id.*

61. Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996), *aff’d*, 134 F.3d 615 (4th Cir. 1998).

62. Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1272-73 (E.D. Va. 1996), *aff’d*, 134 F.3d 622 (4th Cir. 1998).

pending, the State Department issued a formal apology to Paraguay for what it acknowledged was a breach of the VCCR, but still took the position that the VCCR created no individually enforceable rights that foreign nationals could enforce in U.S. courts.⁶³ Moreover, when Paraguay sought relief from the ICJ, the executive effectively disregarded the resulting order that the United States prevent Breard's execution while Paraguay's case against the United States before the ICJ was pending.⁶⁴ Solicitor General Seth Waxman filed a brief in the U.S. Supreme Court adopting the position that the United States was not bound by the ICJ's order and arguing for a denial of the stay.⁶⁵ Although Secretary of State Madeleine Albright sent a letter to Virginia Governor Jim Gilmore asking him to stay the execution out of principles of comity,⁶⁶ she noted that the United States' position was to support the State and that the ICJ's order was "nonbinding."⁶⁷

The Supreme Court ultimately denied the stay of execution and the request for relief.⁶⁸ The Court acknowledged that as a treaty ratified by the United States, the VCCR is the "supreme law of the land," but held that the State's procedural default rule barred Breard from raising this claim.⁶⁹ The Court explained that the VCCR expressly contemplates that it "shall be exercised in conformity with the laws and regulations of the receiving State," and thus found that the VCCR did not displace a basic rule of state criminal procedure.⁷⁰ Ignoring Secretary Albright's request, the State of Virginia executed

63. See William J. Aceves, *International Decision: Case Concerning the Vienna Convention on Consular Relations*, 93 AM. J. INT'L L. 924, 927-28 (1999).

64. Frustrated by its treatment in U.S. courts, Paraguay had filed a complaint and an application for the indication of provisional measures in the ICJ. The complaint alleged that the United States had violated article 36 and should not be permitted to use the procedural default doctrine to bar review of a VCCR claim. Paraguay requested that Breard's conviction be vacated. See Application of the Republic of Paraguay, Vienna Convention on Consular Relations (Apr. 3, 1998), <http://www.icj-cij.org/docket/files/99/7183.pdf>.

65. Brief for the United States as Amicus Curiae at 49-51, *Breard v. Greene*, 523 U.S. 371 (1998) (Nos. 97-1390, 97-8214).

66. Letter from Madeleine K. Albright, U.S. Sec'y of State, to James S. Gilmore III, Governor of Va. (Apr. 13, 1998).

67. See Charney & Reisman, *supra* note 59, at 667.

68. See *Breard*, 523 U.S. at 378-79 (per curiam).

69. *Id.* at 375-77.

70. *Id.* at 375-76 (quoting VCCR, *supra* note 25, art. 36(2)). The Court also noted that the procedural default rule was adopted after the VCCR and thus displaced the VCCR under the last in time principle. *Id.*

Breard before the ICJ issued its decision on the merits.⁷¹ After the execution, Paraguay withdrew its case.⁷²

The *Breard* pattern was repeated in the cases of Karl and Walter LaGrand, two German citizens who were sentenced to death in Arizona.⁷³ Both raised their VCCR claims for the first time on collateral review.⁷⁴ After Karl was executed, Germany sued the United States in the ICJ and separately requested a stay of Walter's execution pending the ICJ's decision in the case.⁷⁵ The ICJ issued a stay order,⁷⁶ but again the Supreme Court refused to delay the execution.⁷⁷ Walter was executed before the ICJ's ruling, but unlike Paraguay, Germany continued to litigate and ultimately prevailed before the ICJ, which held that the United States had violated Germany's rights under the VCCR.⁷⁸ Further, the ICJ held the United States was obligated, in cases of conviction and death sentence obtained in violation of the VCCR, to "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention," notwithstanding any kind of state procedural bar.⁷⁹

The *Breard* and *LaGrand* cases demonstrate what has become the federal attitude towards state actors in VCCR enforcement. That is, the executive branch has generally adopted a deferential posture towards the states' VCCR enforcement efforts, limiting itself to educating state and local officials as to what the VCCR entails and to encouraging the states to comply with its mandates, while at the same time, taking the position that the VCCR does not create judicially enforceable individual rights, but rather must be invoked and protected through diplomatic channels between VCCR parties.⁸⁰ In both *LaGrand* and

71. Aceves, *supra* note 63, at 927.

72. See Scott W. Lyons, *Breach Without Remedy in the International Forum and the Need for Self-Help: The Conundrum Resulting from the Medellín Case*, 13 LEWIS & CLARK L. REV. 73, 78 (2009).

73. Aceves, *supra* note 63, at 924.

74. See Lyons, *supra* note 72, at 78.

75. *LaGrand Case (Germ. v. U.S.)*, 1999 I.C.J. 9 (Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Federal Republic of Germany of Mar. 2).

76. *LaGrand Case (Germ. v. U.S.)*, 1999 I.C.J. 9 (Provisional Measures Order of Mar. 3).

77. See *Federal Republic of Germany v. United States*, 526 U.S. 111, 112 (1999).

78. *LaGrand Case (Germ. v. U.S.)*, 2001 I.C.J. 466, 516 (June 27).

79. *Id.*

80. Prior to *Breard*, "[T]he [notification] requirement [was] not . . . tak[en] very seriously . . . including not by the federal government. A periodic State Department notice sent to the states' attorneys general was the federal government's only attempt to urge compliance . . ." Elizabeth Samson, *Revisiting Miranda After Avena: The Implications of Mexico v. United States of America for the Implementation of the Vienna Convention on*

Breard, the executive's litigation position undermined its message to the States that they have the obligation to enforce the VCCR's provisions and provided the Supreme Court with a clear path to denying petitioners' VCCR claims based on state law barriers.⁸¹

B. *Medellín and Sanchez-Llamas*

Despite these early losses in federal court, States parties to the VCCR have continued to seek remedies for violations of VCCR rights in the United States. Although the ICJ judgment came too late for the *LaGrand* brothers, it was significant for José Ernesto Medellín, a Mexican national who was sentenced to death in Texas.⁸² Medellín raised his article 36 claim for the first time in his federal habeas corpus petition, and while this case was pending, the Mexican government initiated proceedings in the ICJ against the United States, alleging violations of the VCCR in the case of Medellín and fifty-three other Mexican nationals who had been sentenced to death in state criminal proceedings.⁸³ On March 31, 2004, the ICJ issued its decision in *Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*.⁸⁴ The court found that the United States was in breach of its VCCR obligations and ordered that U.S. courts give the death row inmates effective "judicial review and reconsideration" without applying procedural default rules to block defendants' claims.⁸⁵ Medellín's attorneys returned to U.S. courts to enforce the judgment of

Consular Relations in the United States, 29 FORDHAM INT'L L.J. 1068, 1116 (2006). After the *Breard* and *LaGrand* cases, the executive branch did make a significant effort to inform state and local officials about their obligations under the Convention. The State Department launched a "broad educational program to inform local and state police, prosecutors, and courts about the notification requirement." McGuinness, *supra* note 45, at 824. These efforts did bring about some results. Some states "published their own guidelines on consular notification to local police." *Id.*

81. McGuinness, *supra* note 45, at 824-25.

82. *Id.* at 755.

83. Mexico argued that the United States should be ordered to overturn the convictions and sentences of the Mexican nationals whose proceedings occurred in violation of the United States' international legal obligations. *Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) (Avena)*, 2004 I.C.J. 128, at *20 (Judgment of Mar. 31, 2004). Mexico further requested that the United States be ordered to take "steps necessary and sufficient" to ensure that domestic law gave full effect "to the purposes for which the rights afforded by Article 36 are intended" and "establish a meaningful remedy at law for violations of the rights afforded to Mexico and its nationals by Article 36 of the Vienna Convention," including by removing any procedural bars for "failure timely [to] raise a claim or defence based on the Vienna Convention," in any case where the United States breached its notification obligations. *Id.* at *21-22.

