

Student Note

From Laggard to Leader: Canadian Lessons on a Role for U.S. States in Making and Implementing Human Rights Treaties

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I. INTRODUCTION

Human rights treaty-making and implementation pose special challenges for federal states. The unique quality of human rights—inherent, universal, urgent, and compelling—and the existence of entrenched domestic rights-protecting instruments give rise to complexities that distinguish these treaties from their international counterparts. Of particular and problematic significance for federal states is the fact that human rights treaties “made” by the national government often implicate the relationship between the individual and the sub-unit government, requiring substantive compliance at the local level. In Canada and the United States, the distinctive nature of human rights has colored the process of treaty-making and implementation, posing delicate legal, political, and practical questions about the division of powers in these federal states. In response to these challenges, Canada has worked to resolve the apparent tension between its federal structure and international human rights law, while the United States has accepted and exploited a zero-sum relationship between the two.

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At the advent of the U.N. system and the creation of the human rights instruments following World War II, both countries responded to the obstacles posed by their federal systems with a policy and practice of non-adherence. In the early 1970s, Canada changed course, transitioning to a path of engagement marked by the will to balance federalism with respect for international human rights law. To honor both values, Canada developed a discrete mechanism that addressed the challenges posed by human rights by recognizing a new role for the provinces in the treaty process. In the years since, the Federal-Provincial-Territorial Continuing Committee has facilitated continuous, dialectical consultation between the federal and sub-unit governments at all stages of the treaty process, making critical contributions that have enabled Canada to emerge as a human rights leader.

Canada's transition to a course of leadership contrasts sharply with the second path of qualified adherence pursued by the United States. This approach assumes an antithetical relationship between federalism and human rights law, building layers of resistance to meaningful ratification and substantive compliance in order to enable the foreign policy gains of signing treaties while minimizing political costs. Qualified adherence has produced a highly complex and uncertain treaty scheme, badly in need of rationalization and reform, along with substandard performance that has earned the United States a reputation as one of the world's human rights laggards.

The valuable lesson from the Canadian experience is that the meaningful, structured inclusion of sub-unit voices in the dialogue on human rights can work to dissolve the antagonism between federalism and international human rights law, benefiting each. This Note will argue that the United States would gain from a similar mechanism that would recognize a new role for the states in the human rights treaty process by facilitating "dialectical federalism."¹ The unique challenges posed by human rights and the uncertain state of the present scheme create a compelling case for a discrete mechanism that would complement the formal scheme, making informal—but far-reaching—political, pragmatic, and symbolic contributions to the human rights treaty process in the United States.

In Part II, this Note surveys treaty-making and implementation in Canada and the United States. Part III contrasts the relationship between federalism and international human rights law in Canada and in the United States, highlighting Canada's workable balance and the United States' zero-sum approach. Finally, Part IV draws on the Canadian experience to recommend a discrete role for the U.S. states in human rights treaty-making and implementation.

1. This term appears in Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L. J. 1035 (1977).

II. TREATY-MAKING AND IMPLEMENTATION: CANADA AND THE UNITED STATES

As a highly decentralized federation,² Canada's treaty scheme is perhaps the most complex in the world.³ Federal powers of treaty-making and implementation are not concurrent, and jurisdiction over treaty implementation is subject to the ordinary constitutional division of powers. Formally, the "watertight compartments"⁴ of Canadian federalism remain intact in the realm of foreign affairs. In the case of human rights, an area of near exclusive provincial jurisdiction, Canada's sub-units retain special constitutional and political significance for the treaty process.

In contrast, the United States boasts a treaty scheme in which the federal government's powers to make and implement treaties are coextensive, and jurisdiction over activities reserved to the states in the Tenth Amendment becomes immaterial in the treaty context. Formally, Canada's scheme of "watertight compartments" is anathema to a U.S. treaty process in which "state lines disappear."⁵ As a result, unlike their Canadian counterparts, the American states enjoy limited constitutional relevance to international affairs. However, the states retain crucial political significance in the treaty process, particularly in the realm of human rights, which holds like implications for sub-unit authority in the United States.

A. Canada

1. Historical Overview

The foundation of Canadian federalism is the Constitution Act of 1867, the British North America Act (BNA). Like the U.S. Constitution, the BNA divides legislative powers between national and sub-unit governments. Unlike its U.S. counterpart, however, the BNA vests residual competence in the national parliament,⁶ while the provinces enjoy exclusive jurisdictional competence over several important areas, including

2. Canadian Embassy, Department of Foreign Affairs and International Trade, *Federalism in Canada* (May 1997), at <http://www.canadianembassy.org/issues/federalism.html> (last visited March 3, 2001).

3. Gerald Morris, *Canadian Federalism and International Law*, in CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION 55 (R. J. Macdonald et al. eds., 1974) [hereinafter CANADIAN PERSPECTIVES].

4. *Att'y Gen. Canada v. Att'y Gen. Ontario* [1937] A.C. 326 (P.C.) at 354 [hereinafter *Labour Conventions*].

5. *United States v. Belmont*, 301 U.S. 324, 331 (1937).

6. Section 91 stipulates that the national government may "make laws for the Peace, Order, and good Government of Canada, in relation to all Matters *not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.*" CAN. CONST. (Constitution Act, 1982) pt. VI (Distribution of Legislative Powers), §91 (emphasis added).

