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### The Persistence of Dualism in Human Rights Treaty Implementation

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# YALE LAW & POLICY REVIEW

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## The Persistence of Dualism in Human Rights Treaty Implementation

Johanna Kalb\*

INTRODUCTION .....	72
I. THE PARADOX OF SUBNATIONAL ENGAGEMENT WITH THE HUMAN RIGHTS TREATIES.....	75
A. <i>Identifying the Paradox</i> .....	76
B. <i>Explaining the Paradox</i> .....	89
II. DUALISM IN TREATY IMPLEMENTATION .....	96
A. <i>Rethinking Cooperative Federalism</i> .....	96
B. <i>The Spectrum of Cooperative Federalism Relationships: Case Studies</i> ....	99
1. The Vienna Convention on Consular Relations.....	100
2. The Convention on the Form of an International Will.....	102
3. The Sudan Divestment Act .....	104
4. Lessons from the Case Studies .....	106
C. <i>Moving Toward Dynamism</i> .....	109
III. CREATING DYNAMISM.....	111
CONCLUSION .....	121

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\* Associate Professor of Law, Loyola University New Orleans College of Law. Thanks to Andrea Armstrong, Joseph Blocher, Martha Davis, Trey Drury, David Fontana, Lawrence Friedman, Robert Garda, Helen Hershkoff, Jancy Hoeffel, Laila Hlass, Risa Kaufman, John Lovett, Isabel Medina, Rachel Rebouché, Judith Resnik, Jessica Roberts, Jim Rossi, Robert Schapiro, Karen Sokol, Reuben Teague, Sandi Varnado, and Robert Verchick for the conversations that informed my thinking. I would also like to thank Etheldra Scoggin for her help in collecting materials, Geoff Sweeney for his research assistance, and Lindsey Reed for coordinating our efforts. Finally, I am indebted to the staff members of the *Yale Law & Policy Review* for their excellent editorial support. This Article was made possible with the research support of Dean Brian Bromberger and the College of Law and is dedicated to Dean Bromberger's memory.

## INTRODUCTION

A traditional account of federalism in the United States places international law and foreign affairs squarely within the province of the federal government. Nonetheless, subnational participation in matters of international law and foreign affairs is now both a reality and a necessity. From cross-border initiatives on environmental protection<sup>1</sup> and health care,<sup>2</sup> to state-level divestment legislation,<sup>3</sup> to programs to implement the Kyoto Protocol,<sup>4</sup> the United States speaks with diverse and divergent voices in the international arena. Moreover, given the significant areas of jurisdictional authority exercised by the states, the United States cannot meet its international legal commitments without state and local cooperation. Thus, a growing body of scholarship considers how best to engage cities and states in advancing local goals on the international stage and argues for legislative and jurisprudential initiatives to create and preserve opportunities for state-level innovation.<sup>5</sup>

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1. See Martha F. Davis, *Thinking Globally, Acting Locally: States, Municipalities and International Human Rights*, in 2 BRINGING HUMAN RIGHTS HOME: FROM CIVIL RIGHTS TO HUMAN RIGHTS 127, 129 (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2008) (describing the Pacific NorthWest Economic Region, an alliance of British Columbia, Alberta, Yukon, and the states of Alaska, Idaho, Montana, Oregon, and Washington). The Pacific NorthWest Economic Region is a cross-border foundation dedicated to promoting regional collaboration and competitiveness while protecting the region's national resources. See *About Us: Background*, PAC. NORTHWEST ECON. REGION, <http://www.pnwer.org/AboutUs/Background.aspx> (last visited Sept. 1, 2011).
  2. See *Worktables: Health*, XXVIII BORDER GOVERNORS CONF., [http://www.bordergovernors2010.org/2010\\_Governors\\_Conference/worktables/worktables\\_health.asp](http://www.bordergovernors2010.org/2010_Governors_Conference/worktables/worktables_health.asp) (last visited Oct. 7, 2011) (describing, inter alia, cross-border health initiatives to track the spread of influenza and improve epidemiological monitoring in the border region).
  3. See Nora Boustany, *Sudan Divestment Effort Gains Momentum at State Level*, WASH. POST, Oct. 7, 2006, at A12 (noting that, by 2006, Maine, Connecticut, Oregon, Illinois, New Jersey, and California had already passed divestment laws).
  4. See, e.g., California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE § 38550 (West 2009); S. 4315, 2009-2010 Leg., 233d Sess. (N.Y. 2009); Cinnamon Carlarne, *Climate Change Policies an Ocean Apart: EU & US Climate Change Policies Compared*, 14 PENN ST. ENVTL. L. REV. 435, 445-46 (2006) (noting that California, New York, and cities like Portland and Philadelphia are adopting climate change policies based on the Kyoto Protocol).
  5. See Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT'L L. 389 (2009) (advocating for a subsidiarity approach to human rights treaty implementation); Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 87 (2007) (arguing for an abandonment of the "dormant foreign affairs" approach to preemption); Robert A. Schapiro, *Monophonic Preemption*, 102 NW. U. L. REV. 811, 812-13 (2008) (sug-

The current discussion lacks, however, any kind of systematic understanding of the conditions under which states and localities view themselves as actors in the international system. One goal of this Article is to begin to understand the ways in which subnational entities engage with international law and, conversely, the ways in which they do not. I address this question through an examination of legislative and executive participation in the implementation of international human rights treaties.<sup>6</sup> A closer look at state and local efforts to implement these treaties exposes an apparent paradox. Although subnational engagement with these treaties is generally limited, it has occurred more frequently with respect to unratified human rights treaties than it has with those that have been ratified and are thus the “law of the land” under the Supremacy Clause.<sup>7</sup> In other words, states and localities have taken fewer legislative and administrative actions to implement the commitments of the binding human rights instruments than to implement those that are nonbinding. I contend that understanding the sources of this contradiction will help to identify strategies for promoting broader subnational participation in implementing the ratified

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gesting that the federal government “seek to accommodate an overlap of state and federal regulation and thus should be wary of preempting state law”).

6. This Article is part of a larger project, which examines strategies for improving U.S. compliance with its international human rights commitments by increasing state and local participation. See Johanna Kalb, *Dynamic Federalism in Human Rights Treaty Implementation*, 84 TUL. L. REV. 1025 (2010) [hereinafter Kalb, *Dynamic Federalism*]; Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellín*, 115 PENN ST. L. REV. 1051 (2011) [hereinafter Kalb, *Human Rights Treaties in State Courts*]. This piece focuses on these types of activities both because they are the most common and visible, see Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 FORDHAM L. REV. 411, 419 (2008) [hereinafter Davis, *Upstairs, Downstairs*], and because the non-self-execution provisions of treaties have limited the formal role that state courts play in implementing these instruments, thereby creating a barrier to their participation in this project that the other branches of state and local government do not face. See *infra* notes 12-14 and accompanying text (discussing these conditions on ratification); see also Penny J. White, *Legal, Political, and Ethical Hurdles to Applying International Human Rights Law in the State Courts of the United States (and Arguments for Scaling Them)*, 71 U. CIN. L. REV. 937 (2003). This is not to suggest that state courts have no role in treaty implementation. Professor Martha Davis has proposed that state courts could engage with these treaties as informative, if not binding, sources of law in interpreting their own constitutions. See Martha Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 371-75 (2006) [hereinafter Davis, *The Spirit of Our Times*]; *id.* at 371-72 (“[T]he similarities between international law provisions and state constitutional provisions granting affirmative rights support using transnational human rights norms to interpret state law.”).
7. U.S. CONST. art. VI, cl. 2.

human rights instruments and for engaging states and cities with the United States' international obligations more generally.

Part II begins with a description of the paradox. I review some commonly discussed examples of legislative and executive engagement with the unratified human rights treaties, and then contrast this experience with that of the ratified instruments. Despite the ratified treaties' greater claim to legitimacy and the space created within them for state participation through the ratification process, they have failed to stimulate significant subnational interest. This is true even among the "incorporationists"<sup>8</sup>—those states and localities that favor increased substantive and procedural engagement with international human rights instruments and that are often quite active with respect to matters of foreign affairs and international law.

The seemingly contradictory behavior of the incorporationists belies the most common and obvious explanations that are usually provided for the states' failure to engage. While political resistance to or ignorance of international human rights law may account for the lack of activity in many or most states, it is not an adequate explanation for the silence by the incorporationists. I posit an alternative theory that focuses on how states and localities view their roles and responsibilities within our federalist system. I contend that states and localities continue to view the United States' treaty commitments through a traditional "dualist" federalist lens, which neatly divides areas of jurisdictional authority between the states and the federal government, leaving treaty implementation entirely to federal control. This perspective resolves the apparent paradox: Acting within a dualist framework of divided state and federal responsibility, even the incorporationists view their role in the treaty project as limited to encouraging the federal adoption of human rights standards.

The dualist perspective poses a barrier to increased state and local participation in implementing these instruments and thus threatens the United States' ability to reach full compliance with its international obligations. In order to move beyond this dualist orientation, however, a deeper understanding of the range of possible cooperative federal-subnational relationships is necessary. Part III reframes the relationship between a traditional dualist view of federalism, which seeks to create clear lines delineating exclusive areas of jurisdictional authority, and its converse, "dynamic" federalism, in which states and the federal government are presumed to have no areas of exclusive jurisdictional control, but rather relate through a series of overlapping and ongoing regulatory interactions. By contrast to the position advanced in the existing literature, which treats dualism and dynamic federalism as binary opposites (and thus places all types of federal-subnational collaboration in the "dynamic" category), I consider dualism and dynamism as the extreme points on a continuum of cooperative federal-state relationships. Viewing the range of possibilities as a spectrum, rather than as a binary choice, permits a more exact characterization of the

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8. See Melish, *supra* note 5, at 421.

dynamics of each of these interactions and a deeper understanding of the conditions that facilitate their success or failure.

With this new framework in place, I review three oft-discussed successes of federal-subnational cooperation in treaty implementation as case studies. Under a binary understanding of federalist relationships, the existence of ongoing and overlapping regulatory authority in the treaty's implementation scheme would qualify each of these models of interaction as dynamic. I demonstrate, however, that the success of these projects is actually attributable to their relative susceptibility to a *dualist* division of responsibilities between the federal and subfederal governments. That is, these projects work because they fit easily into a framework that relies on clear lines of jurisdictional authority.

This perspective helps to explain why the implementation of the human rights treaties is so challenging. Many of the human rights treaties are not naturally conducive to a dualist approach because of the broad and cross-cutting nature of the rights that they protect. I therefore suggest that a dynamic approach, which has yet to be applied in the treaty context, is necessary to promote subnational involvement in implementing the ratified human rights treaties, and could help to advance the project of treaty implementation more generally. A dynamic approach would focus on creating and promoting ongoing and overlapping implementation activities toward reaching the treaty goals at multiple jurisdictional levels, both horizontally across states and vertically between states, municipalities, and the federal government.

Part IV focuses on strategies for creating dynamism in order to maximize the possibilities of federal-subnational partnerships. Most of the literature in this area to date has been descriptive and normative in that it attempts to harmonize the theoretical federalism framework with the reality on the ground. My focus in this final Part is prescriptive: How can dynamism be generated in order to solve a particular policy challenge? Drawing on lessons from the case studies of successful subnational engagement, I begin to suggest strategies for breaking down the barriers that prevent fuller engagement with the ratified human rights treaties, both among the incorporationists and other subnational actors.

## I. THE PARADOX OF SUBNATIONAL ENGAGEMENT WITH THE HUMAN RIGHTS TREATIES

In recent years, a handful of incorporationist states and localities have demonstrated an interest in promoting domestic acceptance and implementation of international human rights law. Somewhat surprisingly, perhaps, these efforts have been almost entirely focused on the international human rights instruments that the United States has not yet ratified. This appears to be true even though the ratified treaties explicitly carve out a space for state and local participation in the realization of their commitments. This Part surveys the patterns of subnational behavior with respect to these instruments and attempts to explain the apparent paradox of state and local participation in human rights treaty implementation.

### A. Identifying the Paradox

Not all human rights treaties have equal status under United States law. There are some treaties that the United States has signed, but not ratified.<sup>9</sup> That is, the President has negotiated and signed the treaty on behalf of the United States, but the Senate has yet to ratify it. Then there are instruments that the United States has signed and ratified, but that have not been implemented through federal legislation.<sup>10</sup> Finally, there are treaties that have been signed, ratified, and implemented through federal legislation.<sup>11</sup> Complicating the picture further is the fact that the United States often ratifies treaties with a package of reservations, understandings, and declarations (RUDs) that purport to limit their domestic effect in a variety of ways.<sup>12</sup> For example, many of these ratified treaties are deemed “non-self-executing,” which at a minimum means that their guarantees may not be enforced against noncompliant states in state or federal courts.<sup>13</sup> Additionally, many of these treaties were ratified with a res-

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9. See, e.g., Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].
  10. See, e.g., International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD].
  11. See 18 U.S.C. §§ 1091, 1093 (2006) (providing for the domestic implementation of the Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]); 18 U.S.C. § 2340 (2006) (providing for the domestic implementation of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]).
  12. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 341-48 (1995) (describing the frequently used RUDs and their implications).
  13. See *id.* at 346 (“[T]he declaration that a convention shall be non-self-executing is designed to keep its own judges from judging the human rights conditions in the United States by international standards.”); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 695 (1995) (“At a general level, a self-executing treaty may be defined as a treaty that may be enforced in the courts without prior legislation by Congress, and a non-self-executing treaty, conversely, as a treaty that may not be enforced in the courts without prior legislative ‘implementation.’”). The Supreme Court has recently indicated that non-self-executing treaties may not even be domestic law absent federal implementing leg-

ervation stating that the United States' adherence to an international human rights treaty should not effect—or promise—change in existing law or practice.<sup>14</sup>

Most of the scholarly discussion of subnational participation in human rights treaty implementation has focused on a handful of examples of state and local engagement with the unratified treaties. Most frequently referenced are efforts related to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>15</sup> a treaty that was signed by President Jimmy Carter in 1980 but has yet to be ratified.<sup>16</sup> CEDAW requires its signatories to take action to “ensure the full development and advancement of women, for the purposes of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”<sup>17</sup> Frustrated by the national government's failure to ratify the treaty, a number of domestic civil society organizations have campaigned to encourage states and localities to pass resolutions calling for the ratification of CEDAW.<sup>18</sup> As a result, by 2010, eighteen states and the territory of Guam, forty-seven cities, and nineteen counties had passed legislation related to CEDAW.<sup>19</sup> Nonbinding “ratification resolu-

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islation. See *infra* note 100 and accompanying text (discussing the possible implications of the Court's decision in *Medellín v. Texas*, 552 U.S. 491 (2008)).

14. See Henkin, *supra* note 12, at 341.
15. See, e.g., Stacy Laura Lozner, *Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative*, 104 COLUM. L. REV. 768, 777-90 (2004); Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland*, 73 MO. L. REV. 1105, 1110 (2008); Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 493 (2008).
16. See Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 258 (2001).
17. CEDAW, *supra* note 9, at 16. CEDAW also has an optional protocol, which permits individuals or groups, after exhausting any available remedies at the national level, to file complaints directly with the CEDAW committee, which is then authorized to initiate investigations. See *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 54/4, U.N. Doc. A/RES/54/4, at 3 (Oct. 15, 1999).
18. This coalition generated model resolutions to “‘recognize’ equal rights, to ‘eschew all forms of discrimination on the basis of sex,’” and to lend support for ratification. Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Points of Entry*, 115 YALE L.J. 1564, 1640 (2006) (quoting CEDAW: THE TREATY FOR THE RIGHTS OF WOMEN (RIGHTS THAT BENEFIT THE ENTIRE COMMUNITY) 16-17, 67-72 (Leila Rassekh Milani, Sarah C. Albert & Karina Purushotma eds., 2004)).
19. COLUMBIA LAW SCH. HUMAN RIGHTS INST. & INT'L ASS'N OF OFFICIAL HUMAN RIGHTS AGENCIES, STATE AND LOCAL HUMAN RIGHTS AGENCIES: RECOMMENDATIONS FOR ADVANCING OPPORTUNITY AND EQUALITY THROUGH AN INTERNATIONAL HUMAN RIGHTS FRAMEWORK app. C at 25 [hereinafter COLUMBIA HUMAN



tions” are the most common form of local engagement with CEDAW. That is, “[m]ost of these provisions are expressive or hortatory, calling for the United States to ratify CEDAW.”<sup>20</sup>

A handful of cities have gone further, taking affirmative steps toward local implementation of CEDAW. San Francisco has the most extensive program, which is illustrative of one way in which these types of treaties may be implemented domestically.<sup>21</sup> The San Francisco ordinance tracks the language of CEDAW, defining discrimination against women as any

distinction, exclusion or restriction made on the basis of sex that has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights or fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>22</sup>

The ordinance also requires that selected city departments undertake “gender analysis to identify areas of gender discrimination in their internal practices and service delivery.”<sup>23</sup> These analyses have allowed the city to identify facially neutral practices with gender-differentiated impacts and have resulted in the modification of various city programs to increase access.<sup>24</sup> Following San

RIGHTS INST.], available at [http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file\\_id=153843](http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=153843) (list compiled by Sarah Albert of the YWCA and Billie Heller of the National Committee on CEDAW).