84. *Id.*

85. *Id.* at *57.

the ICJ but had no success in the United States Court of Appeals for the Fifth Circuit.⁸⁶ The Supreme Court granted certiorari to consider the status of the ICJ judgment in U.S. courts.⁸⁷

However, before oral argument took place, a surprising development occurred. President George W. Bush issued a memorandum to the Attorney General directing state courts to give effect to the ICJ ruling in *Avena* and to review the cases of Medellín and the fifty other Mexican foreign nationals on death row.⁸⁸ The memorandum stated “that the United States [would] discharge its inter-national obligations under the decision of the International Court of Justice” and that it would do so “by having State courts give effect to the decision in accordance with general principles of comity.”⁸⁹ Simultaneously, however, the United States announced that it would be withdrawing from the compulsory jurisdiction of the ICJ over future VCCR disputes.⁹⁰ The Supreme Court then dismissed the writ as improvidently granted, and Medellín returned to the Texas Criminal Court of Appeals, requesting relief based on the ICJ decision and the Bush Memorandum.⁹¹

While Medellín’s case was in the Texas court system, the Supreme Court granted certiorari in the consolidated cases of *Sanchez-Llamas v. Oregon* and *Bustillo v. Virginia Department of Corrections* to consider the availability of an appropriate remedy for an article 36 violation.⁹² Bustillo’s case was similar to the earlier ones in that he raised his claim for the first time in habeas proceedings in

86. *Medellín v. Dretke*, 371 F.3d 270 (5th Cir. 2004). The Fifth Circuit acknowledged the ICJ judgment, but denied relief on the basis that Medellín’s claims were procedurally defaulted and its prior holding that the VCCR does not create individually enforceable rights. *Id.* at 279-80.

87. *Medellín v. Dretke*, 543 U.S. 1032, 1032 (2004).

88. Memorandum from President George W. Bush to the Attorney General (Feb. 28, 2005).

89. *Id.*

90. Frederic L. Kirgis, *Addendum to ASIL Insight, President Bush’s Determination Regarding Mexican Nationals and Consular Convention Rights*, ASIL INSIGHTS, Mar. 2005, <http://www.asil.org/insights/2005/03/insights050309a.html> (quoting letter from U.S. Sec’y of State Condoleezza Rice to the United Nations Secretary-General (Mar. 7, 2005) (announcing United States withdrawal from the Optional Protocol)).

91. *Medellín v. Dretke*, 544 U.S. 660, 666-67 (2005).

92. *See Sanchez-Llamas v. Oregon*, 546 U.S. 1001 (2005). In the consolidated cases, the Court granted certiorari to decide three issues: whether article 36 creates individual rights that may be invoked in a criminal or post-conviction proceeding, whether a violation of these rights requires suppression of any statements made to law enforcement as a remedy, and whether a state may treat a defendant’s article 36 claim as procedurally defaulted if he failed to raise it at trial. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 337 (2006).

Virginia.⁹³ Sanchez-Llamas, however, had filed a pretrial motion to suppress the statements he gave at the time of arrest on the grounds that they were involuntary and that he was not notified of his article 36 rights.⁹⁴ Despite the ICJ's decision, the United States again took the position that the VCCR creates no individual rights that can be enforced in U.S. courts.⁹⁵ However, in deciding the case, the Court never reached this enforceability issue. Rather, the Court assumed that article 36 creates judicially enforceable individual rights, but rejected its own authority to require state courts to provide a remedy.⁹⁶

Sanchez-Llamas had urged the Court to "require suppression for Article 36 violations as a matter of [its] 'authority to develop remedies for the enforcement of federal law in state-court criminal proceedings.'"⁹⁷ The Court rejected that argument, however, explaining that it "do[es] not hold a supervisory power over the courts of the several States" except to correct wrongs of constitutional dimension.⁹⁸ The Court concluded that "where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own."⁹⁹ Thus, in *Sanchez-Llamas*, the Court appears to have gone even further in its deference to state court authority and autonomy than it had in *Breard* and *LaGrand*: not only has the Court determined that state procedural rules trump treaty rights, but also that it is without authority to remedy even those violations of treaty rights that are properly invoked in the state judicial system.

Even after *Sanchez-Llamas*, however, there remained the possibility that VCCR violations could be remedied through executive action to enforce the ICJ's judgment. Following that case, Medellín returned to the Supreme Court, appealing a decision from the Texas Court of Criminal Appeals that rejected his claims for relief based on

93. *Sanchez-Llamas*, 548 U.S. at 341-42.

94. This motion was denied and Sanchez-Llamas was convicted and sentenced to over twenty years in prison. *Id.* at 340.

95. Brief for the United States as Amicus Curiae Supporting Respondents at 11-15, *Sanchez-Llamas v. Oregon*, 598 U.S. 331 (2006) (Nos. 05-51, 04-10566).

96. *Sanchez-Llamas*, 548 U.S. at 345-47.

97. *Id.*

98. *Id.* at 347 (quoting *Dickerson v. United States*, 530 U.S. 428, 438 (2000)) (internal quotation marks omitted).

99. The Court then went on to explain, apparently in dicta, why suppression would not in any event be an appropriate remedy for a treaty violation and concluded by reiterating the *Breard* holding that treaty claims could be procedurally defaulted under state law if not raised at trial. *Id.* at 347-60.

the *Avena* decision and the Bush Memorandum.¹⁰⁰ In a six-three decision, the Court affirmed the judgment of the Texas court, concluding that nothing in relevant treaties and case law indicated that the *Avena* judgment was binding on state courts and that the President could not unilaterally make an ICJ judgment binding.¹⁰¹ The majority noted:

[T]he Government ha[d] not identified a single instance in which the President ha[d] attempted (or Congress ha[d] acquiesced in) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws.¹⁰²

After the Supreme Court affirmed the Texas Court of Criminal Appeals' dismissal of his writ of habeas corpus, Medellín filed a subsequent writ of habeas corpus in the Texas Court of Criminal Appeals, seeking to stay his execution on the grounds that his case was still pending before the ICJ and that legislative action was possible both in the United States House of Representatives and the Texas Senate.¹⁰³ His request was rejected by both the Texas court and, ultimately, by the United States Supreme Court with four justices dissenting.¹⁰⁴ With no place left to turn in the federal government,

100. The Texas court had held that the *Avena* decision is not federal law that binds U.S. courts and concluded that the "President ha[d] exceeded his constitutional authority by intruding into the independent powers of the judiciary" to determine "what law to apply or how to interpret the applicable law." *Ex parte* Medellín, 223 S.W.3d 315, 335 (Tex. Crim. App. 2006).

101. Medellín v. Texas, 128 S. Ct. 1346, 1371-72 (2008).

102. *Id.* at 1372.

103. This application was based on "new developments," including the Supreme Court's decision in *Medellin* and Mexico's subsequent filing in the ICJ seeking to clarify the meaning of the *Avena* decision; the existence of a new bill in the United States House of Representatives that would have given the Mexican nationals the right to the "review and reconsideration" required by *Avena*,

the indication by a Texas Senator that he [would] introduce similar legislation . . . in the 2009 session; and . . . the fact that the Inter-American Commission on Human Rights, allegedly the only body to have reviewed *all* of the evidence pertaining to [Medellin's] Vienna Convention violation under the standard required by the ICJ . . . [had] issued its preliminary findings concluding [he] was prejudiced by the violation of his Vienna Convention rights.

Ex parte Medellín, 280 S.W.3d 854, 856 (Tex. Crim. App. 2008) (internal quotation marks omitted).

104. In rejecting the stay application, the majority relied upon the inaction of other federal actors to justify its decision. The majority noted:

It is up to Congress whether to implement obligations undertaken under a treaty which (like this one) does not itself have the force and effect of domestic law

Medellín then requested a stay of execution from Texas Governor Rick Perry.¹⁰⁵ Governor Perry promptly denied the stay, despite the pleas of the Supreme Court, President George W. Bush, Mexico, and the United Nations Secretary General.¹⁰⁶ Medellín was executed by the State of Texas on August 5, 2008.¹⁰⁷

The more recent VCCR cases continue the pattern set out in *Breard* and *LaGrand*. Notwithstanding the decision by the international court charged with resolving treaty disputes regarding the VCCR's obligations, the executive has maintained its view that VCCR rights can be implemented only through diplomatic efforts between signatory states. This position ignores the fact that history suggests that federalism concerns limit the executive's ability to offer any meaningful remedy to a state VCCR violation through diplomatic channels. In *Breard*, the United States adopted a deferential posture towards the State of Virginia, asking for Breard's execution to be stayed pending the ICJ judgment, while simultaneously arguing to the Supreme Court (and assuring the state) that it had no legal obligation to do so.¹⁰⁸ The executive's request was summarily ignored.¹⁰⁹ The only relief the United States was able to offer was a formal apology to Paraguay for the violation.¹¹⁰ Similarly, Medellín was executed despite

sufficient to set aside the judgment or the ensuing sentence, and Congress has not progressed beyond the bare introduction of a bill in the four years since the ICJ ruling and the four months since our ruling in *Medellín v. Texas*.

This inaction is consistent with the President's decision in 2005 to withdraw the United States' accession to jurisdiction of the ICJ with regard to matters arising under the Convention. *Medellín v. Texas*, 129 S. Ct. 360, 361 (2008) (citation omitted).

In dissent, Justice Stevens reiterated his concerns about the decision's impact upon the United States' international reputation, because "[b]alancing the honor of the Nation against the modest burden of a short delay to ensure that the breach is unavoidable convince[d] [him] that the application for a stay should be granted." *Id.* at 362. Both Justices Ginsburg and Souter argued a stay of execution should be granted until the conclusion of the proceedings before the ICJ. *Id.* at 362-63. Justice Souter would also have granted the stay to give time for Congress to act on the Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong., 2d Sess. (2008). *Id.* Justice Breyer agreed with Justices Ginsburg and Souter, but also explicitly stated that Medellín's execution placed the United States in violation of international law. *Id.* at 363-64.

105. See James C. McKinley Jr., *Texas Executes Mexican Despite Objections*, N.Y. TIMES, Aug. 6, 2008, at A19.

106. See *id.*

107. Lyons, *supra* note 72, at 74.

108. *Breard v. Greene*, 523 U.S. 371, 376-78 (1998).

109. *Id.*

110. One scholar has characterized this case as "a classic example of the inertness (perhaps deliberately chosen) of the federal government under a mistaken interpretation of its inability to mandate state compliance with U.S. treaty obligations." Craig Jackson, *The Anti-*

requests from President George W. Bush (himself a former Texas governor) and from several members of the Supreme Court.¹¹¹ Because of the federalist structure of criminal prosecutions, the vast majority of VCCR violations will occur in cases like *Breard* and *Medellín*, thus the diplomatic efforts will not be between the VCCR parties, but rather between the United States' federal government and the noncomplying state. The United States' ability to offer a diplomatic solution will therefore depend upon its ability to coax states into acknowledging and offering a remedy for VCCR violations.

Moreover, it now appears that the executive actually lacks the ability to require states to remedy VCCR violations (and arguably, the ability to require implementation of the treaty).¹¹² The sole (and limited) coercive enforcement effort undertaken by the executive branch in any of the VCCR cases, the Bush Memorandum, was rejected first by the Texas Criminal Court of Appeals and ultimately by the Supreme Court as infringing upon the prerogatives of federalism.¹¹³ Although stating that the "President may comply with the treaty's obligations by some other means," consistent with our constitutional structure, the Court in *Medellín* neglected to articulate what those "means" would be.¹¹⁴ Thus, after *Medellín*, the executive branch may be left in the position of asking for state cooperation in VCCR implementation, but having no redress if such cooperation is not forthcoming.

Commandeering Doctrine and Foreign Policy Federalism—The Missing Issue in Medellín v. Texas, 31 SUFFOLK TRANSNAT'L L. REV. 335, 363 (2008).

111. *Id.* at 336-39.

112. At the very least, the executive appears to lack the ability to enforce treaties deemed to be non-self-executing. See *Medellín v. Texas*, 128 S. Ct. 1346, 1371 (2008). There is precedent to suggest that the executive may bring suit in federal court to enforce self-executing treaties. See *Ku*, *supra* note 11, at 516-18. However, given the heightened bar that *Medellín* appears to impose on finding self-execution, it seems likely that the VCCR will ultimately be found to be non-self-executing, at least by the traditional definition. See *infra* note 138 and accompanying text.

113. Notably, even while asserting federal authority to enforce the *Avena* judgment, President Bush assured the states that such "interference" would not occur in the future by withdrawing from the Optional Protocol submitting the United States to the jurisdiction of the ICJ to resolve disputes over VCCR rights. It is possible, therefore, that the judicial players in this case felt that the President's effort lacked serious commitment to obtaining relief. In rejecting the Bush Memorandum, the Texas Court of Criminal Appeals indicated that it might have looked more favorably upon an Executive Agreement between the United States and Mexico. *Ex parte Medellín*, 223 S.W.3d 315, 342-43 (Tex. Crim. App. 2006). Whether that is true or not, the Administration took no additional steps after that decision to buffer Executive authority or to persuade Congress.

114. *Medellín*, 128 S. Ct. at 1371.

The federal courts also appear to have abdicated responsibility for remedying VCCR violations. Despite the fact that the Supreme Court has yet to find that article 36 is judicially unenforceable, most federal courts that have addressed this question have reached this conclusion on their own.¹¹⁵ Thus, federal courts have tied their own hands. Like the federal executive, the federal judiciary is now in the position of requesting and encouraging state compliance with the VCCR while simultaneously denying its own ability to do anything to compel it. Justice Stevens acknowledged this in his *Medellín* concurrence. He noted:

Under the express terms of the Supremacy Clause, the United States' obligation to "undertak[e] to comply" with the ICJ's decision falls on each of the States as well as the Federal Government. One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation. Texas' duty in this respect is all the greater since it was Texas that—by failing to provide consular notice in accordance with the Vienna Convention—ensnared the United States in the current controversy. Having already put the Nation in breach of one treaty [the VCCR], it is now up to Texas to prevent the breach of another [the Optional Protocol].¹¹⁶

Justice Stevens then went on to urge Texas to take on the "modest cost of compliance" and review and reconsider *Medellín's* sentence.¹¹⁷ Texas, of course, rejected this request.¹¹⁸

Thus, the result of *Sanchez-Llamas* and *Medellín* is that state violations of article 36 cannot currently be remedied by the federal government. Without undermining the validity of the VCCR as a legal matter or declaring it unenforceable in U.S. courts, the Supreme Court (usually in concert with the executive) has left VCCR enforcement

115. Federal courts have "whenever possible . . . sidestepped the question of whether the treaty creates individual rights—typically by concluding that remedies such as suppression of evidence or dismissal of an indictment are not available even if the treaty creates individual rights." *United States v. Emuegbunam*, 268 F.3d 377, 391 (6th Cir. 2001). Generally, those that have reached the issue have rejected the claim in both criminal prosecutions and in civil cases brought pursuant to § 1983. *See id.* at 391-94 (criminal); *Mora v. New York*, 524 F.3d 183 (2d Cir. 2008); *Cornejo v. County of San Diego*, 504 F.3d 853, 859-64 (9th Cir. 2007) (holding that article 36 does not create judicially enforceable individual rights); *United States v. Jimenez-Nava*, 243 F.3d 192, 198-99 (5th Cir.), *cert. denied*, 533 U.S. 962 (2001) (criminal). *But see Jogi v. Voges*, 480 F.3d 822, 834-36 (7th Cir. 2007) (holding that article 36 gives rise to individually enforceable rights under § 1983).

116. 128 S. Ct. at 1374.

117. *Id.* at 1375.

118. *Ex parte Medellín*, 280 S.W.3d 854, 855 (Tex. Crim. App. 2008).

essentially to the good will of the states.¹¹⁹ This strategy worked in at least one case. In *Avena*, the ICJ expressed “great concern” that Oklahoma had already set a date for execution for one of the Mexican nationals, Osbaldo Torres, whose case was part of Mexico’s action in the ICJ.¹²⁰ Following the ICJ judgment, the Oklahoma Court of Appeals stayed Torres’ execution and ordered an evidentiary hearing on whether Torres had been prejudiced by the lack of consular notification.¹²¹ On the same day, Governor Brad Henry of Oklahoma commuted Torres’ death sentence to life without the possibility of parole.¹²² After the evidentiary hearing, the Oklahoma Court of Criminal Appeals held that Torres had failed to establish prejudice with respect to the guilt phase of his trial and that any prejudice with respect to the sentencing phase had been mooted by the commutation order.¹²³

The *Torres* case demonstrates that state government may exercise its independent authority to remedy violations of the VCCR. However, the federal *Medellín* case shows how impotent federal actors are when states refuse to do so. The significant point is that the United States’ ability to “speak in one voice” in its diplomatic negotiations over VCCR violations is entirely undermined by the executive’s inability to enforce national obligations on the states.

Of course, Congress could pass legislation implementing the ICJ judgment or providing a standard remedy for violations of the VCCR. The majority in *Medellín* repeatedly noted that “Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes.”¹²⁴ Although any action by Congress to implement the VCCR would likely be formally authorized under

119. In *Medellín*, the Court reiterated that “the United States’ interpretation of a treaty ‘is entitled to great weight,’” *Medellín*, 128 S. Ct. at 1361 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982)), and noted that “[t]he Executive Branch has unfailingly adhered to its view that the relevant treaties do not create domestically enforceable federal law.” *Id.* (citing Brief for United States as Amicus Curiae at 27-29, *Sumitomo*, 457 U.S. 176 (Nos. 80-2070, 81-24)).

120. Concerning *Avena* and Other Mexican Nationals (*Mex. v. U.S.*) (*Avena*), 2004 I.C.J. 128, at *21 (Judgment of Mar. 31).

121. See *Torres v. Oklahoma*, No. PCD-04-442, 2004 WL 3711623, at *1 (Okla. Crim. App. May 13, 2004).

122. In explaining his decision, Governor Henry emphasized that (1) the United States signed the VCCR, (2) that VCCR is “important in protecting the rights of American citizens abroad,” (3) the ICJ ruled that Torres’ rights had been violated, and (4) the U.S. State Department urged his office to give careful consideration to the United States’ treaty obligations. See Press Release, Office of Governor Brad Henry, Gov. Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004), http://www.ok.gov/governor/display_article.php?article_id=301&article_type=1.