20. See Resnik, *supra* note 18, at 1641.
21. Notably, one of the challenges of these treaties is understanding the meaning of implementation in the context of the treaties’ broad principles. The San Francisco experience provides one potential lens, although by no means the only one, for thinking about the requirements of implementation. Martha Davis has developed an account of the San Francisco experience through interviews with some of the city officials and advocates involved with its implementation. Davis, *supra* note 1, at 134-40; see also Lozner, *supra* note 15.
22. S.F., CAL., ADMIN. CODE § 12K.2(d) (2000), available at <http://www.sfgov3.org/index.aspx?page=130>; cf. CEDAW, *supra* note 9, at 16. As Davis points out, in its focus on discriminatory effects, the legislation goes farther than the U.S. constitutional guarantees. Davis, *supra* note 1, at 136.
23. Davis, *supra* note 1, at 137.
24. As of the time of Davis’s account, published in 2008, six city agencies had completed a gender analysis, which resulted in changes in the ways in which some government programs were administered. *Id.* For example, the Art Commission learned that the reason that primarily male artists were funded for large public arts projects was not “societal imbalances” as it had previously believed, but rather that its lottery for spots was set up in a way that made it less accessible for applicants who are primary caregivers for children. *Id.* The program was therefore changed. The gender review also resulted in changes in the types of services provided by the Juvenile Probation Department. Once the agency’s standard consciously accounted for girls, as well as boys, it began to provide services targeting

Francisco, Los Angeles passed a similar ordinance implementing CEDAW,<sup>25</sup> and New York City has considered legislation that would adopt CEDAW principles.<sup>26</sup> Prompted in part by these initiatives, and the advocacy of civil society organizations, the Senate is again holding hearings on the ratification of CEDAW.<sup>27</sup>

A similar, albeit less extensive, pro-ratification movement is afoot with respect to the Convention on the Rights of the Child (CRC). CRC seeks to ensure that the guarantees of the other major human rights treaties—civil, political, economic, social, and humanitarian—are extended to fit the particular needs of children.<sup>28</sup> “Among the issues addressed by the Convention that are

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young women, such as sexual assault counseling and pregnancy prevention services. *Id.* at 138.

25. L.A., Cal., Ordinance 175735 (Dec. 24, 2003), available at [http://clkrep.lacity.org/councilfiles/00-0398-S2\\_ORD\\_175735\\_02-08-2004.pdf](http://clkrep.lacity.org/councilfiles/00-0398-S2_ORD_175735_02-08-2004.pdf).
26. See Davis, *supra* note 1, at 139; see also *Reintroduction of the Human Rights GOAL at New York City Council*, N.Y.C. HUM. RTS. INITIATIVE (June 29, 2010), <http://www.nychri.org/ReintroductionoftheHumanRightsGOAL.htm>. As Davis explains, “Like the San Francisco initiative, the New York City proposal draws on international human rights law for inspiration and basic standards, while tailoring the provisions to local implementation needs.” Davis, *supra* note 1, at 139. The Human Rights Government Operations Audit Law (GOAL) would require that city agencies take a proactive approach to preventing discrimination. It also calls for the creation of a public-private Human Rights Advisory Committee to oversee city compliance. *Id.* Advocates have suggested that this kind of approach is necessary “to address the cumulative effects of unintentional biases in city decision making—effects that are often beyond the reach of litigation, but that have a significant effect on the participation of women and minorities in the life of the city.” *Id.* at 140. Nonetheless, despite the San Francisco experience, Mayor Bloomberg has promised to veto the bill should it ever be adopted by the city council and suggested that the proposed ordinance is overbroad and duplicative of existing civil rights guarantees. *Id.*
27. The Senate Judiciary Committee’s Subcommittee on Human Rights and the Law held hearings on the ratification of CEDAW on November 18, 2010. Witnesses testifying before the Subcommittee included Marcia Greenberger, Co-President of the National Women’s Law Center; actress Geena Davis, founder of The Geena Davis Institute on Gender in Media; Wahzma Frogh of the Afghan Women’s Network; Melanne Vermeer, U.S. Ambassador-at-Large for the Office of Global Women’s Issues, U.S. Department of State; Samuel Bagenstos, Principal Deputy Attorney General, Civil Rights Division, U.S. Department of Justice; and Steven Groves of the Heritage Foundation. For transcripts of the witness testimony, the member statements, and a webcast of the hearings, see *Women’s Rights Are Human Rights: U.S. Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, U.S. SENATE COMMITTEE ON THE JUDICIARY (Nov. 18, 2010), <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da164da79>.
28. CRC, *supra* note 9.

given greater clarification are the juvenile justice standards, the relationship among the child, the family, and the state, the child's right to privacy, and the extent to which other civil and political rights belong to children . . . ."<sup>29</sup> As of early 2009, nine cities and five states had passed resolutions in support of CRC.<sup>30</sup> Some jurisdictions, like Chicago, have committed to "advance policies and practices that are in harmony with the principles of [CRC] in all city agencies and organizations that address issues directly affecting the City's children."<sup>31</sup> A handful of cities, most notably Denver and New York City, have joined the Child Friendly Cities Initiative of the United Nations Children's Fund (UNICEF), which is designed to implement the principles of CRC locally to make cities "a more livable place for children."<sup>32</sup> The Denver Child and Youth Friendly City Initiative, for example, aims to promote a healthy environment for child development and to ensure that the voices of children and youth are included in city planning. The organization's leadership includes representatives from the mayor's office, as well as Denver-based youth organizations, and

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29. Kurtis A. Kemper, Annotation, *Construction and Application of the United Nations Convention on the Rights of the Child*, 28 I.L.M. 1448 (1989)—*Global Cases and Administrative Decisions*, 20 A.L.R. FED. 2d 95 (2007).
30. See CHILDREN & FAMILY JUSTICE CTR., NORTHWESTERN UNIV. SCH. OF LAW, TOOLKIT FOR THE ADOPTION OF THE CONVENTION ON THE RIGHTS OF THE CHILD BY CITY COUNCILS AND STATE LEGISLATURES 8, available at <http://www.law.northwestern.edu/legalclinic/documents/CRC-TOOLKIT-11-2009.pdf>. By this count, the list of cities included Austin, Texas; Cambridge, Massachusetts; Cleveland, Ohio; Detroit, Michigan; Kansas City, Missouri; Minneapolis, Minnesota; New York, New York; San Diego, California; and Savannah, Georgia. The list of state governments included Hawaii, Rhode Island, Vermont, South Carolina, and New York. However, even simply identifying the number of CRC initiatives is challenging. Another source indicates that around the same time, such initiatives existed in nine cities and two states. See U.S. COMM. FOR UNICEF, U.S. ORGANIZATIONS WHICH ENDORSE THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD (Apr. 5, 2005), available at [http://www.abanet.org/intlaw/committees/public\\_II/human\\_rights/entitiesuppcrc.pdf](http://www.abanet.org/intlaw/committees/public_II/human_rights/entitiesuppcrc.pdf); see also Sally Engle Merry et al., *Law from Below: Women's Human Rights and Social Movements in New York City*, 44 LAW & SOC'Y REV. 101, 109 n.2 (2010); *Chicago City Council Passed Resolution Supporting the Convention on the Rights for the Child*, U.S. HUM. RTS. FUND (Feb. 17, 2009), <http://www.ushumanrightsfund.org/news/Chicago-city-council-passed-resolution-supporting-/> (adding Chicago to the existing list).
31. City of Chicago Resolution Adopting the UN Convention on the Rights of the Child (Feb. 11, 2009), available at [http://www.luc.edu/chrc/pdfs/City\\_of\\_Chicago\\_Resolution.pdf](http://www.luc.edu/chrc/pdfs/City_of_Chicago_Resolution.pdf).
32. *Examples of CFC Initiatives: United States of America*, CHILD FRIENDLY CITIES (UNICEF), <http://www.childfriendlycities.org/en/to-learn-more/examples-of-cfc-initiatives/united-states-of-america> (last visited June 13, 2011).

it has a Youth Steering Committee to ensure that children have a direct voice in the development of the initiative.<sup>33</sup>

Advocates have also begun organizing to implement the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>34</sup> which seeks to promote human dignity and equality by guaranteeing all persons a set of basic positive rights including, *inter alia*, adequate food, housing, healthcare, and education, as well as the right to participate in cultural life.<sup>35</sup> As of yet, no state or local legislative initiatives appear to have been enacted that specifically call for or adopt ICESCR principles.<sup>36</sup> One explanation may be that most advocates are currently focused on using a general human rights framework (rather than specific treaty instruments) to argue for state-level reforms related to the specific areas of housing, healthcare, and other fundamental social rights. Thus, even if these efforts are successful, reference to the Covenant may not be explicit in the final regulation, statute, or decision.<sup>37</sup>

Finally, the Convention on the Rights of Persons with Disabilities (CRPD),<sup>38</sup> which, like CRC, seeks to ensure access to the full range of human rights to a particularly threatened group, is a new instrument, but several

33. *Id.*

34. See Lauren Groth, *Engendering Protection: An Analysis of the 2009 Kampala Convention and its Provisions for Internally Displaced Women*, 23 INT'L J. REFUGEE L. 221, 237 (2011).

35. See ICESCR, *supra* note 9.

36. The National Lawyers Guild and the Meiklejohn Civil Liberties Institute have developed a toolkit for activists working to promote the adoption of ICESCR ratification resolutions locally. See *Resources and Documents on the Human Rights Framework*, NAT'L LAWYERS GUILD INT'L COMM., <http://www.nlginternational.org/news/article.php?nid=360> (last visited Feb. 9, 2011).

37. For example, the City-County Health Board of Lewis and Clark County, Montana, adopted a resolution in December 2008 stating that "health care is a 'basic human right' and that everyone has a 'right to access to a universal health care system.'" See *Health Reform from the Bottom Up*, HELENA INDEP. REC. (Dec. 14, 2008), [http://www.helenair.com/news/local/article\\_37ec214a-197d-53fe-9eb9-7eb3364b4ccb.html](http://www.helenair.com/news/local/article_37ec214a-197d-53fe-9eb9-7eb3364b4ccb.html) (quoting the ordinance). The Board was exploring options for fulfilling this goal locally in cooperation with the Montana Human Rights Network and the National Economic and Social Rights Initiative. *Id.* The state of Vermont has also passed a Universal Access to Healthcare Act in direct response to the "Healthcare Is a Human Right" campaign of the Vermont Workers' Center. See Press Release, Vt. Workers' Ctr., Final Passage of Vermont Universal Health Care Bill Marks Success of Growing Human Rights Movement (May 5, 2011), <http://www.workerscenter.org/node/861>. Although ICESCR includes the right to health care as one of its commitments, see ICESCR, *supra* note 9, at 8, the Act refers only to the notion of human rights generally and does not refer to the relationship between health care and human rights at all. See 2010 Vt. Acts & Resolves, No. 128, available at <http://www.leg.state.vt.us/docs/2010/Acts/ACT128.pdf>.

38. G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006).

organizations have launched programs focused on helping advocates work toward implementation and ratification.<sup>39</sup>

The subnational engagement with these unratified treaties contrasts with that of the ratified instruments, which have prompted fewer subnational legislative and executive branch implementation efforts and resulted in less advocacy by subnational actors. With respect to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)<sup>40</sup> and the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),<sup>41</sup> this may be unsurprising, given that these two treaties have been implemented through federal legislation, which may seem to obviate the need for state action given that federal law also binds the states.<sup>42</sup> However, the lack of activity by the incorporationist cities and states with

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39. For example, Disabled Peoples' International is an organization dedicated to promoting the human rights of persons with disabilities. It has designed toolkits both for CRPD ratification and implementation. See *Tool Kits*, DISABLED PEOPLES' INT'L, <http://www.dpi.org/lang-en/index?page=19> (last visited Feb. 9, 2011). The toolkit on ratification provides an explanation of the rights guaranteed by the Convention, explains how the process of adoption and ratification works domestically and internationally, and provides messaging and a strategy for organizing for ratification. *ICRPD Ratification Toolkit*, DISABLED PEOPLES' INT'L, <http://www.icrpd.net/ratification/en/index.htm> (last visited Feb. 9, 2011). The toolkit on implementation focuses on helping advocates to evaluate their own environment in terms of the protections of CRPD and to develop a concrete vision of the full realization of those rights. *ICRPD Implementation Toolkit*, DISABLED PEOPLES' INT'L, <http://www.icrpd.net/implementation/en/index.htm> (last visited Feb. 9, 2011).
40. CAT was created to more effectively combat the struggle against all torture and any other types of "cruel, inhuman or degrading treatment or punishment throughout the world . . ." CAT, *supra* note 11, at 113.
41. The Genocide Convention was created to ensure that genocide could be prosecuted as a crime whether it occurred in a time of war or peace. See Helen Fein, *Discriminating Genocide from War Crimes: Vietnam and Afghanistan Reexamined*, 22 DENV. J. INT'L L. & POL'Y 29, 30-31 (1993). The Convention punishes those who actually commit genocide, those who conspire or attempt to commit genocide, and those who incite or comply with genocide. Genocide Convention, *supra* note 11, art. 3.
42. This may not necessarily be true. Professor John Parry has demonstrated that the statutes implementing CAT adopt an approach that is "more restrictive" than "the text of the Convention . . . would support." John T. Parry, *Torture Nation, Torture Law*, 97 GEO. L.J. 1001, 1049 (2009). Thus, there might still be space left for state and local advocacy with respect to the United States' satisfaction of its international obligations, especially given the recent controversy surrounding the use of torture in the war on terror. The CAT implementing legislation specifically reserves space for state and local regulation of the same areas. See 18 U.S.C. § 2340B (2006) ("Nothing in this chapter shall be construed as precluding the application of State or local laws on the same subject . . .").

respect to the other ratified treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>43</sup> and the International Covenant on Civil and Political Rights (ICCPR),<sup>44</sup> is anomalous for two reasons. First, these treaties would seem to have a stronger claim to domestic legitimacy than the unratified instruments simply by virtue of their ratification. Ratification requires not only the assent of the executive but also the support of two-thirds of the Senate, giving these treaties more democratic imprimatur.<sup>45</sup> And by the terms of Article VI of the Constitution, “all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land . . . .”<sup>46</sup>

Second, these treaties were ratified in a way that specifically anticipated state and local participation in the treaty implementation process. Both CERD and ICCPR require domestic implementation, which may be done either through “making the treaty itself part of domestic law” or “by mak[ing] effective the rights guaranteed by the treaty in . . . domestic law.”<sup>47</sup> Under ICCPR, the United States is obliged to refrain from violating the rights guaranteed by the instrument and to take steps to prevent others from doing so, including, if necessary, ensuring that these rights are adequately protected in domestic law.<sup>48</sup> Article 4 of CERD requires that the United States

(1) review and eliminate any laws or policies that have the purpose or effect of creating or perpetuating racial discrimination; (2) prohibit by all appropriate means racial discrimination by others, including private actors; (3) when necessary, adopt “special and concrete measures” aimed at equalizing the status of racial and ethnic minorities in order to ameliorate the present effects of past discrimination; and (4) pass laws prohibiting hate speech and incitement and outlawing groups engaging in those activities.<sup>49</sup>

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43. CERD, *supra* note 10.

44. ICCPR, *supra* note 10.

45. U.S. CONST. art. II, § 2, cl. 2.

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

47. William M. Carter, Jr., *Treaties as Law and the Rule of Law: The Judicial Power To Compel Domestic Treaty Implementation*, 69 MD. L. REV. 344, 371-72 (2010).

48. *Id.* at 372; *see also* ICCPR, *supra* note 10, at 173 (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . .”); *id.* at 173-74 (“Where not already provided for by existing [domestic law], each State Party . . . undertakes to take the necessary steps, in accordance with its constitutional processes . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”).

49. Carter, *supra* note 47, at 373 (citing CERD, *supra* note 10, at 218, 220). Professor William Carter notes that the obligations of Article 4 are likely unconstitutional

Because of domestic political concerns, the United States adopted CERD and ICCPR with a “federalism” clause, which purports to leave treaty enforcement to the states in those areas of law traditionally reserved to them.<sup>50</sup> The federalism understanding attached to ICCPR, for example, explains:

[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.<sup>51</sup>

According to the first report on ICCPR compliance that the United States submitted to the United Nations Human Rights Committee, this provision means that federal authority is limited in “matters such as education, public health, business organization, work conditions, marriage and divorce, the care of children and exercise of the ordinary police power.”<sup>52</sup> Although these areas are the subject of both state and federal regulation at present, the federal government continues to rely on these provisions to excuse further action on its treaty obligations.

Under international law, the inclusion of a federalism understanding does not prevent the United States from accepting a treaty;<sup>53</sup> however, its presence means that “[i]f states fail to implement international treaty provisions that address areas traditionally reserved to them, the United States cannot, as a prac-

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and therefore could not have become effective domestically upon ratification. *Id.* at 373 n.149.

50. See 140 CONG. REC. 14,326 (1994) (CERD); 138 CONG. REC. 8071 (1992) (ICCPR).
51. 138 CONG. REC. 8071 (1992). Similar language was adopted with the ratification of CERD. 140 CONG. REC. 14,326 (1994).
52. U.N. Human Rights Comm., *Initial Reports of States Parties Due in 1993: United States of America*, ¶ 3, U.N. Doc. CCPR/C/81/Add.4 (Aug. 24, 1994), at <http://www.unhcr.ch/tbs/doc.nsf/Symbol/da936c49ed8a9a8f8025655c005281cf>.
53. Henkin, *supra* note 12, at 346 (“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.”); see also Margaret Thomas, “Rogue States” Within American Boundaries: Remedying State Noncompliance with the International Covenant on Civil and Political Rights, 90 CALIF. L. REV. 165, 173 (2002) (The conditions on ratification “merely displace[] the primary implementation burden from the national government to each of the states . . . encourag[ing] unique enforcement solutions tailored to each state’s specific situation.”).

tical matter, achieve compliance with the treaty provisions to which it is party,” and cannot meet its obligations under international law.<sup>54</sup> Thus one might argue that states are currently required under federal law to take independent action to implement these instruments.<sup>55</sup> Of course, the presence of the ratification RUDs may eliminate the possibility that these treaties will be enforced against noncompliant states and cities.<sup>56</sup> But given the commitment the incorporationists have demonstrated to the goals of human rights treaties, it is curious that they have not relied on the federalism understanding as a mandate, especially given the possibility that actions taken pursuant to the federalism clause should be protected from preemption.<sup>57</sup>

Despite their stronger claim to authority and the mandate they create for state participation, there is little evidence that the ratified human rights treaties are prompting explicit state and local implementation initiatives, even among

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54. Davis, *The Spirit of Our Times*, *supra* note 6, at 362.

55. Again, the decision in *Medellin v. Texas*, 552 U.S. 491 (2008), may have cast some doubt on the domestic status of these treaties. See *infra* note 100. However, this development is recent enough that it cannot explain the historical lack of engagement.

56. See *supra* notes 12-14 and accompanying text. The RUDs send a strong message that whatever role the states might have in treaty implementation, there is neither an actual expectation that they will participate, nor any threat of sanction if they fail to do so.

57. By contrast, actions taken to implement the unratified treaties could be subject to challenges on preemption grounds. See Resnik, *supra* note 5, at 77-78; see also Gaylynn Burroughs, *More Than an Incidental Effect on Foreign Affairs: Implementation of Human Rights by State and Local Governments*, 30 N.Y.U. REV. L. & SOC. CHANGE 411, 418 (2006) (“[T]he CEDAW ordinance could be seen as an unconstitutional exercise of local power that tramples upon the United States’ prerogative to reject a particular treaty and to speak with one voice.”) (citation and internal quotation marks omitted). How the preemption doctrines would be applied to actions taken pursuant to the federalism understandings is complicated. Essentially, the federal government would have to make the argument that despite the historic (and potentially constitutionally mandated) delegation of a particular area of regulation to the states, and despite the federalism understanding included at ratification that preserves state control over these areas, federal primacy in the area of international law requires that independent state initiatives in this area be negated pursuant to the dormant foreign affairs doctrine. See *id.* The states then would be required to demonstrate that the regulation of their relationship with their own population had “more than some incidental or indirect effect” on the foreign affairs of the United States. See *Zschernig v. Miller*, 389 U.S. 429, 434-35 (1968). The complexity of this articulation of the argument alone demonstrates the problems of divvying up jurisdictional authority over these instruments. My point, however, is that the incorporationist states and localities have been the most proactive in terms of pushing the boundaries of federal exclusivity on issues of international law and foreign affairs, and yet, here, in an area in which they apparently have delegated authority, they have for the most part declined to act.



the incorporationists. Identifying these programs is somewhat challenging because the federal government has historically done little tracking of these activities. The 2008 report of the United States Human Rights Network's CERD Working Group on Local Implementation and Treaty Obligations noted that the United States has authorized no federal or state body to promote and monitor treaty implementation, and has done nothing to raise awareness of CERD at the state or local level, despite the significant role that the states must play in implementing the treaty's guarantees.<sup>58</sup> Similarly, "the United States' 2006 Report on its compliance with ICCPR provided 'only limited information . . . on the implementation of the Covenant at the state level.'"<sup>59</sup> This trend is changing, however. The most recent U.S. compliance report, which was submitted to the CERD committee in 2007, includes sections dealing specifically with state activities and programs.<sup>60</sup> In May 2010, Harold Hongju Koh, Legal Adviser to the Department of State, sent a letter to state and local human rights commissions regarding the reports due in 2010 and 2011 on the implementation of U.S. human rights obligations under ICCPR, CERD, and CAT.<sup>61</sup> In this letter, Koh explains the significant role of state and local governments in ensuring compliance with the country's international commitments.<sup>62</sup> He also solicits the assistance of these entities in collecting and compiling information related to subnational management of the wide variety of issues covered by these treaties.<sup>63</sup>

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58. Risa E. Kaufman, *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, Catherine Albisa & Martha F. Davis eds., 2007)) (citing U.S. HUMAN RIGHTS NETWORK'S CERD WORKING GROUPS ON LOCAL IMPLEMENTATION AND TREATY OBLIGATIONS, A REPORT TO THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION ON U.S. CERD OBLIGATIONS AND DOMESTIC IMPLEMENTATION (2008), available at <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN7.doc>).

59. *Id.* at 165-66 (quoting U.N. Human Rights Comm., *Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant*, ¶ 4, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006)).

60. See, e.g., PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 27 (2007), available at <http://www.state.gov/documents/organization/83517.pdf>.

61. See Letter from Harold Hongju Koh, Legal Adviser for the Dep't of State, to State and Local Human Rights Commissions (May 3, 2010), available at [http://www.iaohra.org/storage/pdf/human-rights-campaign/Letter\\_from\\_HaroldKoh\\_to\\_Stateand%20LocalCommissions.pdf](http://www.iaohra.org/storage/pdf/human-rights-campaign/Letter_from_HaroldKoh_to_Stateand%20LocalCommissions.pdf).

62. *Id.*

63. *Id.*

By rough measures, subnational engagement in this area is still relatively minimal. A 2009 survey of state-level human rights and civil rights commissions revealed that none includes even a reference to these ratified treaties in their mission statements.<sup>64</sup> Other scholars have collected isolated examples of state and local attempts to promote CERD that parallel the initiatives in support of ratification, but these are few and far between.<sup>65</sup> And, perhaps more significantly, even these initiatives generally appear to treat the ratified and unratified treaties identically for purposes of domestic implementation. That is, there is no express distinction made based on their legal status.<sup>66</sup>

One notable exception is the California legislature's ongoing efforts to use CERD to undo the effects of Proposition 209, which amended the California Constitution to prohibit any public use of racial, ethnic, or gender preferences to remedy past discrimination.<sup>67</sup> In 2003, the legislature adopted a bill defining a provision in the state constitution in accordance with CERD in order to per-

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64. See Kalb, *Dynamic Federalism*, *supra* note 6, at 1062 n.193 (2010). This study, relying as it does on reviewing the websites of state civil and human rights commissions, does not capture activity at a substate level. The Human Rights Institute at Columbia Law School reports on several initiatives occurring at the municipal level, but even these projects tend to focus on the unratified treaties and on the Universal Declaration of Human Rights. See COLUMBIA HUMAN RIGHTS INST., *supra* note 19.
65. See Davis, *supra* note 1, at 134-40; Lesley Wexler, *The Promise and Limits of Local Human Rights Internationalism*, 37 *FORDHAM URB. L.J.* 599, 632 (2010). In 1986, Burlington, Iowa, adopted some provisions of CERD in Human Rights Ordinance 2807. Burlington, Iowa, Ordinance 2807 (Sept. 2, 1986), reprinted in THOMAS M. FRANCK & MICHAEL J. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS* 790 (2d ed. 1993). In 2000, San Francisco's CEDAW ordinance was amended to include the principles of CERD. See Davis, *supra* note 1, at 137. New York City's proposed CEDAW legislation would also implement CERD, but the ordinance has not yet been adopted. See *Reintroduction of the Human Rights GOAL at New York City Council*, N.Y.C. HUMAN RIGHTS INITIATIVE (June 29, 2010, 2:30 PM), <http://www.nychri.org/ReintroductionoftheHumanRightsGOAL.htm> (announcing the reintroduction of the Human Rights GOAL bill).
66. For example, the New York City Human Rights Initiative proposes "ground-breaking legislation that draws from broad human rights principles of non-discrimination, participation, accountability, and transparency, as well as from two key international treaties addressing gender and race discrimination—CEDAW . . . and CERD . . ." N.Y.C. HUMAN RIGHTS INITIATIVE, <http://www.nychri.org/> (last visited June 14, 2011). The Initiative emphasizes the role of these international instruments in helping frame and promote a local human rights agenda but says nothing about the importance of fulfilling the United States' binding legal commitments. Moreover, the Initiative does not distinguish between CERD, which has been ratified, and CEDAW, which has not.
67. See CAL. CONST. art. I, § 31.

mit some forms of preferential treatment based on race.<sup>68</sup> This attempt prompted numerous legal challenges, and in *C&C Construction v. Sacramento Municipal Utility District*,<sup>69</sup> a California appeals court determined that the legislature had unconstitutionally infringed on the power of the courts to interpret the constitution.<sup>70</sup> In the wake of that decision, Professor J. Owens Smith, who was responsible for the research and drafting of the legislation, said that the state court failed to accord the appropriate weight to the ratified treaty: “The state constitution should be subordinate to the human rights treaty . . . . The CERD definition, the Supreme Law of the Land, should have trumped state law.”<sup>71</sup> In other words, the California courts relied incorrectly on a “soft law” view of the treaty’s norms as providing guidance to the legislature (similar to the way that an unratified treaty could be used), rather than as a binding source of authority.

Advocates raised this argument in a later case. In *Coral Construction v. City of San Francisco*, appellants challenged San Francisco’s Minority/Women/Local Business Utilization Ordinance, which required race- and gender-conscious remedies to ameliorate the effects of past discrimination in the awarding of city contracts.<sup>72</sup> The court noted that the Supreme Court of California (acting in its role as the ultimate arbiter of constitutional meaning) had previously defined

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68. CERD specifically permits the use of “special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection,” which may conflict with the limitations that the U.S. Supreme Court has placed on the use of affirmative action programs. CERD, *supra* note 10, at 216.

69. 18 Cal. Rptr. 3d 715 (Cal. Ct. App. 2004).

70. The Court explained that “Assembly Bill No. 703 amounted to an attempt by the Legislature and the Governor to amend the California Constitution without complying with the procedures for amendment. This attempt was manifestly beyond their constitutional authority.” *Id.* at 726. The California Supreme Court declined to review the case. The relationship between CERD and the provision in question, and the state’s obligations with respect to CERD, were raised for the first time on appeal and were thus summarily dismissed. *Id.* The court did note, however, that CERD permits “special measures” only to ensure certain racial or ethnic groups or individuals “equal enjoyment or exercise of human rights and fundamental freedoms . . . .” *Id.* at 727 (citing CERD, *supra* note 10, at art. 1(4)). The court held that the decision to ban affirmative action programs by referendum meant that the California citizenry had determined that “special measures are not only unnecessary to ensure human rights and fundamental freedoms in California, but inimical to those principles.” *Id.* Therefore, the court concluded that the special measures authorized by CERD “are not permitted in California, even under the Convention.” *Id.*

71. Davis, *supra* note 1, at 142-43 (citing Davis’s discussion with J. Owens Smith on June 26, 2006).

72. 57 Cal. Rptr. 3d 781, 783 (Cal. Ct. App. 2007).

the term “discriminate” according to its ordinary dictionary definition.<sup>73</sup> The appellate court then rejected the notion that the federal authority granted by the federalism reservation gave the state some “super-legislative” power to change the California Constitution without following the proper procedures for amendment.<sup>74</sup> The court then considered whether CERD actually trumped the California constitutional prohibition on the use of racial and gender preferences and ultimately determined that it did not.<sup>75</sup> It noted that at the time of ratification, the United States expressed its position that CERD did not require the use of preferences to remedy past racial discrimination.<sup>76</sup> Despite the conflict this limitation posed to the position of the CERD Committee responsible for the treaty’s interpretation,<sup>77</sup> the court deferred to the State Department’s permissive approach. It concluded, therefore, that because the state constitutional provision could be reconciled with CERD, it was not preempted.<sup>78</sup>

Although this case represented a disappointment for human rights advocates, the use of CERD and the resulting dialogue it created between and among the branches of the state government is demonstrative of the deep engagement by state actors that the federalism reservation enables and even necessitates. This example is, nonetheless, anomalous. Despite the breadth of these treaties’ protections, there is little subnational engagement with them, nor much indication that the incorporationists feel empowered or obligated to apply them as law. Somewhat surprisingly then, it appears that the incorporationist states and localities are more engaged with unratified than ratified treaties.

### B. *Explaining the Paradox*

The general failure of states and localities to implement the ratified human rights treaties may be explained in multiple ways; however, the obvious explanations fail to address the contradictory behavior of the incorporationists. For example, the absence of state-level implementation activity could simply reflect political resistance by subnational actors to the imposition of international human rights norms. In this view, the federalism understanding is simply a “bait-and-switch” move by the states and the federal government to avoid mak-

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73. *Id.* at 792 (citing *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1081 (Cal. 2000)).

74. *Id.*

75. *Id.*

76. *Id.*

77. The CERD Committee is the monitoring body for CERD. Among its other responsibilities, the Committee reviews the submissions of the State Parties documenting the legislative, judicial, administrative, and other efforts taken to effectuate the Convention, and it provides suggestions and general recommendations for compliance. See CERD, *supra* note 10, at 224-26.