123. *Torres v. State*, 120 P.3d 1184, 1188-90 (Okla. Crim. App. 2005).

124. *Medellín*, 128 S. Ct. at 1366; see *id.* at 1366 n.12.

Holland, it is unlikely to be forthcoming because it would require Congress to legislate deeply and specifically in an area of traditional state control. Given Congress's unwillingness in recent decades to rely upon the treaty power, even with the support of the *Holland* precedent, it seems unlikely that Congress will take this opportunity to pass legislation that would be so politically charged and that could set up a constitutional challenge.¹²⁵

The VCCR cases illustrate the multilayered complexities of enforcing international human rights treaties in our federalist system. Because criminal law has historically been an area reserved to the states, detaining officials are typically members of state and local law enforcement agencies.¹²⁶ Therefore, attempts to bring the United States into compliance with its treaty obligations under the VCCR have had to contend with the fact that proper implementation of the VCCR requires education and coordination of law enforcement officials in fifty states.¹²⁷ Furthermore, these prosecutions generally go forward in state courts. Thus, efforts on the part of criminal defendants to seek remedies for VCCR violations have brought treaty enforcement into direct conflict with state criminal procedure. Finally, federalism concerns have limited federal actors' willingness and ability to exert federal authority to remedy VCCR violations. This sends the signal to state actors that there is no consequence for their noncompliance.

Many international law scholars would and have argued that this is all smoke and mirrors—that a correct understanding of the Constitution renders treaty law the “Supreme law of the land,” and therefore, that the VCCR should be enforced in and on the states without regard to contradictory state law.¹²⁸ What the VCCR cases demonstrate, however, is that the present reality is far more challenging. Political and jurisprudential concerns about protecting the integrity of our federalist structure prevent federal actors from enforcing remedies for VCCR violations by the states. Any plan to

125. See *supra* note 42 and accompanying text.

126. Janet Koven Levit, *Does Medellín Matter?*, 77 *FORDHAM L. REV.* 617, 619 (2008).

127. This is despite the fact that “the underlying policy goal—that all foreign defendants should receive consular notification—has been accepted by the United States as a valuable objective deserving of governmental support and implementation.” *Leading Cases*, 120 *HARV. L. REV.* 303, 310-11 (2006) (citing Telegram from U.S. Department of State to All U.S. Diplomatic and Consular Posts Abroad Concerning Consular Assistance for American Nationals Abroad (Jan. 1, 2001), <http://www.state.gov/s/l/16139.htm> (“[C]onsular notification . . . has long been crucial to providing basic protective services abroad. . . . [T]he Department is working to improve our record domestically.”)).

128. See, e.g., Bradley, *supra* note 5, at 391-92; Davis, *supra* note 9, at 369-70; Ku, *supra* note 2, at 345-46.

move towards compliance with our international obligations must therefore take this reality into account. Moreover, rethinking this internationalist approach to VCCR implementation might well lead to more innovative and successful implementation strategies.

III. RESOLVING THE IMPASSE

As I have demonstrated, federal actors have been hesitant to cross traditional federalism boundaries to impose VCCR requirements on recalcitrant state actors. However, state authorities have been slow to fill the void created by lack of federal action, and, in fact, generally appear to have taken the view that federal inaction represents a license to ignore treaty mandates with impunity. Federalism principles have therefore presented a barrier to the enforcement of VCCR rights—that is, they have been interpreted to “protect” the criminal justice systems of the states from the intrusive authority of the federal government. This need not be the case, however. Federalism principles could also be interpreted not only to provide an opportunity for proactive state engagement in VCCR implementation, but also to require such engagement. Nonetheless, those most dedicated to VCCR enforcement have generally continued to push solely for the traditional internationalist view of treaty implementation.¹²⁹ In this Part, I will suggest that both practically and normatively, a dynamic federalist approach to implementation of the VCCR has much to offer. However, if this opportunity is to be exploited, it will necessitate reframing what federalism means in this context.

The dilemma in human rights treaty implementation is illustrative of the problems of traditional “dual federalism,” which, in its attempt to draw lines separating areas of state and federal authority, fails to recognize the reality that “[t]he federal government and the states have extensive areas of concurrent authority [i]n many realms, from narcotics trafficking to securities trading to education.”¹³⁰ In recent years, numerous scholars have also argued that as a normative matter, dual federalism fails to recognize the productive possibilities that could emerge from jurisdictional overlap.¹³¹ Properly understood, Robert Schapiro contends, “harness[ing] the gains that flow from the

129. Louis Henkin has gone so far as to say that federalism is “largely irrelevant to the conduct of foreign affairs.” HENKIN, *supra* note 32, at 149-50; *see also* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1078 (2000).

130. Schapiro, *supra* note 13, at 246 (footnotes omitted).

131. *Id.* at 246-48.

overlapping exercise of power” leads to “the valuable characteristics of plurality, dialogue, and redundancy.”¹³² Plurality refers to the possibility federalism offers for offering “a variety of different responses . . . encouraging policy experimentation.”¹³³ It captures the notion of the states as “laboratories,” and recognizes that “the appropriate regulations may differ from region to region.”¹³⁴ The experience of plurality is enhanced by the possibility of dialogue between institutional actors, permitting further innovation resulting from shared experiences.¹³⁵ Finally, “Regulatory overlap facilitates redundancy as well. If one set of regulators fails to address the problem, another set provides an alternative avenue for relief.”¹³⁶

The VCCR cases present an interesting nuance on much of the existing federalism scholarship. Whereas most of that scholarship focuses on the problem of coordinating the actions of competing state and federal actors, in the VCCR cases, the problem is not one of competing action, but of consistent inaction. The United States’ VCCR obligations have fallen into a jurisdictional gap. The solution is therefore not just one of authority and coordination, but of ownership and responsibility. Presumably, therefore, the appropriate dynamic federalism model for treaty implementation must diverge somewhat from that posited by Powell, Resnik and others in the context of foreign affairs preemption.¹³⁷ Valid treaties bind the United States to particular international commitments. Thus it is not enough simply to create the space for state participation and experimentation. States must act to fill that space, and there must be a corrective mechanism if they do not. This is the current challenge in implementing the VCCR rights.

As a doctrinal matter, the space currently exists for state institutions to implement and remedy violations of the notification provision of the VCCR. The Supreme Court has thus far assumed that the VCCR is self-executing, which means that as a ratified treaty, the VCCR operates as federal law, thus requiring the states to enforce the

132. Robert A. Schapiro, *From Dualism to Polyphony*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION* 33, 43 (William W. Buzbee ed., 2009).

133. *Id.*

134. *Id.*

135. Schapiro references Kirsten Engel’s illustration of this phenomenon in the development of national low-emission vehicle standards. *Id.* at 44. See generally Engel, *supra* note 19, at 171-73.

136. Schapiro, *supra* note 132, at 44.

137. See generally Powell, *supra* note 14; Resnik, *supra* note 23.

rights therein.¹³⁸ The State Department also takes the position that “[i]mplementing legislation is not necessary (and the VCCR and bilateral agreements are thus ‘self-executing’) because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers.”¹³⁹ Thus, at present, the states have an affirmative obligation to take steps to ensure that foreign nationals receive their VCCR rights, and a number of them have done so.¹⁴⁰

However, states have been slow to fill this gap. Actual implementation of the VCCR rights by the states has been patchy. Only two states have amended their criminal codes to explicitly require police notification in all arrests, although additional states have considered proposals.¹⁴¹ “Texas has produced a sixty-seven page manual outlining requirements, procedures, and forms to be used in compliance with Article 36,” but has historically resisted implementing

138. See *Ku*, *supra* note 11, at 462 (noting the importance of the states in helping the United States reach compliance with non-self-executing treaties). *Medellín* may also have been a watershed decision in terms of defining or redefining what it means to declare a treaty “non-self-executing.” In a footnote, the Court noted this ongoing uncertainty and provided its own definition. The Court stated, “What we mean by ‘self-executing’ is that the treaty has automatic domestic effect . . . upon ratification. Conversely, a ‘non-self-executing’ treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.” *Medellín v. Texas*, 128 S. Ct. 1346, 1356 n.2 (2008).

As Steve Vladeck noted in the immediate aftermath of the decision, if this terse statement means that ratified treaties do not constitute binding federal law, “this is an extremely important development, and one that seems thoroughly at odds with the plain text of the Supremacy Clause (to wit, . . . ‘all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .’).” Posting of Steve Vladeck to *Opinio Juris*, <http://opiniojuris.org/2008/03/25/Medellin-non-self-executing-treaties-and-the-supremacy-clause/> (Mar. 25, 2008 13:52 EST) (quoting U.S. CONST. art. VI, cl. 2). Nonetheless, at least one state court has already concluded that this statement means that the VCCR is not enforceable federal law. *Gikonyo v. State*, 283 S.W.3d 631, 636 (Ark. App. 2008).