78. *Coral Construction*, 57 Cal. Rptr. 3d at 792.

ing any revisions to domestic law to comply with treaty obligations.<sup>79</sup> This explanation probably accounts for the behavior of many states and localities, given the negative attention that the domestic incorporation of international law has received in recent years.<sup>80</sup> Certain elements of the Republican Party have recently expressed broad opposition to the United States' participation in international legal regimes,<sup>81</sup> and some states are considering taking, or have taken, steps to try to block the consideration of international or comparative law in their courts. For example, Oklahoma voters recently decisively adopted a constitutional amendment<sup>82</sup> to ban consideration of foreign, international, or Sharia law in judicial decision making.<sup>83</sup> Although the adoption of the amendment was promptly enjoined by a federal court on First Amendment grounds,<sup>84</sup> nu-

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79. Certainly, this reading of the situation would receive some support from the presence of the ratification RUDs that purport to limit these treaties' domestic effect and enforceability. See Henkin, *supra* note 12, at 342.

80. Even nondispositive references to comparative and international law have prompted legislative proposals forbidding any reference to international law in U.S. constitutional interpretation and providing for the impeachment of any judge who violates this rule. See, e.g., Constitution Restoration Act of 2004, S. 2082, 108th Cong. §§ 201, 302 (2004).

81. See, e.g., TEX. REPUBLICAN PARTY, 2010 STATE REPUBLICAN PARTY PLATFORM 22-23 (2010), available at [https://www.1888932-2946.ws/TexasGOP/E-Content/Strategy/userfiles/2010\\_RPT\\_PLATFORM.pdf](https://www.1888932-2946.ws/TexasGOP/E-Content/Strategy/userfiles/2010_RPT_PLATFORM.pdf) (advocating, among other things, withdrawal of the United States from the United Nations, rejection of the Law of the Sea Treaty, and rescission of "any existing treaties that compromise the United States Constitution"); *Mission and Platform*, ME. REPUBLICAN PARTY, <http://www.maine共和.com/about-2/mission-and-platform> (last visited Oct. 7, 2011) (The Maine Republican Party "[o]ppose[s] any and all treaties with the UN or any other organization or country which surrenders US sovereignty," specifically including the CRC and the Law of the Sea Treaty).

82. According to press reports, the ballot initiative was passed with more than seventy percent support. See Ariane de Vogue, *Federal Judge Bars Oklahoma Ballot Initiative on Sharia Law*, ABC NEWS, Nov. 29, 2010, <http://abcnews.go.com/Politics/federal-judge-bars-implementation-ballot-initiative-sharia-law/story?id=12269179>.

83. See Martha F. Davis & Johanna Kalb, *Oklahoma and Beyond: Understanding the Wave of State Anti-Transnational Law Initiatives*, 87 IND. L.J. SUPPLEMENT 1 (2011), [http://ilj.law.indiana.edu/articles/87/87\\_daviskalb.pdf](http://ilj.law.indiana.edu/articles/87/87_daviskalb.pdf); see also Donna Leinwand, *More States Enter Debate on Sharia Law*, USA TODAY (Dec. 9, 2010), [http://www.usatoday.com/news/nation/2010-12-09-shariaban09\\_ST\\_N.htm](http://www.usatoday.com/news/nation/2010-12-09-shariaban09_ST_N.htm).

84. See James C. McKinley, *Judge Blocks Oklahoma's Ban on Using Shariah Law in Court*, N.Y. TIMES (Nov. 29, 2010), <http://www.nytimes.com/2010/11/30/us/30oklahoma.html>.

merous other states considered similar initiatives in their most recent legislative sessions.<sup>85</sup>

Nonetheless, it seems clear that resistance to international human rights law does not account for the behavior of the incorporationists, given the actions they have already taken to encourage national acceptance of treaties that have not been ratified. Additionally, outside the treaty context, a number of states have raised their voices on a variety of different human rights issues, including, most famously, Massachusetts's passage of legislation to prohibit the purchase of goods from Burma,<sup>86</sup> California's attempt to provide rights of recovery to Holocaust victims,<sup>87</sup> and Illinois's adoption of divestment provisions preventing the state treasurer and state pension funds from investing in the Sudanese government or its business partners.<sup>88</sup> Thus, it seems obvious that the incorporationists are not consistently averse to participating in human rights regimes or expressing a voice on rights-related issues of foreign affairs.

Another possible explanation for the lack of subnational engagement with human rights treaties is a general lack of local expertise or interest in international law. Again, this factor may account for the behavior of some subset of subnational actors with respect to these treaties; however, other evidence suggests that a broad subset of the states is very active in implementing a variety of other kinds of treaty law. Professor Julian Ku has documented several examples of state involvement in treaty implementation in the private law context.<sup>89</sup> For example, the Hague Convention on the Civil Aspects of International Child Abduction was implemented through federal legislation, but a group of states have 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."<sup>90</sup> Similarly, "most states have enacted legislation to ensure implementation [of the Convention Abolishing the Requirement of Legalization for Foreign Public Documents] either through adoption of the Uniform Law on Notarial

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85. Judith Resnik, Comparative (In)Equalities: CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production 7-8 (Oct. 2, 2011) (unpublished manuscript) (on file with author) (listing initiatives); *see also* Leinwand, *supra* note 83.

86. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (holding the legislation preempted by federal law and therefore unconstitutional).

87. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (finding the state act preempted by national foreign policy).

88. Act To End Atrocities and Terrorism in the Sudan, 15 Ill. Comp. Stat. 520/22.5 (2005), available at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?name=094-0079>.

89. Julian G. Ku, *The Crucial Role of the States and Private International Law Treaties: A Model for Accommodating Globalization*, 73 Mo. L. REV. 1063, 1065 (2008).

90. *Id.*

Acts or separate legislation.”<sup>91</sup> Because many of these treaties squarely overlap with domestic state law, state legislatures have often taken the lead role in implementing them to ensure that their citizens benefit from the rights that the laws afford.<sup>92</sup> It appears, therefore, that at least some state legislators are quite comfortable domesticating certain kinds of treaty law.

Thus, to characterize the states’ position as one of rejection (either of international law generally or of human rights law particularly) fails to acknowledge not only an arguably deep base of knowledge and expertise at the state level, but also the genuine commitment of some states and cities to the project of “bringing human rights home.”<sup>93</sup> The states are not a uniform group, and cities offer a far more numerous and consequently even more diverse set of perspectives and capabilities. Thus, though these two explanations likely account for the lack of activity in some or even most states, they fail to explain the absence of engagement by the incorporationists. This group is likely to be at the forefront of the movement to implement the ratified human rights treaties, and the challenges these actors face are worth understanding. Additionally, their successful engagement with treaties might reveal strategies for overcoming the barriers faced by other subnational entities.

What then accounts for the incorporationists’ behavior? One possibility is that the paradox could be explained by politics, although in a more complex rubric than the simple story of state resistance.<sup>94</sup> As Professor Judith Resnik has noted, American “sovereignists” who decry the application of international human rights law domestically “are particularly focused on issues often grouped under the rubric of ‘the culture wars’—a phrase usually referring to clashes about gender and sex, lifestyles and families, race, crime, and punishment.”<sup>95</sup> Thus, some of the structural resistance to implementing international human rights law is a guise for political opposition to the normative outcomes these instruments may be perceived to require.<sup>96</sup> Because these treaties have become

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91. *Id.*

92. *See infra* Subsection II.B.2 (discussion of the Wills Convention).

93. Maria Foscarinis, *Advocating for the Human Right to Housing: Notes from the United States*, 30 N.Y.U. REV. L. & SOC. CHANGE 447, 453 (2006) (“[I]n June 2004, the Ford Foundation organized a day-long conference called ‘Bringing Human Rights Home,’ highlighting the domestic use of human rights strategies and encouraging funders to support such efforts.”). This slogan now characterizes a discourse and strategy used by domestic advocates.

94. *See supra* notes 75-78 and accompanying text.

95. Resnik, *supra* note 18, at 1574 (citing THOMAS FRANK, *WHAT’S THE MATTER WITH KANSAS?: HOW CONSERVATIVES WON THE HEART OF AMERICA* 5-7 (2004)).

96. *See* Melish, *supra* note 5, at 425 (“[A]ssertions are . . . made that adhesion to currently unratified treaties, like the CRC and CEDAW, will require immediate mandatory legalization of same-sex marriage, provision of abortion and contra-

contested sites in these ongoing domestic disputes, subnational resolutions of support may be a way of expressing a position in these national disputes through the lens of a treaty commitment. In other words, the battle over treaty acceptance is just another front in the war over federal standards—the fact that the mechanism is international law is incidental to the actual purpose.<sup>97</sup>

An alternative (or additional) angle to the political account is that the incorporationist states and cities are engaged in what economists call “cheap talk,” which can be cynically defined as “frisson-inducing dissent that does not make itself too inconvenient in practice for the current arrangement of interests and ideas.”<sup>98</sup> As the San Francisco CEDAW program illustrates, there is a real financial and administrative burden that comes with implementation. Resolutions of acknowledgement allow cities and states to take credit for forwarding human rights values without incurring any of these costs.<sup>99</sup>

A third possibility is that subnational entities do not recognize the space that the treaty RUDs create for their consideration of these treaties. To date, the federal government’s position as to the states’ obligations under these treaties is ambiguous at best. The ratification RUDs purport to preserve a significant role for the states while simultaneously disavowing any obligation on their part to

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ception on demand, decriminalization of prostitution, the turning over of child-rearing to the state, and other measures that could not currently be achieved through national-level democratic processes alone.”).

97. This explanation receives some support from the fact that issue advocacy organizations have played a key role in mobilizing support for CEDAW and CRC ratification initiatives. Both campaigns involve partnerships between organizations focused on international human rights with those focused on particular area initiatives. In the San Francisco case, the CEDAW implementation movement was led by the Women’s Institute for Leadership Development, known as WILD for Human Rights, working in collaboration with Amnesty International and the San Francisco Women’s Foundation. CRC is promoted by a number of national and local organizations, including Amnesty International, the Child Welfare League of America, the Conference of Catholic Bishops, the Center for Human Rights at Northwestern Law School, and a national volunteer organization called the Campaign for U.S. Ratification of the Convention on the Rights of the Child.
98. Jedidiah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 *YALE L.J.* 1122, 1190 n.225 (2010). Thanks to David Fontana for this insight.
99. This example of “cheap talk” may incorrectly suggest that the simple expression of these norms has no value or impact. To the contrary, norms scholar Cristina Bicchieri has argued that “[t]he very act of promising, ‘cheap talk’ of no consequence, might be enough to induce many of us to behave contrary to self-interest. A social norm has been activated, and, under the right circumstances, we are prepared to follow it.” CRISTINA BICCHIERI, *THE GRAMMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS* 175 (2006). Andrew Woods has argued that human rights advocates should focus more on the power of social influence as a way of increasing respect for human rights. See generally Andrew K. Woods, *A Behavioral Approach to Human Rights*, 51 *HARV. INT’L L.J.* 51 (2010).



take any action, as well as any threat of judicial enforcement. Nonetheless, as previously explained, the federalism reservation creates a possible mandate for state and local action, even if not an enforceable directive. This view may, however, be contradicted by the Supreme Court's recent decision in *Medellin v. Texas*, which includes language suggesting that the ratified human rights treaties are not even domestic law until implemented through federal legislation.<sup>100</sup>

The Court's holding in *Medellin* has not affected the view of the State Department, which continues to take the position that "the United States is bound under international law to implement all of its obligations under these treaties."<sup>101</sup> It recently notified state governors that "implementation of [the ratified human rights treaties] may be carried out by officials at all levels of government"<sup>102</sup> and asked them to distribute information regarding these treaties to

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100. 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." *Medellin v. Texas*, 552 U.S. 491, 505 n.2 (2008); see also *id.* at 504 ("This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law."). Given the conflict that this reasoning would present with the plain language of the Supremacy Clause, most of the subsequent scholarly commentary has assumed that *Medellin* must be read more narrowly. Professor Curtis Bradley, for example, acknowledges that the Court's statements could be viewed as stating that treaties "have no domestic law status at all," but contends that the decision should be interpreted to mean only that non-self-executing treaties are not judicially enforceable. Curtis Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 541, 548-50 (2008); see also Carlos Manuel Vazquez, *Treaties as the Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 649 (2008) ("At several points, the Court said that the non-self-executing treaties were not 'enforceable' domestic law. Only this narrower understanding of *Medellin* avoids a direct conflict with the constitutional text."). Nonetheless, until the Supreme Court is presented with an opportunity to clarify its meaning, the domestic status of these treaties is uncertain.

Thus far, there has been little discussion of the implications of this decision for U.S. federalism in human rights treaty implementation. The purpose of the federalism understanding would be unclear if these treaties (which are explicitly non-self-executing because of the RUDs with which they were ratified) are not even domestic law. The federal government could then make the treaty applicable to the states only through federal legislation requiring state compliance. However, in so doing, the federal government would presumably cross the boundaries of federalism that the understanding was designed to protect. Therefore, to adopt this view of self-execution would seemingly render the federalism understanding meaningless.

101. Memorandum from Harold Hongju Koh, Legal Adviser to the Dep't of State, to State Governors 2 (Jan. 20, 2010), available at <http://www.state.gov/documents/organization/137292.pdf>.

102. *Id.*

the responsible subnational actors. But confusingly, the State Department simultaneously represents that the United States has *already* implemented these treaties because its law at the time of ratification was sufficient to satisfy the treaty guarantees.<sup>103</sup> Thus, as a result of these mixed messages, the incorporationists may view these treaties as implemented, or they may be unaware of the potential mandate that is created by the federalism understanding—a mandate for additional consideration of the rights that the treaties seek to protect beyond or in addition to what domestic law already requires.

Without minimizing the possible significance of these explanations, I want to focus here on an alternative. My suggestion is that even when the incorporationists are participating in implementing treaties (in human rights and in other areas), they are generally doing so from within the constraints of a dualist understanding of federalism. That is, they act when there are clearly delineated areas of state and federal authority within the implementation project. As I will explain, the human rights treaties, both ratified and unratified, are not conducive to this kind of approach because of the broad and cross-cutting nature of the principles that they endorse. This characteristic makes divvying up the implementation tasks vertically (as between the different levels of government) and horizontally (between different actors at the same level) extremely challenging. It also makes the actual goals of implementation difficult to define. The incongruence between the structure of these treaties and a dualist approach is, I contend, impeding substantive implementation activities at the state and local level.

If I am correct, this thesis resolves the apparent paradox because the incorporationists' behavior toward the ratified and the unratified treaties becomes consistent. Human rights treaties are viewed as a federal responsibility, and therefore states and localities generally focus their efforts on encouraging federal adoption of these standards. Moreover, this explanation dovetails with the first three I offered. The dualist perspective may be adopted purposefully by the "cheap talk" incorporationists, who can then exploit the uncertainty around implementation responsibilities by focusing their efforts on advocating ratification while leaving the burden of implementation on the federal government. Alternatively, the dualist approach may operate more subtly, as cities and states endorse international human rights treaties as a way of changing federal policy without considering fully the possible benefits of their local adoption. Finally, lack of awareness of what implementing these treaties actually entails and which level of government is responsible may simply cause incorporationists to miss

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103. *Id.* at 1-2 ("United States obligations under ICCPR, CERD, and the CRC Optional Protocols are implemented under existing law; in other words, prior to becoming a party to each of these treaties, the U.S. State Department, coordinating with other relevant agencies, reviewed the treaties and relevant provisions of U.S. law and determined that existing laws in the United States were sufficient to implement the treaty obligations, as understood or modified by reservations, understandings or declarations made by the United States at the time of ratification in order to ensure congruence between treaty obligations and existing U.S. laws.").

opportunities for engaging with these instruments. Moving beyond a dualist focus on divisions of responsibility could thus increase incorporationist participation in the treaty process.

## II. DUALISM IN TREATY IMPLEMENTATION

I have argued that the failure of the incorporationists to engage fully with the ratified human rights treaties can be explained in part by their dualist perspective on the task of treaty implementation. In this Part, I begin to unpack this somewhat counterintuitive hypothesis by providing another point of comparison through which to understand the implementation challenges of the ratified human rights treaties. First, I will present the range of possible cooperative federalist relationships. Next, I reexamine three of the examples of federal-subnational collaborations in regulating the nation's foreign affairs that have been regularly raised in the academic literature, and I argue that the relatively successful domestication of these instruments may be attributed to the fact that, by contrast to the human rights treaties, they are conducive to a dualist model of implementation.