139. See *Consular Notification and Access, Part 5: Legal Material*, http://travel.state.gov/law/consular/consular_744.html (last visited July 7, 2009).

140. Moreover, because the Supreme Court has carefully avoided rejecting the position that the VCCR creates a judicially enforceable individual right, it has actually created an opening for state courts to engage directly with the VCCR. That is, the Court has left space for state courts to determine independently whether the VCCR is enforceable and then to design a remedy for any violation consistent with state law. However, in practice, this has not led to more judicial engagement with treaty rights. Most state courts have followed the majority of lower federal courts in finding the VCCR unenforceable. See, e.g., *State v. Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001), *cert. denied*, 535 U.S. 937 (2002); *State v. Sanchez-Llamas*, 108 P.3d 573, 578 (Or. 2005); *Kasi v. Commonwealth*, 508 S.E.3d 57, 64 (Va. 1998), *cert. denied*, 527 U.S. 1038 (1999); *State v. Navarro*, 659 N.W.2d 487, 494 (Wisc. Ct. App. 2003).

141. See CAL. PENAL CODE §§ 834c, 5028 (West 2000); OR. REV. STAT. § 181.642 (2005).

its requirements.¹⁴² Most states, however, have not taken proactive steps to incorporate the notification right into state law, and some have actively taken steps to flout the VCCR's requirements.¹⁴³

Numerous reasons have been proposed for the states' failure to comply with the VCCR's mandate, including lack of knowledge and lack of capacity.¹⁴⁴ However, given that most courts—both state and federal—have found the VCCR to be judicially unenforceable, there is also no consequence for noncompliance, particularly now that the Supreme Court has found that neither the executive nor the federal courts may step in to remedy state VCCR violations. Thus, the incentives for affirmative state action towards VCCR implementation are extremely weak. Additionally, there may still be ambiguity about the meaning of state action to enforce the VCCR—whether it is an expression of political cooperation or political defiance.¹⁴⁵

The challenge is to encourage states to see federalism as providing a mandate and not just creating a shield. Thus, the model of dynamic federalism that seems most appropriate in the context of the VCCR is one where the treaty provides a “floor” below which the states may not fall, but then leaves the specifics of implementation and remedy primarily in the hands of the states.¹⁴⁶ In his dissent in

142. Samson, *supra* note 80, at 1114; *see also* Reynaldo Anaya Valencia, Craig L. Jackson, Leticia Van de Putte & Rodney Ellis, *Avena and the World Court's Death Penalty Jurisdiction in Texas: Addressing the Odd Notion of Texas's Independence from the World*, 23 YALE L. & POL'Y REV. 455, 503 (2005).

143. Marc J. Kadish & Charles C. Olson, *Sanchez-Llamas v. Oregon and Article 36 of the Vienna Convention on Consular Relations: The Supreme Court, The Right to Counsel, and Remediation*, 27 MICH. J. INT'L L. 1185, 1232 (2006). Florida's statute explicitly states that “failure to provide consular notification under the Vienna Convention on Consular Relations . . . shall not be a defense in any criminal proceeding against any foreign national and shall not be cause for the foreign national's discharge from custody.” FLA. STAT. ANN. § 901.26 (West 2009). Compliance overall has improved due to the combined efforts of federal and state agencies, the members of the bar who litigate these cases, and the activities of nongovernmental organization and foreign nation-states. *See generally* Levit, *supra* note 126. However, even Professor Levit's analysis offers only this same handful of examples of state action on VCCR implementation, which seem insufficient to demonstrate a real sense of responsibility at the state level for treaty compliance.

144. Samson, *supra* note 80, at 1115-16.

145. For example, Martha Davis has recently suggested that “California's adoption of the Vienna Convention on Consular Relations standards could be seen as thumbing the state's nose at Congress's decision to not enact legislation implementing the treaty on the national level.” Martha Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 FORDHAM L. REV. 411, 421 (2008). I would offer an alternative explanation—that is, that California's adoption of the VCCR demonstrates its compliance with its designated role in treaty implementation in our federalist structure.

146. A “floor” requires states to comply with a “minimal required level of stringency or protection,” but permits state and local governments to offer “greater protection from risk.” William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling*

Sanchez-Llamas, Justice Breyer recognizes and proposes this model of dynamic federalism as a way to bring the state into compliance with its Convention obligations.¹⁴⁷

Justice Breyer would have held that the VCCR is self-executing and enforceable by individuals in U.S. courts.¹⁴⁸ He would not, however, have had the Supreme Court dictate a remedy for any VCCR violation.¹⁴⁹ Rather, he would have “remand[ed] the[] [consolidated] cases, thereby permitting the States to apply their own procedural and remedial laws, but with the understanding that the Federal Constitution requires that the application of those laws be consistent with the Convention’s demand for an effective remedy for an Article 36 violation.”¹⁵⁰ Breyer envisioned that state courts would develop remedies for VCCR violations that are consistent with state law. His proposal would have permitted treaty rights to be enforced differently in different states, with federal courts able to review state court decisions only to the extent of determining whether the state remedy is “effective” within the meaning of the VCCR. Thus, Breyer’s solution would create the possibility for dynamic federalism in the implementation of international human rights treaties because it would recognize that consular notification is neither inherently a “state” issue, nor a “federal” issue, but rather a challenge that could benefit from shared responsibility through jurisdictional overlap.¹⁵¹

Distinction, 82 N.Y.U. L. REV. 1547, 1558-59 (2007). By contrast, a ceiling, “[i]n its actual manifestations,” creates a “federal standard [that] coincides with or undercuts all other standards . . . leav[ing] no opportunity for modifications by others.” *Id.*

147. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 365-98 (2008).

148. *Id.*

149. *Id.*

150. *Id.* at 366.

151. Of course, the additional challenge that Breyer’s solution would face (even if a majority of the Court could be persuaded to his position) is the possibility that the VCCR will eventually be found to be non-self-executing or unenforceable in U.S. courts. Breyer’s model relies on the presumption that the VCCR is both (if indeed footnote 2 is intended to indicate that these are distinct concepts). *See supra* note 138 and accompanying text. If the VCCR is ultimately held to be non-self-executing, and non-self-execution means that the treaty does not even take effect until implementing legislation is passed, then states would be relieved not only of the duty to remedy violations of these rights, but of their responsibility for enforcing the VCCR, until such legislation is passed.

As I have previously explained, Congress could pass legislation under *Holland* codifying the rights guaranteed in the VCCR in federal law and structuring a standard remedy. But Congress is unlikely to be willing to risk the political consequences of passing implementing legislation that intrudes so deeply into an area otherwise controlled by the States. It might be more politically palatable, however, for Congress to pass implementing legislation that simply renders the ratified human rights treaty valid and judicially enforceable as part of U.S. law. This would protect Congress somewhat from the politically and practically challenging position of attempting to translate the VCCR into detailed domestic legislation as it has done

The advantages of this dynamic federalism model would in many ways be similar to those identified by proponents of the “floor” approach in other contexts in the way that it would help to capture the benefits of plurality, dialogue, and redundancy. States are impacted differently by the mandates of the VCCR, and thus “[t]here are many reasons why the optimal remedy . . . in one state might be different from the optimal remedy in another.”¹⁵² For example, VCCR violations have been and will probably continue to be more frequent in border states with large populations of foreign nationals.¹⁵³ In those states, it might make sense for the legislature to develop a standardized remedy for VCCR violations. By contrast, in states in which violations are rare, legislatures might choose to permit their courts to develop individualized remedies for particular cases that are consistent with the VCCR’s demand for an effective remedy. It is possible that some states might choose to offer an “effective remedy” through the payment of damages in a 42 U.S.C. § 1983 action, rather than in the course of the original criminal prosecution.¹⁵⁴ Additionally, a state in which the opportunities for violation are infrequent might determine that it would rather bear the cost of remedying the occasional violation (and the potential damage to the prosecution) than invest extensively in training its law enforcement officials to ensure full compliance with the VCCR’s mandates. Conversely, in a state in which foreign nationals make up a larger part of the population, and a correspondingly larger percentage of arrestees, an upfront investment in retraining law enforcement to notify all arrestees of their VCCR rights might be the more attractive option. As state courts and legislatures explored the

with the treaties that it has ratified. And it would place them into a position in which Breyer’s solution would be workable.

152. Ilya Somin, *A Floor, Not a Ceiling: Federalism and Remedies for Violations of Constitutional Rights in Danforth v. Minnesota*, 102 NW. U. L. REV. COLLOQUY 365, 371 (2008).

153. *See id.*

154. Defining a floor for remedying VCCR treaty violations would be somewhat more complicated than for the human rights treaties discussed in Part IV *infra*, as the rights guaranteed by VCCR protect the rights of the nation-state, not just its citizen. *See, e.g.*, Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) (Avena), 2004 I.C.J. 128, at *12, *19 (Judgment of Mar. 31). The Government of Mexico requested a finding from the ICJ “that the United States, in arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals on death row . . . violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals” *Id.* Therefore, it is unclear whether the payment of damages would actually satisfy the VCCR’s demand for an effective remedy. However, some forms of individual relief would presumably satisfy the State. In its petition to the ICJ, for example, Mexico requested that the convictions and sentences of its nationals be vacated. *Id.* at *20-21.

potential paths to VCCR compliance (either through additional investment in avoiding violations or additional investment in remedying those that occur), the dialogic opportunities of federalism would be realized. That is, state courts and legislatures could learn from each other's successes and failures, modifying their own policies based on lessons learned from the laboratory of the fifty states. Finally, the interaction of state and federal efforts to encourage treaty compliance and to remedy violations would offer the benefit of redundancy.

Beyond these traditional benefits, adopting a dynamic federalist approach in the particular context of international human rights treaty implementation could have an additional advantage. Returning to the initial problem with which I began, federalism concerns, both doctrinal and political, have impeded the United States' ability to meet its international obligations under the VCCR. Therefore, "By leaving much of the incorporation, implementation, and execution of international law to the states, the federal government [could] confer the greatest amount of political legitimacy on the new international law."¹⁵⁵ This is not to say that placing states in the primary position of remedying VCCR rights would eliminate noncompliance. I have argued that the states already occupy this position and yet few have really engaged with this role.¹⁵⁶ A federal mandate to states to take on that role—enforced by federal review power—is clearly necessary if the United States, as a nation, is to meet its international obligations. Nonetheless, a federal review power that allows and encourages states to be the primary innovators and that obviates the need for detailed incursions into the workings of state criminal processes could help make the intrusion that is required more palatable to those who must enforce it.¹⁵⁷

Given the potential benefits of a federalist approach to human rights treaty interpretation and implementation, it is interesting that little of the extensive scholarship exploring the new possibilities of federalism has suggested it in this context. This may be because the competition and policy variation that federalism permits may be viewed as incompatible with the United States' ability to speak with a

155. Ku, *supra* note 11, at 531-32.

156. *See supra* Part II.

157. A recent *New York Times* article suggested, for example, that the Obama Administration is open to experimenting with regulation through dynamic federalism. John Schwartz, *Obama Seems To Be Open to a Broader Role for States*, N.Y. TIMES, Jan. 30, 2009, at A16, available at http://www.nytimes.com/2009/01/30/us/politics/30federal.html?_r=1&scp=1&sq=federalism%20obama&st=cse.

single voice at the international level.¹⁵⁸ However, at least in the example of the VCCR, this view ignores the possibility that the opportunity for diverse interpretations is built into the treaty structure. The language of the VCCR acknowledges that the convention rights will be “exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.”¹⁵⁹ Therefore, the VCCR explicitly anticipates that the rights embodied in article 36 will be implemented differently by the States parties, in order to be consistent with national law. Thus, the “floor” solution simply replicates the global treaty structure within the federalist state.

Moreover, the controlled variation permitted by this type of federalist structure appears in a variety of forms in U.S. law, particularly in areas of overlap between state and federal authority. As I have explained, Justice Breyer’s proposal mirrors an existing phenomenon in U.S. law where federal law provides a minimum “floor” against which varying state policies are tested and ultimately approved or rejected.¹⁶⁰ In the regulatory context, space is often left for independent state initiatives that exceed federal regulatory minimums.¹⁶¹ “Such cooperative federalism schemes are especially prevalent in the environmental law field.”¹⁶² Examples include the Endangered Species Act, the Clean Water Act, and the Clean Air Act.¹⁶³ A floor approach has also been implemented in the context of insurance regulation.¹⁶⁴ At the most basic level, the states have long been free to set their own minimum wage rates above the federally mandated standard, and some have taken advantage of this opportunity

158. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). The “full and exclusive responsibility for the conduct of affairs with foreign sovereignties” lies with the federal government, and “the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.” *Id.*

159. See VCCR, *supra* note 25, art. 36(2).

160. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 365-98 (2006).

161. William W. Buzbee, *Federal Floors, Ceilings, and the Benefits of Federalism’s Institutional Diversity*, in PREEMPTION CHOICE, THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION, 98, 101 (William W. Buzbee ed., 2009).

162. *Id.*

163. See *id.* at 101 n.6 (citing 16 U.S.C. § 1531(c)(2) (2006) (Endangered Species Act); 33 U.S.C. § 1251(b) (2006) (Clean Water Act); 42 U.S.C. § 7402(a) (2006) (Clean Air Act)).

164. See Note, *Public-Private Partnerships and Insurance Regulation*, 121 HARV. L. REV. 1367, 1380 (2008) (describing the use of a regulatory floor in the context of implementing the Medicaid Partnership for Long-Term Care).

to increase wage minimums during periods where the federal wage rates stagnated.¹⁶⁵

The Supreme Court has also incorporated a floor approach into federal constitutional jurisprudence.¹⁶⁶ In these cases, the “floor” often emerges out of the dialogue between sovereigns.¹⁶⁷ In the area of criminal law and procedure, Robert Cover and Alexander Aleinikoff have detailed how the Warren Court provided a general outline of the rights to which criminal defendants are entitled under the federal Constitution.¹⁶⁸ These rights were then interpreted and clarified through a dialogue between state criminal courts, which dealt with these principles in the first instance, and federal courts, which considered the same issues again on habeas.¹⁶⁹ New understanding arose out of the conversation enabled by jurisdictional overlap between separate sovereigns. Sometimes, the result of this process was that the Supreme Court ultimately weighed in, setting a federal standard which binds the states. For example, in *Batson v. Kentucky*, the Supreme Court considered how state courts had been handling questions of racial discrimination in the selection of juries before reaching its decision.¹⁷⁰ “By allowing the issue to ‘percolate’ in the state courts, the United States Supreme Court was able to draw from a broad body of law before revisiting its decision in *Swain v. Alabama*.”¹⁷¹ However, in other cases, the Court appears to have concluded that the constitutional standard could tolerate diversity. For example, despite numerous challenges, the Supreme Court has refused to impose a unanimity requirement for criminal convictions, finding that a variety of numerical possibilities satisfy the constitutional standard.¹⁷² Diversity

165. Franklin Foer, Essay: The Joy of Federalism (Mar. 6, 2005), <http://query.nytimes.com/gst/fullpage.html?res=9405EFDF143DF935A35750C0A9639C8B63&scp=3&sq=federalism&st=cse>.

166. See generally Buzbee, *supra* note 146.

167. See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1048 (1977).

168. *Id.* at 1045.

169. See *id.* at 1035-37. See generally Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

170. 476 U.S. 79, 82 n.1, 83, 99 n.22 (1986).

171. Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 206 (1998) (citing *Swain v. Alabama*, 380 U.S. 202 (1965)).

172. See *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972) (approving 11-1 or 10-2 jury verdicts); *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972) (approving 9-3 verdict). Other cases, however, make clear that there is some constitutional floor that states must meet. See *Burch v. Louisiana*, 441 U.S. 130, 134 (1979) (holding nonunanimous six-person jury unconstitutional); *Ballew v. Georgia*, 435 U.S. 223, 228 (1978) (holding jury of fewer than five persons unconstitutional).

in the implementation of fundamental rights has thus consistently been a part of our jurisprudential landscape.

Finally, in the recent decision *Danforth v. Minnesota*,¹⁷³ the Court chose to limit the preemptive power of its own decisions and create a “floor” structure for remedying federal constitutional violations.¹⁷⁴ In *Danforth*, the Court freed state courts to determine independently whether to apply new rules of constitutional criminal procedure retroactively, finding that state courts may provide victims of *federal* constitutional rights violations broader remedies than those mandated by its own decisions.¹⁷⁵ Thus, although the federal courts remain the ultimate arbiters of determining when a federal right has been violated, there is still space for state courts to participate in the dialogue about how best to remedy these violations. In reaching this holding, the Court acknowledged the predominant role of state courts in managing state criminal prosecutions.¹⁷⁶ It explained that the “federalism and comity” concerns that animated the presumption against retroactivity are inapplicable when state courts are reviewing their own convictions, and noted that there is “fundamental interest in federalism that allows individual States to define crimes, punishments, rules of evidence, and rules of criminal and civil procedure in a variety of different ways—so long as they do not violate the Federal Constitution.”¹⁷⁷ The Court indicated, therefore, a willingness to permit a dialogic floor approach to federal constitutional law in traditional areas of state control and expertise.¹⁷⁸

Finally, and perhaps most significantly, a floor approach already seems to be in effect in some areas of private international law. As Julian Ku has illustrated, the states have been instrumental in implementing the United States’ private law treaty obligations.¹⁷⁹ He notes, “In many cases, states will work to enact state-level legislation that implements private international law treaty obligations alongside

173. 128 S. Ct. 1029 (2008).