### A. *Rethinking Cooperative Federalism*

Before turning to my case studies, some definitional clarity is necessary. At first blush, the contention that even the incorporationists are bringing a dualist perspective to international treaty law seems contradictory. In a traditional dualist model, under which federal and state authorities have clearly defined and distinct areas of authority that are differentiated both by territory and subject matter,<sup>104</sup> “foreign affairs and international law . . . have been areas of particular insulation against subnational participation.”<sup>105</sup> Thus, on one level, any state or local participation in international lawmaking crosses traditional federalism boundaries. The literature in this area has generally characterized federal-subnational interactions around international treaty law as falling into the broad category of “cooperative” federalist relationships.

This binary framework, which sets dualist and cooperative relationships in opposition, is no longer particularly helpful as a descriptive matter. Moving away from a binary approach allows for a more precise characterization of different modes of national and subnational interaction—and, therefore, for a bet-

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104. Robert A. Schapiro, *From Dualism to Polyphony*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION* 33, 34 (William W. Buzbee ed., 2009) (“The key postulates of dual federalism are that the states and the federal government exercise exclusive control over nonoverlapping regions of authority, that these realms of exclusive control are defined by subject matter, and that the federal courts play an important and distinctive role in guarding the boundaries of state and federal terrain.”).

105. Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 *MO. L. REV.* 1185, 1192 (2008).

ter understanding of how different kinds of regulatory relationships may be employed to solve different problems. Instead of conceiving of federalist relationships as a binary, therefore, assume that “dualism” is one end point of a spectrum of cooperative relationships. “Pure” dualism rejects entirely the possibility of concurrent jurisdiction over different subject matter areas: State and federal governments have designated areas of authority in which they operate, and the role of the courts is simply to protect these clear jurisdictional boundaries from incursion from both directions.

At the other end of the spectrum is dualism’s converse: “dynamic federalism.”<sup>106</sup> Dynamic federalism describes a relationship that is purposefully structured to capture the benefits of jurisdictional overlap: plurality, dialogue, and redundancy.<sup>107</sup> Plurality refers to the possibility federalism creates for “a variety of different responses[, which] . . . encourag[es] policy experimentation.”<sup>108</sup> It captures the notion of states as laboratories and recognizes the possibility that the appropriate regulatory response may vary based on local conditions. The experience of plurality is enhanced by the possibility of dialogue between institutional actors, which allows for further innovation based on

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106. The literature on dynamic federalism emerged as a response to the Rehnquist Court’s jurisprudential movement to redraw and enforce the boundaries on federal and state power. While the Court was engaged in this project of line drawing, “[t]he most significant developments in federalism were occurring outside of the courts, as the states and the national government worked through various cooperative and competitive arrangements.” Robert A. Schapiro, *From Dualist Federalism to Interactive Federalism*, 56 EMORY L.J. 1, 3 (2006). This disconnect between the Rehnquist Court’s dualist model of federalism and the reality on the ground has led to a body of scholarship that attempts to more accurately describe the state-federal relationship by accounting for the many areas of shared state-federal jurisdiction and offers constructive ways of mediating that overlap. These models, referred to as “adaptive,” “dialogic,” “polyphonic,” and “interactive” federalism, attempt to describe ways in which the federal government and subnational governments manage their areas of concurrent authority. See David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2008); Powell, *supra* note 16, at 250; Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409 (1999); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005). However, these models also attempt to go beyond the descriptive, working to identify and maximize the perceived benefits that result from jurisdictional redundancy. I use Professor Kirsten Engel’s term “dynamic” as a way to broadly capture the underlying principles of this set of models. See Kirsten Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 176-77 (2006) (adopting the term “dynamic” to describe this body of work in which “federal and state governments function as alternative centers of power and any matter is presumptively within the authority of both the federal and state governments”).

107. Schapiro, *supra* note 104, at 43.

108. *Id.*

the exchange of experiences. Finally, “[r]egulatory overlap facilitates redundancy as well. If one set of regulators fails to address the problem, another set provides an alternative avenue for relief.”<sup>109</sup>

In order to reap the benefits of plurality, dialogue, and redundancy, local, state, and federal governments must engage repeatedly through interactions over concurrent areas of authority. To maximize the values of dynamism, therefore, partnerships must be structured to encourage ongoing, simultaneous federal-subnational activity in overlapping areas of jurisdiction.<sup>110</sup> This kind of framework permits the development of a diverse range of approaches to different regulatory problems, which can then be shared and replicated, rejected, or improved upon. This process is purposefully advanced through proactive efforts to collect and publicize both best practices and failures. Concurrent jurisdiction is actively retained to permit the coexistence of alternative solutions from different authorities.<sup>111</sup>

These features of dynamism are present to greater or lesser degrees in all cooperative federalist interactions, and measuring their presence or absence allows for the characterization of a partnership as either more dualist or more dynamic along the spectrum of cooperative relationships. A related observation is that not all of these characteristics may be necessary or productive in every cooperative relationship. Rather, their significance will depend on the nature of the obligation in question, as well as the nature of the pressure the federal government is authorized or willing to apply to urge state participation in national goals. For example, a more dualist cooperative model may be adequate if the solution to a particular regulatory problem falls more clearly within the realm of existing state or federal regulation and the other sovereign is content to play a supporting role. By contrast, a more dynamic cooperative relationship may be necessary when implementation cannot be resolved simply by divvying up tasks along clear lines of territorial authority and where the federal government is unwilling to act, or incapable of acting, coercively.

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109. *Id.* at 44.

110. *Id.* (“The optimal regulatory regime develops and changes over time, with constant interaction from a variety of forces, including information generated by other regulators.”).

111. The notion that the framework should actively promote ongoing interactions as a normative good may not be captured within most conceptions of dynamic federalism. In introducing their idea of “adaptive” federalism, Professors David Adelman and Kirsten Engel contend that dynamic federalism empowers states to compete with the federal government, with policy conflicts resolved “on the merits.” Adelman & Engel, *supra* note 106, at 1830. Their adaptive federalism, as I understand it, focuses more on protecting the process by “emphasiz[ing] the critical role that a multijurisdictional framework of government plays in allowing policy diversification and optimization to coexist.” *Id.*

Dynamism imposes costs in uncertainty, inefficiency, and inconsistency.<sup>112</sup> These must be weighed against its potential benefits in particular circumstances. In any event, selecting the appropriate model of federalist engagement requires a more detailed understanding of the desired goals in relation to the range of possible modes of interaction. In the next Section, I rely on case studies to illustrate the utility of this approach in the realm of international law and foreign affairs.

*B. The Spectrum of Cooperative Federalism Relationships: Case Studies*

With this “spectrum” framework of cooperative federalism in place, I turn now to consider some of the most regularly cited<sup>113</sup> examples of federal-subnational cooperation in realizing the nation’s international commitments outside the human rights context. While all of these cases could be (and in some instances, have been)<sup>114</sup> described as “dynamic” in the existing literature, my goal here is to refine this categorization by looking more closely at where specifically each of these interactions fits along the spectrum from dualism to dynamism. Generally, I argue that the relative success of these partnerships results from the fact that, by contrast to the human rights treaties, their goals are conducive to a more dualist model of federal-state cooperation.

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112. See Ahdieh, *supra* note 105, at 1242-44. Professor Robert Ahdieh explains that the presence of multiple authorities with regulatory control over a question of law or fact can create uncertainty. He gives the example of foreign states’ unwillingness to extradite criminal suspects to the United States because of uncertainties as to which jurisdiction could offer a binding commitment to remove the death penalty as an option. *Id.* at 1242-43. Further, the redundancies of dynamism may create inefficiencies in achieving some substantive goals. *Id.* at 1243-44. Finally, dynamism may “dictate some trade-off with universalistic or other substantive commitments as to ends” given “the embrace of multiple voices.” *Id.* at 1243. For the last reason, Ahdieh suggests that dynamism may be inappropriate in the human rights context, given its commitment to universalism. *Id.* at 1237.

113. See generally Ahdieh, *supra* note 105 (discussing the federalist relationships embodied in the Sudan Accountability and Divestment Act (SADA)); Amelia H. Boss, *The Future of the Uniform Commercial Code Process in an Increasingly International World*, 68 OHIO ST. L.J. 349 (2007) (Wills Convention); Kalb, *Dynamic Federalism*, *supra* note 6, at 1025 (2010) (Vienna Convention on Consular Relations (VCCR)); Julian Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457 (2004) (VCCR and Wills Convention); Resnik, *supra* note 15, at 1144-45 (SADA).

114. See, e.g., Powell, *supra* note 16, at 274 (describing the interactions around the VCCR as dialogic).

## 1. The Vienna Convention on Consular Relations

The Vienna Convention on Consular Relations (VCCR), to which the United States is a party, mandates that a foreign national within a signatory state be advised of his right to notify his consulate of his arrest.<sup>115</sup> Because the notification guarantee is triggered by an arrest, compliance in the United States requires the participation of a variety of national and subnational entities. Implementation of the Convention thus requires some level of state engagement with the federal commitment.

Despite the fact that the vast majority of arrests are conducted by state and local law enforcement officials, no guidance was provided at the subnational level as to the new requirements at the time of ratification. As a result, in the early years after ratification, “[s]tate and local police forces . . . operated in blissful ignorance of the requirement, with the result that noncompliance was widespread.”<sup>116</sup> Beginning in the early 1990s,<sup>117</sup> this ongoing failure to comply with the VCCR began to be challenged in state, federal, and international courts, as other parties to the Convention protested the imposition of the death penalty on those of their citizens who had failed to exercise their right to consular notification while in U.S. custody. The federal government then launched a large-scale educational campaign intended to inform state and local officials of their obligations under Article 36.<sup>118</sup> According to the State Department, since 1998, it has conducted approximately 450 training sessions in forty states and territories. Additionally, the Department has: distributed over one million pieces of instructional material, “including manuals, pocket reference cards, training videos, and CD-ROMs;” “published several articles on consular notification” for “the membership magazines of the American Correctional Association and the American Jail Association;” and provided information for articles published in other law enforcement publications.<sup>119</sup> The State Department also pro-

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115. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].

116. Margaret McGuinness, *Medellín, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 796 (2006) (citing S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to Counsel*, 26 ST. MARY'S L.J. 719, 748 (1995)).

117. Professor Margaret McGuinness has identified a Canadian national named Joseph Stanley Faulder as the first defendant in this wave of litigation. *Id.* at 800. She notes, however, that the first case brought pursuant to Article 36 of the VCCR was a challenge to a deportation order in the late 1970s. *Id.* at 799-800 (citing *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979)).

118. *See id.* at 824.

119. *Outreach by the State Department: State Department Activities To Advance Consular Notification and Access Awareness and Compliance*, TRAVEL.STATE.GOV, [http://travel.state.gov/law/consular/consular\\_2244.html](http://travel.state.gov/law/consular/consular_2244.html) (last visited Feb. 10, 2011).

vides a model standard operating procedure through its website, which is intended for law enforcement agencies to use as a template.<sup>120</sup>

The impact of all of these activities is difficult to measure comprehensively; however, the effort appears to have decreased ignorance and noncompliance. As of this writing, only two states, California and Oregon,<sup>121</sup> have formally amended their penal codes to include the requirements of Article 36, but “many local police departments [have] incorporate[d] instructions on consular notification into their internal manuals.”<sup>122</sup> Furthermore, “a written directive governing procedures for assuring compliance with consular notification and access requirements is now required for accreditation by the Commission on Accreditation for Law Enforcement Agencies,” which will likely lead to even more widespread adoption of the requirements.<sup>123</sup> The State Department’s educational efforts have been successful enough that Dean Janet Koven Levit has argued that by the time the Court issued its decision in *Medellín*, effectively ending the possibility of a judicial remedy for Article 36 violations, the “core goal of Vienna Convention litigation, compliance, had been met.”<sup>124</sup>

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120. *Part Six: Consular Notification and Access Model Standard Operating Procedure*, TRAVEL.STATE.GOV, [http://travel.state.gov/law/consular/consular\\_3002.html](http://travel.state.gov/law/consular/consular_3002.html) (last visited Feb. 10, 2011).

121. CAL. PENAL CODE § 834c(a)-(d) (West 1999) (requiring consular notification for “known or suspected foreign national[s]” for any arrest or detention lasting longer than two hours); OR. REV. STAT. § 181.642(2) (2003) (requiring the Board on Public Safety Standards and Training to ensure that all peace officers are trained to provide consular notification). Florida also has a statute requiring consular notification that predates the ratification of the VCCR. FLA. STAT. § 901.26 (1965) (amended 2001). It was amended in 2001 to state that “[f]ailure to provide consular notification under the Vienna Convention on Consular Relations or other bilateral consular conventions 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. § 901.26 (2001). Illinois is considering legislation that would codify the right to consular notification by law enforcement officers and by courts. The statute also provides that if a defendant does not receive the right to consular notification before his or her first appearance in court, the court must grant a continuance to permit contact with the consulate—and that if consular notification is not provided for conviction and sentencing, the trial court shall consider whether the defendant was prejudiced. S.B. 1906, 97th Gen. Assemb., Reg. Sess. (Ill. 2011), available at <http://www.ilga.gov/legislation/97/SB/09700SB1906.htm>.

122. *Part Six: Consular Notification and Access Model Standard Operating Procedure*, *supra* note 120.

123. *Id.*

124. Janet Koven Levit, *Does Medellín Matter?*, 77 FORDHAM L. REV. 617, 630 (2008). Dean Levit interviewed a variety of actors in the county of Tulsa, Oklahoma, as a way of demonstrating how the “bottom up” story of the VCCR differs from the “top down” account of Supreme Court and International Court of Justice decisions. *Id.* This is not an entirely rosy picture, of course. Some states have also



Where does the VCCR fit in a dynamic federalist typology? Clearly the implementation of the Convention's right to consular notification is a cooperative project, requiring participation at all levels of government for full implementation; however, a closer look suggests that characterizing the interaction between different levels of government as dynamic would be somewhat misleading. The obligations imposed by the VCCR were accepted by the federal government without subnational consultation and are easily divisible along territorial boundaries (since they are triggered by the identity of the arresting authority). Moreover, the nature of the federal-subnational interactions around implementation is not particularly interactive. The flow of information is primarily in one direction through the extensive informational campaign the federal government has conducted to educate states and localities as to their role in the predetermined implementation framework. Thus, viewing the possibilities of cooperative federalism as a spectrum would suggest that the VCCR implementation scheme belongs closer to the dualist than the dynamic end of the spectrum.<sup>125</sup>

## 2. The Convention on the Form of an International Will

The 1973 International Institute for the Unification of Private Law (UNIDROIT) Convention on the Form of an International Will (Wills Convention) offers a different model with more of the elements associated with dynamism. The Wills Convention specifies the proper form for an international will and provides that, for its execution to be valid, an "authorized person" must issue a certificate as to its propriety.<sup>126</sup> The Wills Convention permits each signatory to designate the persons who will be "authorized" to execute international wills within that jurisdiction. Every other signatory must then recognize the effectiveness of certificates made by those authorized persons.<sup>127</sup> Because the subject matter of the Wills Convention touches an area of law typically controlled by the states, "federalism concerns were raised early on in the history of the Wills Convention."<sup>128</sup> One commentator to the process suggested that the Convention "sought not merely the resolution of international probate problems but [also] . . . the subversion of the traditional role of the American states

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openly resisted the Convention's requirements, at least to the extent that the requirements mandate a remedy for violations of the notification provision. See 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 Consul, and Remediation*, 27 MICH. J. INT'L L. 1185, 1232 (2006) (discussing the examples of Oregon and Florida, *supra* note 121).

125. An important caveat to this point lies in the area of remedies. See *infra* note 149.

126. See Convention Providing a Uniform Law on the Form of an International Will, S. TREATY DOC. NO. 99-29, Oct. 26, 1973, available at <http://www.unidroit.org/english/conventions/1973wills/1973wills-e.htm>.

127. *Id.*

128. Boss, *supra* note 113, at 380.

in enforcing their own rules for testing the validity of testamentary instruments."<sup>129</sup> In response to these concerns, the United States adopted a "two-tier approach" whereby "federal legislation would cover recognition in the individual states of international wills executed abroad and state legislation would cover recognition of wills executed in-state."<sup>130</sup>

Despite its authority to do so, the federal government declined to implement the Convention by passing federal legislation.<sup>131</sup> The federal government instead chose to rely on the uniform laws system. The State Department Office of Private International Law and the National Conference of Commissioners on Uniform State Laws collaborated in the development of the Uniform International Wills Act.<sup>132</sup> By the close of 2010, at least twenty states and territories had passed the Act,<sup>133</sup> but Congress has yet to adopt the accompanying federal legis-

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129. Jerome J. Curtis, Jr., *The Convention on International Wills: A Reply to Kurt Nadelmann*, 23 AM. J. COMP. L. 119, 120 (1975).

130. Boss, *supra* note 113, at 382 (citing 137 CONG. REC. S12,312 (daily ed. Aug. 2, 1991)).

131. The executive said as much in its message sent to Congress:

It would be undesirable . . . to rely exclusively on federal legislation to bring both aspects of the Convention—the execution of international wills as well as their recognition—into force. Our testators and their attorneys are not accustomed to consulting federal statutes for guidance on the formalities for making wills; they should continue to be able to place primary reliance on the laws of their States, rather than on federal law, for this purpose. What is therefore to be recommended to the Congress and the several State legislatures, is that the making of international wills within the United States be governed by State legislation, with each State free to decide whether it wishes to make it possible for testators to execute wills in its jurisdiction in this new form.

Letter of Submittal from the Secretary of State to the President of the United States, *in* President's Message to Congress Transmitting the Convention Providing a Uniform Law on the Form of an International Will, S. TREATY DOC. NO. 99-29, at 6 (1986), *available at* 1973 U.S.T. LEXIS 321.

132. See Curtis R. Reitz, *Globalization, International Legal Developments, and Uniform State Laws*, 51 LOY. L. REV. 301, 322 (2005).

133. ALASKA STAT. § 13.12.918 (2010); CAL. PROB. CODE § 6387 (West 2010); COLO. REV. STAT. § 15-11-1001 (2010); CONN. GEN. STAT. § 50a-8 (2006); DEL. CODE ANN. tit. 12, § 258 (2007); D.C. CODE § 18-708 (2008); HAW. REV. STAT. § 560:2-1001 (2010); 755 ILL. COMP. STAT. ANN. 10/0.01 (West 2007); MD. CODE ANN., EST. & TRUSTS § 4-608 (West 2011); MICH. COMP. LAWS §§ 700.2951-.2959 (2002); MINN. STAT. § 524.2-1008 (2002); MONT. CODE ANN. §§ 72-2-901 to -910 (2011); NEV. REV. STAT. ANN. § 133A.010 (2009); N.H. REV. STAT. ANN. §§ 551-A:1 to -A:10 (2006); N.M. STAT. ANN. §§ 45.2-1001 to -1010 (2010); N.D. CENT. CODE § 30.1-08.2-01 (2010); OKLA. STAT. tit. 84, § 350 (2011); OR. REV. STAT. § 112.232 (2009); VA. CODE ANN. §§ 64.1-96.2 to -96.11 (2007); V.I. CODE ANN. tit. 15, § 2-1001 to -1010 (2010). Interestingly, the National Conference of Commissioners on Uniform State Laws' website reports only fifteen enactments nationally, while other sources report double that number. *Compare* Unif. Law Comm'n, *Legislative Fact Sheet*—

lation. Pending its enactment, the United States has not deposited the instrument of ratification.<sup>134</sup> Nonetheless, in the states and territories that have adopted legislation, testators may “execute wills under the Convention, and foreign international wills are recognized in those states.”<sup>135</sup>

The Wills Convention experience evidences more of the elements of a dynamic federalist relationship than the VCCR, in that the initial international legal commitment was the product of a state-federal dialogue. Nonetheless, this period of collaboration was limited to the Wills Convention, and it was focused on how best to draw a bright line between the state and federal implementation obligations. The proposed solution was standardized through the uniform laws system *ex ante*, limiting the possibility for ongoing horizontal or vertical engagement. Thus, although further along the spectrum than the VCCR, the experience of the Wills Convention still retains elements of a dualist approach.

### 3. The Sudan Divestment Act

A final example of cooperative dualism involves the recent state-federal interaction around divestment in Sudan. In response to ongoing human rights violations in Sudan, President George W. Bush expanded U.S. sanctions against Sudan.<sup>136</sup> These sanctions were somewhat limited, however, in that they did not prohibit U.S. persons from making investments in foreign companies based in

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*Uniform International Wills Act*, NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=International%20Wills%20Act> (last visited Oct. 7, 2011), with M. READ MOORE, TAX AND ESTATE PLANNING ISSUES FOR U.S. CLIENTS WHO OWN FOREIGN PROPERTY (2011) (listing thirty states and territories). The absence of an easily accessible and accurate count of participating states makes tracking and measuring the progress toward full implementation and ratification more challenging.

134. The status of the Wills Convention is somewhat confusing. The Senate has given advice and consent to ratification and the President has signed the instrument of ratification. See 137 CONG. REC. 21,866 (1991). Nonetheless, because the United States has not deposited its instrument of ratification, the treaty is not considered ratified. See 7 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 214 (2009), available at <http://www.state.gov/documents/organization/121620.pdf> (“U.S. consular officers cannot execute the certificate under the Uniform International Wills Act because the United States has not, to date, become a party to the Convention Providing a Uniform Law on the Form of an International Will of October 26, 1973.”).

135. Ku, *supra* note 113, at 504.

136. See Exec. Order No. 13,412, 71 Fed. Reg. 61,369 (Oct. 13, 2006) (revising economic sanctions imposed against Sudan pursuant to Exec. Order No. 13,067, 62 Fed. Reg. 59,989 (Nov. 3, 1997)); Blocking Property of Persons in Connection with the Conflict in Sudan's Darfur Region, Exec. Order No. 13,400, 71 Fed. Reg. 25,483 (Apr. 26, 2006). Sanctions had originally been imposed against Sudan as a state sponsor of terror.

countries that do not prohibit doing business in Sudan.<sup>137</sup> Dissatisfied with the limitations of the federal divestment initiative, a number of states (prompted by the advocacy efforts of civil society organizations) took independent measures to divest from the Sudanese government and its business partners.<sup>138</sup> After a successful district court challenge threatened the viability of these initiatives,<sup>139</sup> Congress enacted the Sudan Accountability and Divestment Act of 2007 (SADA), which explicitly permits state and local divestment from Sudan, in addition to strengthening federal divestment.<sup>140</sup> This congressional intervention in turn prompted more states to adopt their own divestment measures.<sup>141</sup>

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137. See Perry S. Bechky, *Darfur, Divestment, and Dialogue*, 30 U. PA. J. INT'L L. 823, 835-36 (2009). Professor Perry Bechky explains that the U.S. Department of Treasury

has taken the position that its regulations do not prohibit U.S. persons from making investments in non-Sudanese third country companies doing business in Sudan . . . provided that such companies are not owned or controlled by the Government of Sudan or predominantly dedicated to or derive the predominant portion of their revenues from investments, projects, or other economic activities in Sudan.

*Id.* at 835 n.53 (alteration in original) (internal quotations marks and citation omitted). Nor did they block state pension funds from investing in companies with business dealings in Sudan. *Id.* at 836.

138. See John B. Reynolds III & Maureen E. Thorson, *California, Illinois and Other States Have Sudan Divestment Legislation: What Do You Need To Know?*, WILEYREIN LLP (Oct. 5, 2006), <http://www.wileyrein.com/publications.cfm?sp=articles&id=1947>.

139. The State of Illinois adopted a particularly aggressive approach, enacting a series of legislative provisions requiring the State Treasurer and state pension funds to divest from entities affiliated with the Sudanese government, companies engaged in business in the Sudan, or banks that do not impose reporting requirements on their loan applicants regarding their associations with the Sudanese government. See Act To End Atrocities and Terrorism in the Sudan, 15 Ill. Comp. Stat. 520/22.5 (2005). This legislation was then challenged in federal district court by the National Foreign Trade Council. In support of its position, the Council cited the Supreme Court's decision in *Crosby v. National Foreign Trade*, 530 U.S. 363 (2000), which struck down similar state legislation that barred state entities from buying goods or services from companies doing business in Burma. The district court issued its decision invalidating Illinois's legislation based on *Crosby* in February 2007. *Nat'l Foreign Trade Council v. Giannoulis*, 523 F. Supp. 2d 731 (N.D. Ill. 2007).

140. Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-74, 121 Stat. 2516. The Act provides that "a State or local government may adopt and enforce measures to divest the assets of the State or local government from, or prohibit investment of the assets of the State or local government in, persons that the State or local government determines are conducting or have direct investments in business operations in" Sudan. *Id.* § 3(b). States are required to provide the Justice Department with notice of their intent to divest. *Id.* § 3(c). SADA also provided

SADA is unlike the earlier examples in that the initiative for increased divestment in Sudan came “up” from the states, rather than “down” from the federal government. Thus, states were involved in setting the nation’s international agenda, rather than just cooperating in its implementation. The federal response in this case was also creative. Rather than cutting off state innovation either by allowing the district court’s decision to stand or by passing preemptive federal legislation dictating a national position, “Congress opened the door to state and local involvement in just the kind of foreign affairs questions that have typically been claimed to fall—as a matter of necessity—within the exclusive orbit of the federal government.”<sup>142</sup> Thus, this strategy has resulted in ongoing, concurrent regulatory activity at both the state and federal levels of government.

SADA is thus the most dynamic of these examples. Nonetheless, even though SADA represents a federal posture that is supportive of a collaborative relationship with the states, the divestment task is, like providing consular notification or adopting a process for executing valid international wills, relatively easy to define and divide along jurisdictional boundaries. Essentially, the legislation shifted responsibility and control over these initiatives to the states, but it is doing little beyond that to encourage or draw upon subnational innovation.

#### 4. Lessons from the Case Studies

These examples demonstrate that different models of state-federal engagement can successfully stimulate subnational participation in treaty implementation. Nonetheless, although each of these examples involves state-federal cooperation, the fact that both levels of government are participants does not mean that there is actually ongoing interaction in areas governed by competing sources of authority. Rather, the success of these partnerships seems linked to the dualist approach that was taken with respect to their implementation. With regard to the Wills Convention, the problem of jurisdictional overlap was resolved prior to the adoption of the instrument, with specific model legislation drafted for the states and the federal government that reflected the division of authority and responsibility. In the Vienna Convention context, the lines of

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for increased federal divestment from Sudan, including new provisions requiring companies seeking contracts with the federal government to certify that they are not doing business with Sudan. *Id.* § 6(a).

141. Following SADA, several additional states passed divestment legislation. As of July 2010, thirty states and the District of Columbia had divested from Sudan. See *Who Has Divested*, INVESTORS AGAINST GENOCIDE, <http://www.investorsagainstgenocide.net/page1004> (last visited June 15, 2011). This group includes the states that usually exhibit incorporationist behavior—like California, Massachusetts, and New York—but also many more, like North Carolina, Indiana, Kansas, Texas, and Wyoming, which are not generally known for their engagement with human rights. See *id.*

142. Ahdieh, *supra* note 105, at 1194.

authority were already clear since the treaty right was triggered by arrest. Because the tasks at issue in these cases are fairly straightforward and conducive to jurisdictional line drawing, a relatively dualist approach was sufficient to initiate subnational participation. Finally, through the enactment of SADA, Congress explicitly freed the states to pursue their own divestment strategies, parallel with the efforts of the federal government.

This is not to say, however, that this dualist model of interaction was the best option in these cases. To the contrary, it may have exacted a cost in terms of reaching full compliance with the goals of these initiatives. The divvying up of areas of authority and the delinking of the state and federal implementation projects may have stopped the dialogic interactions that could have built momentum toward full domestication of the treaty instruments. In both cases, a more dynamic approach, although more challenging to implement, could have been more successful.

For example, despite the clear division of authority in the Wills Convention, its adoption has yet to be completed. Over thirty years after the Uniform Law Commissioners approved the Wills Act, less than half of the states and territories have passed the necessary legislation, and the instrument of ratification has not been deposited.<sup>143</sup> A dynamic approach could help reinvigorate this initiative by reengaging the states and the federal government in viewing implementation of the Convention as a cooperative project. By adopting the accompanying federal legislation and publicizing the new state-level activities, the federal government could help to stimulate state-level activity by demonstrating federal commitment to the implementation project and support for state-level implementation initiatives. Similarly, increased state-level ratification activity, perhaps prompted by the efforts of the National Conference of Commissioners on Uniform State Laws, could spark new interest in the ratification process and possibly stimulate the passage of the proposed federal legislation.

A dynamic approach could have had even more dramatic consequences in the VCCR case. In a dualist move (albeit a strange one),<sup>144</sup> the Supreme Court

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143. See *Why States Should Adopt UIWA*, NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS, <http://www.nccusl.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UIWA> (last visited June 14, 2011) (listing states and noting that the United States has not yet ratified the Wills Convention).

144. Under a traditional dualist model, the responsibility for treaty implementation would fall squarely on the federal government. The Court instead chose to draw a jurisdictional line, leaving the states with the responsibility for curing their own violations. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 345-47 (2006). Justice Stevens's concurrence in *Medellin* most explicitly explains this move. He writes:

Under the express terms of the Supremacy Clause, the United States' obligation to "undertak[e] to comply" with the [International Court of Justice]'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's duty in this respect is all the greater

closed the door to individual remedies for VCCR violations by rejecting its own authority to require state courts to provide such a remedy. By contrast, a dynamic approach would have permitted overlapping jurisdictional authority over VCCR remedies and could have struck a balance between preserving state autonomy and ensuring state compliance with U.S. treaty obligations under the VCCR.<sup>145</sup> Dissenting in *Sanchez-Llamas v. Oregon*, Justice Breyer outlined how this relationship could have worked.<sup>146</sup> Justice Breyer would have held that the VCCR was enforceable in U.S. courts, but he would have required the states to resolve any Convention violations in the first instance, subject to review by the federal courts only to determine whether the state solution was consistent with the Convention's demand for an effective remedy.<sup>147</sup> This model would have allowed for a dynamic process through which a range of "effective" remedies could have been developed through horizontal and vertical dialogue.<sup>148</sup> Instead, the Court's line-drawing exercise essentially ended the dialogue over remedies and left the states with plenary control over state-level treaty compliance, pending the enactment of federal legislation.<sup>149</sup>

Finally, SADA offers the most dynamic model of the three treaties mentioned, yet its approach is still concentrated on creating space for subnational action, rather than generating dialogue between federal and state entities. Rather than simply freeing the states to pursue their own initiatives, the federal government could have drawn upon their experience to expand upon its own divestment policies and to encourage additional activities among other states.

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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.

*Medellín v. Texas*, 552 U.S. 491, 536 (2008) (Stevens, J., concurring) (first alteration in original) (quoting U.N. Charter art. 94, para. 1). Justice Stevens then urged Texas to take on the modest cost of compliance and to review and reconsider Jose Medellín's sentence, *id.* at 537, which Texas declined to do, *Ex parte Medellín*, 280 S.W.3d 854, 855 (Tex. Crim. App. 2008).

145. See Kalb, *Dynamic Federalism*, *supra* note 6, at 1049-59.

146. 548 U.S. 331 (2008) (Breyer, J., dissenting).

147. *Id.* at 365-98.

148. See Kalb, *Dynamic Federalism*, *supra* note 6, at 1054.

149. As of this writing, federal legislation has just been introduced that would reaffirm the United States' duty to provide consular notification and give federal courts jurisdiction to review petitions claiming violations of Article 36 in death penalty cases. To obtain relief, the petitioner would have to show actual prejudice—in which case the court would be authorized to order a new trial or sentencing proceeding. See Consular Notification Compliance Act of 2011, S. 1194, 112th Cong. (2011), available at <http://leahy.senate.gov/imo/media/doc/BillTextConsularNotificationComplianceAct.pdf>. The passage of this bill could advance the dialogue over Vienna Convention remedies, given the interest of state courts and legislatures in ensuring the viability of state criminal judgments.