174. *See generally* Somin, *supra* note 152.

175. 128 S. Ct. at 1041-45.

176. *Id.* at 1047.

177. *Id.* at 1080-41.

178. Notably, the two dissenting justices argued that remedies for federal constitutional violations must be standardized because the Constitution requires “*uniformity* of decisions [on federal constitutional questions] throughout the whole United States.” *Id.* at 1053 (Roberts, C.J., dissenting) (quoting *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816)) (internal quotation marks omitted).

179. Julian G. Ku, *The Crucial Role of the States and Private International Law Treaties: A Model for Accommodating Globalization*, 73 MO. L. REV. 1063, 1064 (2008).

federal implementing legislation.”¹⁸⁰ Ku offers the Hague Convention on the Civil Aspects of International Child Abduction as an example.¹⁸¹ It was implemented by the federal International Child Abduction Remedies Act (ICARA), but “a number of states have still adopted the Uniform Child Custody and Enforcement Act so that state law can enforce an order for the return of the child without reference to federal law.”¹⁸² Ku explains that “these seemingly redundant laws ensure that private international law treaty obligations will be carried out at the level of government that most commonly deals with such matters.”¹⁸³

Thus, diversity in implementation does not necessarily mean chaos or noncompliance. Rather, correctly structured, it can be empowering, legitimizing, and educating.¹⁸⁴ The floor model of VCCR enforcement could permit a similarly structured and effective interaction in the context of human rights treaty implementation.

IV. EXTENDING THE MODEL

Federalism has thus far presented a barrier to compliance with the VCCR. However, in human rights treaty implementation, as in other areas of law, this need not necessarily be the case. A model of treaty interpretation that explicitly carves out space for state participation while maintaining a minimum floor of federal oversight could help to move past the current impasse in implementing article 36 and meeting the United States’ international obligations. This solution could be equally applicable—and perhaps even more significant—outside of the context of the VCCR.

Four of the major international human rights treaties were adopted with a “federalism” clause, which purports to leave implementation of treaty rights to the states in those areas that historically have been under state control.¹⁸⁵ The “federalism” clause attached to the ICCPR, for example, explains:

180. *Id.*

181. *Id.* at 1065.

182. *Id.* Ku also identifies the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, as one that has been translated into state law either through the adoption of the Uniform Law on Notarial Acts or through separate legislation. *Id.*

183. *Id.*

184. See generally Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313 (2004).

185. Henkin, *supra* note 36, at 341-46. Professor Henkin explains:

The “federalism” clause attached to U.S. ratifications of human rights conventions has been denominated an “understanding,” a designation ordinarily used for an interpretation or clarification of a possibly ambiguous provision in the

[T]he United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.¹⁸⁶

As a matter of international treaty law, this reservation creates no legal barriers to the acceptance of implementation of a treaty:

International law requires the United States to carry out its treaty obligations but, in the absence of special provision, does not prescribe how, or through which agencies, they shall be carried out. . . . [T]he United States [therefore can] leave the implementation of any treaty provision to the states [while] remain[ing] internationally responsible for any failure of implementation.¹⁸⁷

The presence of the federalism understanding in international human rights treaties ratified by the United States simply means that “[i]f

treaty. The federalism clause in the instruments of ratification of the human rights conventions is not an understanding in that sense, but may be intended to alert other parties to United States intent in the matter of implementation.

Id. at 345.

The United States has taken some action on seven major United Nations human rights treaties: the Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [the Genocide Convention]; the International Convention on the Elimination on all Forms of Racial Discrimination, *adopted* Dec. 21, 1965, 660 U.N.T.S. 195 [CERD]; the International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 [ICESCR]; ICCPR, *supra* note 4; the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 [CEDAW]; the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1456 U.N.T.S. 85 [CAT]; and the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [CRC]. Three of the seven treaties—the ICESCR, CRC, and CEDAW—have been signed but not ratified. *See* Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L L.J. 307, 309 (2007). The other four—the Genocide Convention, CERD, the ICCPR, and the Convention Against Torture—have been signed and ratified with a package of reservations, understandings, and declarations. *See* Connie de la Vega, *Human Rights and Trade: Inconsistent Application of Treaty Law in the United States*, 9 U.C.L.A. J. INT’L L. & FOREIGN AFF. 1, 12-13 (2004). Two of the four—the Genocide Convention and CAT—have been at least partially incorporated into domestic federal law through implementing legislation. *See* Lucien J. Dhooge, *A Modest Proposal To Amend the Alien Tort Statute To Provide Guidance to Transnational Corporations*, 13 U.C. DAVIS J. INT’L L. & POL’Y 119, 149-50 (2007); Linda M. Keller, *Is Truth Serum Torture?*, 20 AM. U. INT’L L. REV. 521, 546-48 (2005).

186. 138 CONG. REC. S4781, S4784 (daily ed. Apr. 2, 1992).

187. Henkin, *supra* note 36, at 346.

states fail to implement international treaty provisions that address areas traditionally reserved to them, the United States cannot, as a practical matter, achieve compliance with the treaty provisions to which it is party.¹⁸⁸ Thus, the federalism reservations appear to anticipate the active participation of state institutions in implementing treaty mandates.

In practice, the federalism understanding has been viewed primarily as working to limit the incorporation of human rights treaties in U.S. domestic law because it purports to obviate the need for federal action to implement the treaty in areas traditionally reserved to the states. The United States has taken this position when reporting on its treaty compliance. In its first report to the United Nations Human Rights Committee regarding ICCPR compliance, the U.S. government explained that it was

a government of limited authority and responsibility . . . [and that] state and local governments exercise significant responsibilities in many areas, including matters such as education, public health, business organization, work conditions, marriage and divorce, the care of children and exercise of the ordinary police power. . . . Some areas covered by the Covenant fall into this category.¹⁸⁹

The report then went on to explain that by including a federalism understanding at ratification,

the United States had . . . put other governments worldwide on notice that “the United States will implement its obligations under the Covenant by appropriate legislative, executive and judicial means, federal or state, and that the federal government will remove any federal inhibition to the abilities of the constituent states to meet their obligations in this regard.”¹⁹⁰

Nonetheless, the federalism understanding does not explicitly attempt to excuse the United States from its treaty obligations; it simply assigns state institutions some responsibility for implementing them. However, despite the significant role envisioned for the states in international human rights treaty implementation, there is little evidence that the states view themselves as having a role in enforcing ratified human rights treaties. The process of identifying state

188. Davis, *supra* note 9, at 362.

189. *Id.* at 364 (quoting United States, Initial Report of States Parties Due in 1993: United States of America, delivered to the U.N. Hum. Rts. Comm., ¶ 3, U.N. Doc. CCPR/C/81/Add. 4 (Aug. 24, 1994) (alteration in original)).

190. *Id.* at 364 (quoting United States, Initial Report of Papers Due in 1993: United States of America, *supra* note 189, ¶ 4).

initiatives to implement human rights treaties is challenging, particularly given that the federal government has no initiative to track state efforts to reach compliance. For example, the report of the United States Human Rights Network's Committee on the Elimination of Racial Discrimination (CERD) Working Group on Local Implementation and Treaty Obligations noted that the United States has no federal or state body authorized to promote and monitor treaty implementation, and the United States has done nothing to raise awareness of CERD at the state or local level, despite the significant role the states must play in implementing the VCCR's guarantees.¹⁹¹ Similarly, "[T]he United States' 2006 Report on its compliance with ICCPR provided 'only limited information . . . on the implementation of the Covenant at the state level.'"¹⁹² By rough measures, state activity in this area is basically nonexistent. A survey of state human rights commissions failed to show even a reference to implementing these treaties as part of their mandates.¹⁹³ Moreover, a review of state court decisions shows that references to the ratified international human rights treaties that the United States has ratified are minimal.¹⁹⁴

One possible explanation for the absence of state level implementation activity is state resistance to engaging with international human rights treaty law. In this view, the federalism understanding helps states and the federal government to collude in avoiding their obligation to change domestic law when necessary to

191. Risa E. Kaufman, Book Review, *Human Rights in the United States: Reclaiming the History and Ensuring the Future*, 40 COLUM. HUM. RTS. L. REV. 149, 159 (2008) (reviewing BRINGING HUMAN RIGHTS HOME (Cynthia Soohoo et al. eds., 2007)) (citing United States Human Rights Network's CERD Working Groups on Local Implementation and Treaty Obligations, A Report to the Committee on the Elimination of Racial Discrimination on U.S. CERD Obligations and Domestic Implementation (Feb. 2008), available at <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN7.doc>).

192. *Id.* (quoting U.N. Hum. Rts. Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, ¶ 4, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006)); see U.N. Hum. Rts. Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, Concluding Observations, United States of America, ¶ 39, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) (requesting additional information on state actions towards treaty implementation).