One way of characterizing the lesson of SADA is to say that dualism permitted the federal government to legislatively pass the buck to the states. A more dynamic approach, on the other hand, would have maintained federal interest and engagement in state initiatives in order to maximize the desired policy outcome.

In sum, a more dualist approach to treaty implementation can operate as both a boon and a burden. From these examples, it appears that divvying up the tasks of treaty implementation along jurisdictional lines can help promote subnational involvement by making the areas of responsibility and authority clear. Nonetheless, it can also lead to ossification and paralysis by limiting the federal-subnational interactions that, whether coercive or not, could work to stimulate ongoing interest and engagement with these projects.

### C. *Moving Toward Dynamism*

The dualist cooperative approach offered a qualified success in the three cases above. By contrast, the particular challenge of human rights treaty implementation is that the dualist view is difficult to impose on some of these instruments given the cross-cutting nature of the rights they protect. Perhaps not coincidentally, those human rights treaties that have been implemented through federal legislation are the most conducive to a dualist approach.<sup>150</sup>

The human rights treaties that have not been federally implemented (both ratified and unratified) provide for much broader guarantees that are necessarily multijurisdictional and multifaceted in scope. For example, ICCPR provides that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>151</sup> Thus, parties to ICCPR are required to “take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.”<sup>152</sup> Enforcing this guarantee requires consideration of its impact on a variety of legal regimes, particularly those governing employment, marriage, and divorce.<sup>153</sup> These are areas that have previously been the subject of both state and federal

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150. Both the Genocide Convention and CAT require the contracting parties to criminalize and punish certain kinds of acts. By making the specified crimes punishable under federal law, the United States can fulfill its treaty commitments, even though the states could presumably adopt parallel legislation. CAT also prohibits State Parties from returning or extraditing any person to a state where there are substantial grounds to believe that the person might be subject to torture, a process which is under federal control. CAT, *supra* note 11, at 114.

151. ICCPR, *supra* note 10, at 179.

152. *Id.*

153. For example, this provision might require reconsideration of laws governing parental leave and the presumptions underlying the disposition of assets and division of custody in the event of divorce.



law.<sup>154</sup> CERD goes a step further, explicitly requiring consideration of the role of subnational entities in enforcing its guarantees. It provides that “[e]ach State Party shall take effective measures to review governmental, national, and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”<sup>155</sup> The rights that these treaties protect thus cut both horizontally across a number of subject matter areas and vertically through multiple layers of regulatory authority. Furthermore, the exact nature of the implementation tasks that the treaty requires is more difficult to define; as the San Francisco example demonstrates, fully implementing these treaties requires a holistic analysis of a variety of different legal regimes. These ambiguities leave both the states and federal government without clearly delineated roles or tasks in the implementation process and are, arguably, a significant reason why even the incorporationist states and localities have generally failed to engage.

This account helps to explain why even the incorporationists have demonstrated more interest in the unratified human rights treaties. As the earlier discussion of these instruments demonstrated, most of the subnational activity related to the unratified treaties does not attempt to enforce the guarantees these instruments protect. Rather, it is more accurately characterized as a protest by a variety of subnational actors of the federal government’s failure to act appropriately *within a designated sphere of national authority*.<sup>156</sup> When the federal government has failed to ratify a treaty, the incorporationists see a role for themselves in advocating for federal action; however, once the treaty is accepted, their job becomes more ambiguous and may even appear to have been eliminated.<sup>157</sup>

Moreover, even for those actors who would go further, there is a challenge in determining how to translate the broad requirements of implementation into

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154. See, e.g., Family and Medical Leave Act, 29 U.S.C. § 2601 (2006). Federal regulation of marriage and divorce is generally constitutional, and the passage of the Defense of Marriage Act in 1996, 1 U.S.C. § 7 (2006), which defines marriage for federal purposes as between one man and one woman, opened the door for increased federal regulation of family structures.

155. CERD, *supra* note 10, at 218.

156. See Powell, *supra* note 16, at 279 (“[M]uch of the local CEDAW work is directed toward the goal of building momentum to pressure the U.S. government to ratify CEDAW, rather than enlisting cities and states to function as laboratories for a range of experimentation.”).

157. Of course, it is possible that we are only at the beginning of the story with the unratified treaties. Were these subnational protests successful in stimulating federal ratification of CEDAW, for example, they could represent the beginning of a cooperative implementation approach. Alternatively, as has been the case with the other major human rights treaties, ratification could actually be the end of state and local engagement with the implementation project, as CEDAW would then become a federal responsibility.

actionable programs. Unlike in the case studies previously discussed, there are no clearly divisible jurisdictional lines in human rights treaties. Promoting increased engagement with these treaties will thus require an approach farther along the cooperative federalist spectrum than the approaches that were successfully applied in these cases. Even if there were federal leadership on these questions, it is hard to envision a federal educational campaign that could provide states and localities with a clear set of directives to follow that would satisfy their CERD commitments.<sup>158</sup> Similarly, it is difficult to conceive of a set of uniform laws that could be adopted to ensure state compliance with ICCPR. Encouraging subnational participation will require changing the narrative around human rights treaty implementation at all levels of government to one that is less focused on divvying up responsibilities and more accepting of the ambiguities and possibilities of jurisdictional overlap. Rather than drawing lines, this model would attempt to promote an ongoing process of experimentation and exchange, both vertically and horizontally, in order to clarify and concretize the ambitions expressed in these instruments.<sup>159</sup>

The challenge, then, is how to create a dynamic federalist relationship where none currently exists. In the final Part, I will offer some preliminary thoughts on how the federal government could encourage dynamism in human rights treaty implementation—and, by extension, in the fulfillment of the United States' other international obligations.

### III. CREATING DYNAMISM

The reality of the modern federalist state is that most regulatory areas are subject to ongoing and overlapping jurisdiction by multiple authorities. Because of their broad guarantees, human rights treaties give rise to particularly complex interactions among federal and subnational actors. What I have argued

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158. This is not to say, however, that these states and cities would be operating within a void. With the increased U.S. participation in human rights monitoring, *see supra* notes 60-63 and accompanying text, has come more guidance from the U.N. monitoring bodies. This provides content upon which states could draw in moving toward implementation.

159. There is a tension, of course, between these treaties' demand for universal acknowledgement of the fundamental rights they embody and the inevitable variation that would come with dynamism. *See Ahdieh, supra* note 105, at 1237. Nonetheless, constitutional rights are also presumptively universal within a particular domestic context—yet the dialogue between state and federal courts has proven productive in areas such as constitutional criminal procedure. *See Robert M. Cover & T. Alexander Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court*, 86 *YALE L.J.* 1035, 1049-50 (1977). Experimentation, and the resulting uncertainty, is a necessary and valuable step in translating even the most core rights. Moreover, this strategy of “intersystemic governance”—avoiding, as it does, the top-down imposition of norms—“may offer a way for jurisdictions to internalize universal norms gradually, on their own terms.” Ahdieh, *supra* note 105, at 1237.

here is that the nature of this federalist relationship (and the design of the framework necessary to support it) must be determined by reference to the substantive task at hand and how it could benefit from maximizing the values that dynamism has to offer. This task is easier if each model of cooperative federalism is viewed not as *sui generis*, but rather as a point along a continuum from dualism to dynamism.

In the area of treaty implementation, there are still some instruments that fall almost exclusively within the province of the federal government, such as an agreement on nuclear arms reduction. Subnational participation in implementation is not necessary for the United States to meet its commitments under this type of treaty, although resolutions of support (like the ones adopted for CEDAW) for these initiatives could be helpful in prompting federal action. The VCCR and the Wills Convention fall more toward the middle of the spectrum. Historic<sup>160</sup> distinctions in the subject matter governed by the states and the federal government mean that a cooperative approach will lead to more successful integration of these rights into existing legal regimes. Finally, the structure of the ratified human rights treaties is such that ongoing efforts at the federal, state, and local levels are necessary to fully domesticate their commitments.

The task of treaty implementation thus demonstrates a wide range of possible partnerships and shows both how ambiguity can stymie initiative and how structure can enable it. The cases that I have reviewed demonstrate that greater state participation will require a more explicit reframing of the question of responsibility for ratified human rights treaties. The model of jurisdictional authority should shift away from the current dichotomy (that either the federal or the state government is responsible) toward an ongoing collaboration (where the state and federal governments have a shared and overlapping responsibility for ensuring that the United States' commitments are kept). Moreover, greater subnational engagement will demand a process by which the requirements of these treaties are given more explicit definition. The role of the federal government in this process should therefore be to stimulate, enable, and moderate an ongoing "diagonal"<sup>161</sup> dialogue about how to evaluate and implement these

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160. I say "historic" in this context, as opposed to "constitutional," because I am referring to the established bodies of law and practice built up around these traditional distinctions that make state participation necessary and productive for full implementation of these treaties. For example, the federal government could have passed federal legislation implementing the Wills Convention. However, because wills are usually governed by state law and practitioners are used to looking to state law in this context, implementation will be more successful and complete if the mandates of the Convention are incorporated into state law where they can be seamlessly integrated into existing practice. In the VCCR context, the state role is even more obvious, given that the rights are triggered by the actions of state and local law enforcement and therefore can most efficiently be administered by outreach at that level.

161. Professor Hari Osofsky has proposed the helpful notion of "diagonal regulation" as a way of describing regulatory initiatives that "cut[]" across both vertical (mul-

treaty rights. The federal role would thus look different than it did in the cases examined in Part III in that it would be less about educating states as to their part in a predesigned implementation program, and more about encouraging and harnessing state and local innovation. To some extent, such collaboration occurred in those examples; however, in the human rights treaty context, the focus on uniformity would be less of a priority—and, in fact, it could even be a hindrance to the opportunity for innovation created by jurisdictional redundancy and overlap. It should be clear, therefore, that the federal programs described in the case studies described above are inadequate to the task of encouraging subnational engagement with human rights treaties. Promoting a truly dynamic federalist approach to treaty implementation will require a structure that supports ongoing experimentation and dialogue.

As an initial matter, this strategy would require a reframing of the federalism understanding as a mandate, rather than a barrier. As previously discussed, the message from the federal government to the states as to their obligations under these treaties has been ambiguous at best. This is likely the result of the federal government's unwillingness to acknowledge any implementation obligation that would require affirmative action at either the state or federal level, as well as uncertainty as to whether it may require state and local compliance consistent with the Constitution<sup>162</sup> and the ratification RUDs. As earlier examples demonstrate, however, a coercive posture is not the only one available to the federal government with respect to subnational treaty activity. Instead, the federal government could actively promote a more decentralized model of human rights treaty implementation as a way of empowering state and local actors.

The discussion here provides some guidance as to the design features that are likely necessary for success. First, a characteristic shared by the examples given above is that they rely in part on the voluntary cooperation of willing states and localities. This kind of implementation strategy provokes two common objections. The first objection is that it is unlikely to work. Professor Lesley Wexler, for example, suggests that the successes in human rights treaty implementation have been limited to a handful of small and extremely liberal

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tiple levels of government) and horizontal (branches of government or other entities functioning at the same level) divisions of governance.” Hari M. Osofsky, *Is Climate Change “International”? Litigation’s Diagonal Regulatory Role*, 49 VA. J. INT’L L. 585, 591 (2009) (citation omitted). This model is appropriate in the context of human rights treaty implementation, as I describe it here, which involves an ongoing, dialogic collaboration between and among state, local, federal, and international actors, acknowledging as it does the need for cooperation and collaboration.

162. Certainly such actions would be upheld under existing Supreme Court precedent; nonetheless, the academic and political attacks that have been launched against this reading of the treaty power may make even its supporters unwilling to test the continuing strength of the doctrine. See Kalb, *Dynamic Federalism*, *supra* note 6, at 1033-34.

cities.<sup>163</sup> As the discussion of CRC demonstrates, this may no longer be an accurate characterization of local participation in the U.N. human rights treaties.<sup>164</sup> Moreover, the group of interested subnational players expands considerably when other types of local engagement with rights-related issues of international law and foreign affairs are included, as the SADA example demonstrates. Therefore, I am not as pessimistic as Wexler about the possibility that these pockets of subnational activity could work to trigger broader acceptance of these human rights norms nationally,<sup>165</sup> particularly if, as I suggest below, the treaty guarantees were disaggregated into more actionable goals.<sup>166</sup>

The second major objection to a voluntary approach is that it is inadequately respectful of the United States' treaty commitments or of the universality of human rights principles.<sup>167</sup> Putting aside the reality that a more coercive federal approach may not be politically possible at present,<sup>168</sup> part of my goal in this discussion has been to challenge the notion that success with respect to the ratified treaties is defined as the achievement of uniform federal implementing legislation.<sup>169</sup> Voluntary participation among even the more traditionally incor-

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163. See Lesley Wexler, *Take the Long Way Home: Sub-Federal Integration of Unratified and Non-Self-Executing Treaty Law*, 28 MICH. J. INT'L L. 1, 38-39 (2006).

164. See, e.g., *supra* notes 31-33 and accompanying text (discussing subnational engagement with CRC, including in more conservative cities in the West and Midwest).

165. See Wexler, *supra* note 65, at 627-28.

166. See *infra* pp. 116-117.

167. See, e.g., Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 487 n.321 (2003) (noting the difficulties associated with allowing the states to commandeer the treaty power); Janet R. Carter, Note, *Commandeering Under the Treaty Power*, 76 N.Y.U. L. REV. 598, 611-14 (2001) (discussing the shortcomings of Congress attaching conditions to the disbursement of federal funds to the states in the treaty implementation context).

168. Melish also proposes a United States Commission on Human Rights, which "would serve as an independent check on implementation failures, providing a forum through which individuals could report abuses and seek political or quasi-judicial address at the domestic level." Melish, *supra* note 5, at 459. Given the federal government's general unwillingness to require action by the states toward treaty implementation, the creation of the Commission is probably unlikely in the near future. See Kalb, *Dynamic Federalism*, *supra* note 6, at 1047-48 (discussing political aversion at the federal level to imposing the mandates of the human rights treaties through federal legislation).

169. I am certainly not the first to propose that there is value in diversity. See, e.g., Powell, *supra* note 16, at 254 ("Even assuming that the federal government undertook greater leadership in ratifying additional human rights treaties, in more fully implementing those it has not ratified, or in withdrawing reservations to treaty provisions, the argument here is that there would still be a value in state and local participation."). My suggestion is that if the push for subnational engagement were to be reframed away from the ultimate goal of promoting ratification or fed-

porationist states and cities, like San Francisco, Chicago, and New York, could help change the narrative from one of federal dominance to one with significant space for local control and initiative, which in turn could translate into deeper and more concrete engagement with the rights that these treaties embody.<sup>170</sup> This process could itself lead to an increase in the number of states and cities that explicitly acknowledge their role in implementing treaty standards.

Noncoercive implementation models have had some success in improving outcomes in the domestic context—particularly when they come with financial incentives. The federal Office on Violence Against Women (OVW) within the Department of Justice has relied on a strategy of providing financial and technical assistance to states and localities to build their capacity toward reducing violence against women.<sup>171</sup> Since its creation in 1995, “OVW has awarded nearly four billion dollars in grants and cooperative agreements” to promote the goals of the Violence Against Women Act (VAWA).<sup>172</sup> Despite the purely voluntary nature of this program, it has succeeded in engaging at least some communities in all fifty states in working toward the goals of the Act.<sup>173</sup> OVW has also developed a number of special, targeted initiatives to address “particularly acute challenges” in order to “explore innovations in the violence against women field and share knowledge that can be replicated nationwide.”<sup>174</sup>

The VAWA strategy could be extended to the treaty implementation process. Like the international human rights treaties, the national discussion of VAWA has sometimes prompted intense political resistance.<sup>175</sup> However, since OVW makes grants available for a variety of programs, states may pick and choose which of the goals of VAWA they pursue. As a result, the national effort to reduce the incidence of violence against women has increased overall. Like-

eral legislation, then the nature of that participation would become more substantive.

170. *See id.* at 279 (“Besides the value of building political momentum, this local treaty work also helps to translate broad abstract principles contained in human rights treaties into concrete, definable standards on the ground.”).
171. *See* Office on Violence Against Women, *About the Office*, U.S. DEPARTMENT JUST., <http://www.ovw.usdoj.gov/overview.htm> (last visited Feb. 10, 2011).
172. *Id.*
173. *See* Office on Violence Against Women, *Awards*, U.S. DEPARTMENT JUST., <http://www.ovw.usdoj.gov/grantactivities.htm> (last visited Feb. 10, 2011).
174. Office on Violence Against Women, *supra* note 171.
175. For example, when the Violence Against Women Act was being considered for reauthorization, opponents argued that it funds “radical feminists,” discriminates against men, is antifamily, and is unnecessary. *See, e.g.*, Wendy McElroy, *Congress Should Kill Discriminatory Domestic Violence Act*, FOX NEWS (June 30, 2005), <http://www.foxnews.com/story/0,2933,160289,00.html>; Phyllis Schlafly, *A Good Father’s Day Gift*, TOWNHALL (June 19, 2010), [http://www.townhall.com/columnists/phyllisschlafly/2010/06/19/a\\_good\\_fathers\\_day\\_gift/page/full/](http://www.townhall.com/columnists/phyllisschlafly/2010/06/19/a_good_fathers_day_gift/page/full/).

wise, a similar federal funding body dedicated to treaty implementation could solicit state participation on a variety of treaty goals, which could result in collaboration with even some of the more skeptical states and localities on areas of common ground. For example, New Orleans, although not generally included on the “incorporationist” list, might apply for a grant through the National Office to consider whether and how its jails and penitentiaries maximize the possibilities for “reformation” and “social rehabilitation” for prisoners in line with the requirements of ICCPR.<sup>176</sup> The VAWA program is one of a variety of forms of dynamic relationships that currently exist within our federalist system that could be replicated within the human rights treaty context. The key variable distinguishing these forms of dynamic relationships is the amount of coercive pressure that the federal government is willing to bring to bear on states and localities to achieve its goals.

An additional feature that may help stimulate dynamism is the subdivision of the treaty’s guarantees into more manageable tasks. As I have argued, the more successful cases have involved rights that are easily actionable—both because they are concrete and because the tasks they entail are divisible along jurisdictional lines. Although the human rights treaties do not deal with such actionable rights, one way to initiate engagement with this implementation project is to develop more concrete tasks within the broader dynamic project. The implementation task for these treaties is not monolithic, nor is there necessarily a well-defined end point at which compliance is achieved. A more realistic goal, therefore, is to engage states and localities in a process of considering what these guarantees mean and how they can be translated into domestic policy changes. By breaking down the general project of treaty implementation into a variety of different area initiatives, as OVW did with VAWA, the federal government could increase overall subnational engagement. The potential hazard of this approach, as the Vienna Convention and Wills Convention examples demonstrate, is that drawing lines of authority can result in stagnation in the process by breaking down dialogue along vertical and horizontal jurisdictional boundaries. The divvying up of tasks, however, is different from the divvying up of authority over the project. Maintaining the dialogue across and between actors at different levels of government (perhaps even as a condition of funding) could help ensure that the process of concretizing the treaty commitments does not stymie the development of a dynamic relationship. As the United States increasingly includes the activities of states and localities in its reports to the U.N. monitoring bodies, the federal government generates and maintains a conversation with subnational actors.<sup>177</sup>

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176. ICCPR, *supra* note 10, at 176. For an overview of the issues plaguing the Orleans Parish Prison System, see SAFE STREETS/STRONG COMMUNITIES, BIG JAILS AND BIG COSTS: THE INDIVIDUAL AND COLLECTIVE COSTS OF OVER-INCARCERATION IN NEW ORLEANS (2006), available at [http://www.safestreetnola.org/pdfs/big\\_jails\\_big\\_costs.pdf](http://www.safestreetnola.org/pdfs/big_jails_big_costs.pdf).

177. See *supra* notes 60-63 and accompanying text. For a more extensive discussion of the possibilities created by the reporting requirements, see Risa Kaufman, *By*

Most significantly, the case studies demonstrate that the promotion of the dynamic relationship necessary to meet the nation's human rights commitments will require not just the creation of space for state activity, but also the development of an administrative structure for proactively encouraging and leveraging state innovation. In other words, because of its demand for repeated, ongoing cross-jurisdictional interactions, dynamic federalism requires an institutionalized supporting structure to capture and link these exchanges over time. Some of the existing proposals for increasing state and local treaty compliance could fill this role. For example, Professor Tara Melish has offered a comprehensive program for promoting a "subsidiarity-based national human rights infrastructure"<sup>178</sup> in the United States that would include the creation of a National Office on Human Rights Implementation. The National Office would focus on ensuring treaty compliance at the federal level through coordination with each of the different agencies and departments of government. Additionally, it would "play an important facilitative role with respect to the human rights implementation initiatives undertaken by state and local authorities" by "col-

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*Some Other Means: Considering the Federal Role in Subnational Human Rights Implementation*, 33 CARDOZO L. REV. (forthcoming 2012).

178. Melish, *supra* note 5, at 453. The subsidiarity principle, as Melish explains, "requires that problems be solved where they occur, by those who understand them best, and by those who are most affected by them" and thus protects more localized social or political units from preemption. *Id.* at 439. However, it also requires intervention from large political units "whenever smaller social or political groupings cannot ensure the protection of human dignity without assistance." *Id.* at 440. This intervention may occur through "directing, watching, urging, restraining, as occasion requires and necessity demands." *Id.* (quoting Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 42 (2003)). The notion of subsidiarity thus captures one of the core challenges of the human rights project that dynamic federalism is intended to resolve: "how to square the idea of universal international standards with the tendency toward localism and particularity." Powell, *supra* note 16, at 253. And Melish's subsidiarity-based approach to treaty implementation provides a good starting point for conceptualizing the administrative structure that is most likely to promote a dynamic relationship, given its focus on empowering subnational entities while also enabling national oversight and information sharing.

There is historical precedent for the kind of approach Melish advocates. President Clinton established an Inter-Agency Working Group on Human Rights to coordinate federal agency participation in the implementation of these treaties and to improve monitoring of state and territorial compliance. *See* Exec. Order No. 13107, 63 Fed. Reg. 68,991, 68,991-92 (Dec. 10, 1998). However, the Working Group only operated for two years and was abandoned by the Bush Administration during a restructuring of the National Security Council system. *See* Melish, *supra* note 5, at 401-02. The American Constitution Society has encouraged the Obama Administration to reinvoke the Working Group. *See* CATHERINE POWELL, AM. CONST. SOC'Y FOR L. & POL'Y, HUMAN RIGHTS at HOME: A DOMESTIC POLICY BLUEPRINT FOR THE NEW ADMINISTRATION 3-5 (2008).



lect[ing] information, shar[ing] best practices, and provid[ing] publicity.”<sup>179</sup> This kind of institutionalized federal entity, with the goal and mandate of encouraging and promoting an ongoing dialogue, is likely necessary to maximize the benefits of cooperation in the federal-subnational relationship. And given the United States’ ratification commitment to remove any barriers to state and local treaty implementation,<sup>180</sup> the federal government should take an active role in encouraging a dynamic approach as a way of getting beyond the current impasse.

Although a formalized institutional presence at the national level would send a strong signal of federal commitment to subnational initiatives, in the interim (and should such a program prove politically or fiscally impossible at present), dynamism could be generated through the initiative and support of nongovernmental actors. All of the case studies discussed in this Article rely heavily on local and national civil society organizations to make the connection between and among receptive local partners—and between state, local, and federal governments. These organizations are currently filling the institutional gap left open by federal inaction by creating grassroots support for these initiatives, developing and publicizing model programs, and collecting and sharing best practices. Moreover, many of these organizations are thinking expansively about the possibilities of state and local implementation efforts as a way of domestically embedding the norms within the human rights treaties and of creating support for change at both the local and national levels.<sup>181</sup> These initiatives have in many ways been successful in beginning to promote the use of a human rights viewpoint in the policy considerations of states and cities nationwide.

As the successes in the incorporationist states and localities suggest, many of the advocacy efforts of these organizations have been focused on the unratified treaties, perhaps because of the (likely accurate) perception that more work is required in these areas. The rights guaranteed in the ratified treaties like ICCPR and CERD are generally covered in both federal and state law (although

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179. Melish, *supra* note 5, at 458.

180. See *supra* note 51 and accompanying text.

181. For example, the Bringing Human Rights Home Lawyers’ Network, an initiative of the Columbia Human Rights Institute, has 390 members representing domestic and international justice advocacy groups and law school human rights programs. The network coordinates and provides support to its members in their efforts to incorporate international human rights law into their domestic advocacy efforts. See *Bringing Human Rights Home Lawyers’ Network*, COLUMBIA L. SCH., [http://www.law.columbia.edu/center\\_program/human\\_rights/HRinUS/BHRH\\_Law\\_Net](http://www.law.columbia.edu/center_program/human_rights/HRinUS/BHRH_Law_Net) (last visited Oct. 7, 2011). The Human Rights at Home Campaign, also spearheaded by the Columbia Human Rights Institute, has a state and local government coordination subcommittee, which is dedicated to building the capacity of state and local human rights and relations commissions, as well as other state and local officials, to integrate and implement human rights treaties into their work. E-mail from Risa Kaufman, Exec. Dir., Columbia Human Rights Inst., to author (June 29, 2011, 22:45 EDT) (on file with author).

in a diminished form), whereas the protections in the unratified treaties generally have no domestic counterpart. Moreover, because of the many difficulties inherent in arguing that even the ratified instruments represent a binding, legal commitment, advocates may believe (also correctly) that the persuasive value of human rights principles is an easier sell than reliance on formal treaty frameworks. Thus, there are strategic reasons why advocates may make rights-related arguments in a way that deemphasizes their formal weight within the U.S. legal system. This strategy may, however, come at a cost. While the federalism understanding may have been intended to reduce opposition to these treaties by signaling that they would not be enforced against the states, it still offers a real mandate for interested states and cities to proactively pursue the goals of the ratified treaty instruments and to demand federal assistance in overcoming any barriers to their ability to do so. Thus, there is some value in taking the federalism understanding seriously and encouraging its subnational beneficiaries to do the same.

This is particularly true given the intersecting nature of the rights that these human rights instruments seek to protect.<sup>182</sup> In fact, Professor Melish contends that “[t]here are . . . virtually no substantive issues arising under the CEDAW, CRC, and ICESCR that cannot in some way be addressed under ICCPR, CERD, and CAT supervisory procedures.”<sup>183</sup> Thus, it is possible that the realization of the goals of even the unratified treaties could be significantly advanced through subnational efforts to implement the ratified treaties. Considering how particular subject matters are covered by both the ratified and unratified treaty instruments allows advocates to argue for policy changes both in terms of persuasive authority and legal commitment.

Moreover, tying human rights principles back to the treaties—and back to the nation’s formal international obligations—helps connect these initiatives nationally and internationally. Human rights advocacy organizations have already achieved some successes by breaking down some of the treaty guarantees into actionable issues. Yet even so, if these programs are not situated within the broader international legal framework, they do less to engage in the dynamic interaction than what I have argued is necessary for fuller implementation. For example, the Washington State Human Rights Commission has been working toward resolving the state’s housing shortage for farmworkers.<sup>184</sup> In reporting its findings, the Commission situated the problem within a human rights framework, drawing on Article 25 of the Universal Declaration of Human Rights, which provides for housing as a basic human right.<sup>185</sup> The Commission

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182. Melish, *supra* note 5, at 397 n.34 (“There is . . . wide overlap in the rights protected in distinct human rights treaties.”).

183. *Id.* at 430.

184. See COLUMBIA HUMAN RIGHTS INST., *supra* note 19, at 7.

185. See WASH. STATE HUMAN RIGHTS COMM’N, FARM WORKER HOUSING AND THE WASHINGTON LAW AGAINST DISCRIMINATION 2 (2007), available at <http://content.knowledgeplex.org/kp2/cache/documents/17830/1783061.pdf>.

could, however, have gone further in drawing connections between the local housing crisis and the United States' commitments under international treaty law. For example, the report identifies racial and national origin discrimination as a major driver of the housing shortage for the farmworker population. The Commission could therefore have tied the resolution of this problem to the United States' legal commitment under CERD "to prohibit and to eliminate racial discrimination . . . and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, . . . [t]he right to housing."<sup>186</sup> The Commission could also have drawn the connection between its initiatives and ICESCR, which commits State Parties to recognize the rights of all people to adequate housing.<sup>187</sup> The impact of these references would be to situate Washington State's activities within the legal framework of the nation's commitments. They would make explicit the connection between the state's activities and the country's ability to fulfill its legal obligation under CERD—and help close the gap between present conditions and the ICESCR standards, thus helping clear the path toward ratification.<sup>188</sup> Like the San Francisco CEDAW program, framing the state's housing initiative as a fulfillment of the nation's commitments would push the federal government to acknowledge, respond to, and assist the effort, thereby helping to generate a dynamic collaboration. Thus, strategically, it makes sense to frame these independent state and local initiatives within the broader context of fulfilling the United States' obligations under international human rights law even in the absence of federal leadership.

In sum, creating dynamism can be viewed as an iterative process of de- and reconstructing responsibility for treaty implementation over time. Dynamism requires the construction of boundaries that are clear enough to protect subnational initiatives but also porous enough to permit dialogue and exchange. Creating dynamism also requires breaking down treaty ideals into actionable tasks while building understanding of how individual interactions between the state and its citizens contribute to satisfying the United States' commitments under these international instruments. These complexities help to explain why both federal and subnational actors continue to seek the clarity of dualism, even in projects that are not conducive to this model of divided authority. Nonetheless, because dualism and dynamism are not binary opposites, there are concrete, incremental steps that can be taken to stimulate increased federal-subnational interaction over these treaty norms. Federal leadership and support would certainly advance this project dramatically, but even in its absence, human rights advocacy organizations can provide the administrative structure to draw connections between local advocacy and international legal obligation.

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186. CERD, *supra* note 10, at 220, 222.

187. ICESCR, *supra* note 9, at 7.

188. Given that the United States has ratified only those treaties with which it believes the country is already in compliance, state and local actions toward meeting treaty standards may be a necessary forerunner to treaty ratification.

This mode of implementation is sometimes criticized for being slow and uneven. Without minimizing the very real problems of rejection and noncompliance, I suggest that these arguments fail to acknowledge the distinctive nature of human rights treaties. Unlike the other instruments discussed here, these treaties are arguably process-driven rather than outcome-driven.<sup>189</sup> They require ongoing evaluation of the relationship between domestic law at all levels and the treaties' substantive commitments. They are therefore in some ways uniquely suited to an incremental, dialogic implementation approach. The benefits that can thus be gained from dynamism may help to balance out the certainty and efficiency that are lost in the rejection of a top-down, coercive approach to implementation.

## CONCLUSION

Dualism lives on in the way that state and local actors view both the practice and the promise of international human rights treaties. This need not be the case, however. Because of federalism understandings, the structure already exists for state and local initiatives to explore ways to actualize these treaties' guarantees. The challenge lies in encouraging broader and deeper engagement within this space. I have suggested strategies through which both public and private actors could begin to stimulate this kind of activity as a way of exploring the meaning of these treaties, building support for them domestically, and, thus, more fully realizing the United States' international commitments. The promise of dynamism also extends beyond the unique case of the human rights treaties to a broader range of international obligations, but its contours do and should vary depending on the nature of the project in question. The idea of dynamism captures the range of possible federal-subnational relationships that exist whenever the absence of federal legislation creates the possibility for variation at the subnational level. The mechanisms of promoting participation can be more or less coercive depending on the political and structural pressures at play within a particular project. Even, however, where treaty obligations are more concrete, dynamism can serve the important goal of preventing stasis and ossification in the state of the law over time. In a time when the realities of domestic politics make it unlikely that the nation will make bold new international commitments to human rights, dynamism offers a powerful mechanism for stimulating the domestic dialogue in ways that will ensure a fuller realization of our existing international obligations and that will lay the groundwork for the adoption of increased human rights protections in the future.

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189. This also helps to explain the United States' somewhat contradictory position that these treaties were both implemented at the time of ratification and yet still the responsibility of state and local government to implement. See *supra* notes 101-103 and accompanying text.