193. As of 2008, "all but three states ha[d] a human rights or human relations commission, and they operate in many cities and counties around the country, as well." Kaufman, *supra* note 191, at 166. I reviewed the Web sites of the forty-seven state human rights commissions and the District of Columbia and found no reference to the United States' international obligations in the mission statements or the descriptions of these agencies, notwithstanding the fact that "[t]hese commissions may be an effective means of implementing human rights treaty obligations and norms at the local level." *Id.*

194. As of July 23, 2009, a Westlaw search found only 111 cases referencing the ICCPR and seventeen cases referencing the CERD. This absence can be explained in part by the fact that these treaties were ratified with provisions rendering them non-self-executing.

comply with the United States' international commitments. Certainly, this reading of the situation would receive some support from the reservation included with ratification of some of the international human rights treaties that the United States' adherence to an international human rights treaty should not effect—or promise—change in existing law or practice.¹⁹⁵

However, it seems like that resistance to international law is not the entire story. As numerous commentators have noted, some states and localities have tried to encourage national acceptance of treaties that have not been signed or ratified by adopting their provisions as part of local law. For example, despite the United States' rejection of the Kyoto Protocol, more than 800 mayors have endorsed it.¹⁹⁶ Additionally, despite the United States' continued failure to ratify the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), “[b]y 2004, forty-four U.S. cities, eighteen counties, and sixteen states had considered or passed legislation related to CEDAW. Some jurisdictions have even gone so far as to implement its provisions as a matter of local law.”¹⁹⁷ Thus, to view the story as entirely one of state resistance fails to recognize genuine differences between the states with respect to these treaties. It seems clear that at least some states and localities would engage with the process of implementing ratified human rights treaties, particularly if they were aware of their obligation to do so.

Therefore, the prevailing misconception of the federalism understandings has resulted in a missed opportunity to engage the states in the implementation of international human rights treaties. When the United States ratifies treaties but makes reservations in the name of federalism (that deference to states on the legality of a particular practice is appropriate and necessary), the purpose is to

195. Henkin, *supra* note 36, at 342. The Senate ratified the ICCPR, which provides in article 7 that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,” ICCPR, *supra* note 4, art. 7, with the explicit reservation that this phrase referred to “the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth or Fourteenth Amendments to the Constitution of the United States.” See, e.g., William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT’L L. 277, 281-82 (1995). The validity of such reservations has been the subject of much discussion, particularly given that as a matter of international law, nations may not attach reservations that are “incompatible with the object and purpose of the agreement.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 313 (1986).

196. Ahdieh, *supra* note 8, at 1196.

197. *Id.*

preserve autonomy for states.¹⁹⁸ Properly understood, this presents a directive to state authorities to pass implementing legislation that enforces treaty rights and norms in those areas in which state law controls and to design appropriate remedies for state violations of these rights. If the federalism reservations were serving their intended purpose, we might expect to see more engagement with ratified international human rights treaties in state institutions. Presently, however, we generally do not. Given the current structure of the United States' participation in most international human rights treaties, the United States cannot comply with its international obligations absent state court participation.

Thus, the federalism understanding included in the ratified treaties creates another opportunity similar to the VCCR cases for implementing a dynamic federalist model for integrating international human rights treaties into U.S. law. Adopting a "floor" model, state institutions could take principal responsibility for interpreting and implementing international human rights treaties, and remedying their violation, subject only to limited review by the federal courts for consistency with broad treaty standards.¹⁹⁹ For example, the ICCPR commits the States parties to "have respect for the liberty of parents . . . to ensure the religious and moral education of their children in conformity with their own convictions."²⁰⁰ The State of Arizona, for example, could decide to effectuate this right in part by creating a state body to certify and support private home schooling organizations. Were a religious parent dissatisfied with this program, she could challenge it as insufficient under the treaty, and the decision by the

198. See generally Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Points of Entry*, 115 YALE L.J. 1564 (2006).

199. As I suggested earlier, general implementing legislation might be more successful than specific legislation in helping the United States reach compliance with its international commitments, given that much can be lost in the *ex ante* translation of these broad texts. See *supra* note 151 and accompanying text. For example, John Parry has demonstrated that the statutes implementing the Convention Against Torture (CAT) take an approach that is "more restrictive" than "the text of the Convention . . . would support," reflecting the "more restrictive view espoused during the ratification process." John T. Parry, *Torture Nation, Torture Law*, 97 GEO. L.J. 1001, 1048-51 (2009). Federalism is far less of an impediment in the context of CAT than in other human rights treaties, which perhaps is part of the explanation why it, unlike the others, has been implemented through domestic legislation. Nonetheless, the problem of translation is still apparent. Despite the fact that CAT was the motivator behind these statutes, Parry still concludes that "international law is simply not a very important source of U.S. legal doctrine with respect to torture and other forms of state violence, even if it does provide a source for legal arguments and political advocacy." *Id.* at 1051. I would like to thank Professor Karen Sokol for calling my attention to this issue in the context of the CAT.

200. ICCPR, *supra* note 4, art. 18.

state or federal court would turn on whether Arizona's program was sufficient to demonstrate that it met the broad treaty standard of respecting parental liberty in controlling the religious education of their child. Education is an area historically controlled by the states, and the diversity of the states on a variety of parameters (number of school age children, religiosity of population, diversity of religious population, state educational resources, and population density, for example) suggests that the question of how to accommodate religious parents and their children in education might best be determined at the local level.

Of course, given that the ICCPR, like many international human rights treaties, was ratified with reservations rendering it non-self-executing, Congress would have to pass general implementing legislation in order to make the treaty enforceable in domestic courts, and thus to permit the parent's lawsuit. Although I have proposed that Congress might be more amenable to general implementing legislation that leaves significant space for state autonomy in treaty implementation, the reality may be that the political will for any implementing legislation is lacking.²⁰¹ However, even without further congressional action, the federalism reservation means that the states (including Arizona in the example) have the obligation to consider the ICCPR and ensure that state law complies with its mandates. Thus, even the process of articulating a proactive role for the states and encouraging their participation in implementing these treaties (similar to that which the State Department has undertaken with respect to the VCCR) could stimulate increased state engagement and dialogue with these treaties.²⁰² In particular, a better understanding of the states' mandate in treaty implementation could empower the grassroots advocates who have been responsible for most of the successes in promoting state and local treaty compliance.²⁰³ This would certainly not solve the problem of state noncompliance—and is far weaker than Justice Breyer's "floor" strategy.²⁰⁴ Nonetheless, increased state engagement with treaty rights, even if patchy, could help bring states into the

201. See *supra* note 151 and accompanying text.

202. Janet Koven Levit has argued persuasively that despite the failure of the *Medellin* Court to articulate a role for the courts in remedying VCCR violations, a decade of VCCR litigation has resulted in significantly increased levels of treaty compliance due to diligent efforts by a variety of nonjudicial players. Levit, *supra* note 126, at 618.

203. See generally Martha F. Davis, *Thinking Globally, Acting Locally: States, Municipalities, and International Human Rights*, in 2 BRINGING HUMAN RIGHTS HOME 127 (Cynthia Soohoo et al. eds., 2008).

204. *Id.*

implementation dialogue, and thus begin to minimize federalism as a barrier to more national engagement.

V. CONCLUSION

A dynamic federalist approach will not, by itself, resolve the problem of American noncompliance with its international human rights treaty obligations. My more modest goal is to suggest that, under current law, treaty implementation is necessarily an interjurisdictional project, and there are benefits, both normative and pragmatic, which could be realized from acknowledging and supporting it as such. Pragmatically, increased participation of the states could help minimize federalism as a barrier to international human rights treaty compliance. Normatively, the decentralization of treaty implementation, in areas historically controlled by the states, could permit the United States to realize the benefits of federalism, plurality, dialogue, and redundancy in the treaty context.

Moreover, the major objection to state participation—that it undermines the nation’s ability to speak authoritatively with one voice—fails to acknowledge that the United States is already speaking with a plurality of voices at the international level, by action and inaction, and in ways that are both rights-enhancing and rights-reducing. Both Texas Governor Perry’s decision not to stay Medellín’s execution and San Francisco’s adoption of CEDAW resonate internationally. They, along with myriad other federal, state, and local actions, currently constitute the way that the United States responds to its treaty obligations. Thus, the decentralized dynamic federalist approach that I suggest does not actually create new voices. Rather, this approach acknowledges and coordinates those who are already speaking with the goal of moving towards a more integrated and inclusive model of treaty implementation. Powell suggests that the “core dilemma confronting the human rights project [is] how to square the idea of universal international standards with the tendency toward localism and particularity.”²⁰⁵ A dynamic federalist approach captures both of these aspirations by creating the space and the mandate for localized understandings of universal commitments.

205. Powell, *supra* note 14, at 253.