"Property and Civil Rights in the Province" and "Generally all Matters of a merely local or private Nature in the Province."⁷

A 1937 opinion rendered by Lord Atkin in *Attorney-General for Canada v. Attorney-General for Ontario* (the *Labour Conventions* case)⁸ definitively established the law on treaties. At issue was whether the federal Parliament had the authority to implement obligations incurred pursuant to the government's treaty-making power. Significantly, the subject matter of the treaty—the labor conventions adopted by the International Labour Conference and ratified by the government of the day—involved an area clearly within provincial competence. Writing for the Board, Lord Atkin established three key principles: 1) there is no discrete category of "treaty legislation" that the federal government can claim as a federal head of power; 2) where the subject matter of the treaty falls within provincial legislative competence, only the province can enact implementing legislation; and 3) only through federal-provincial cooperation could Canada execute international obligations implicating provincial heads of power.⁹ Lord Atkin acknowledged that this scheme, born in a unitary state, could become more "complex" when applied to federal states such as Canada.¹⁰ Nevertheless, the opinion closed with a metaphor expressing deep faith in the sanctity of the division of powers and the possibility of federal-provincial collaboration. "While the ship of state now sails on larger ventures and into foreign waters," Lord Atkin stated, "she still retains the watertight compartments which are an essential part of her original structure."¹¹

2. In Practice

Labour Conventions established an unwieldy treaty scheme. Despite great controversy and judicial "tweaking" of the doctrine,¹² however, it has remained good law. Formally, Parliament has gained no power to legislate in matters otherwise of provincial jurisdiction simply because an act seeks to implement international treaty obligations. The judicial review of treaty-implementing legislation is subjected to the same division-of-powers inquiry applied to other laws, and this analysis will often require

7. Section 92 provides: "In each Province the Legislature may exclusively make laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated. . ." *Id.* The "property and civil rights" subsection, §92 (13), has been interpreted broadly. *Id.* § 92 (13). For a discussion of expansive provincial powers under the property and civil rights clause of Section 92, see Richard H. Leach, *Implications for Federalism of the Reformed Constitution of Canada*, in *RESHAPING CONFEDERATION: THE 1982 REFORM OF THE CANADIAN CONSTITUTION* 149, 151 (Paul Davenport & Richard H. Leach eds., 1984).

8. See *supra* note 4.

9. Morris, *supra* note 3, at 57.

10. *Labour Conventions*, *supra* note 4, at 348.

11. *Id.* at 354.

12. See, e.g., *MacDonald v. Vapor Canada* [1977] 2 S.C.R. 134; *R. v. Crown Zellerbach* [1988] 1 S.C.R. 401. Together, these cases broadened the rule established in *Labour Conventions* to allow greater scope to analyses of the validity of implementing legislation where the subject matter of the treaty falls within provincial jurisdiction.

provincial implementation.

In practice, the treaty-making and implementation process is more nuanced and contentious than the formal scheme would suggest. The Governor General in Council exercises the treaty-making power for the Crown, acting almost invariably on the advice of the Prime Minister and his Cabinet,¹³ who are responsible to the popularly elected House of Commons. As a matter of law, "parliamentary consent is not required to enter into an international agreement": the power to negotiate, conclude, and ratify treaties is the sole authority of the executive.¹⁴

Due to its parliamentary system, Canada's executive is usually able to ensure the adoption of implementing legislation for subject matter that falls within federal jurisdiction. Parliament's primary role comes into play after the executive has ratified a treaty. In general, a ratified treaty will bind Canada internationally but will only have domestic force if it is implemented by legislation.¹⁵ Although some treaties involve subject matter that makes subsequent legislation unnecessary,¹⁶ the general rule requiring legislative implementation to incorporate conventional international law into domestic law poses the complex parallel question of what constitutes treaty-implementing legislation.¹⁷

The Court's jurisprudence seems to require, at minimum, an express reference to a convention in order to consider a statute as implementing legislation.¹⁸ However, the Department of External Affairs has suggested a more flexible, trifurcated approach to identifying legislation as "treaty-implementing":

Treaties require implementing legislation to make them effective in domestic law. . . . If it is necessary to change domestic law in order to enable Canada to discharge its treaty obligations this may be done in a number of ways:

13. OFFICE OF THE GOVERNOR GENERAL OF CANADA, REPRESENTING THE CROWN IN CANADA, at http://www.gg.ca/rolresp/crown_e.html (last modified 2000-05-01).

14. ANNE BAYESKY, INTERNATIONAL HUMAN RIGHTS LAW: USE IN CANADIAN CHARTER OF RIGHTS AND FREEDOMS LITIGATION 25 (1992). However, a form of informal parliamentary assent is often sought for certain types of agreements. See Edward G. Lee, *Canadian Practice in International Law During 1985: At the Department of External Affairs*, 24 CAN. Y.B. INT'L L. 386, 398 (1986).

15. Exceptions include treaties that "give recognition to incidents of sovereignty" or concern "matters in exclusively sovereign aspects," but could be fairly described as not reaching matters that "affect the rights of individuals." R. J. MacDonald, *The Relationship between International Law and Domestic Law in Canada*, in CANADIAN PERSPECTIVES, *supra* note 3, at 120-21 (quoting *Bitter v. Secretary of State of Canada*, [1944] 3 D.L.R. 482, 697-8 and *Francis v. The Queen*, [1956] 3 D.L.R. (2d) 641, 647).

16. BAYESKY, *supra* note 14, at 26.

17. Importantly, Canadian courts follow a rule of statutory interpretation analogous to the United States' *Charming Betsy* doctrine. The presumption is that Parliament and the legislatures do not intend to act in breach of Canada's international obligations, and thus that the courts should construct domestic legislation in accordance with the convention to the extent possible. See, e.g., *Daniels v. the Queen* [1968] S.C.R. 517 (Pigeon, J., concurring).

18. See BAYESKY, *supra* note 14, at 31-32.

- (a) by enacting the required legislation without express reference to the treaty. . .
- (b) by legislation which makes reference to the treaty but without expressly enacting its provisions. . .
- (c) by incorporating into law the treaty or the relevant provisions.¹⁹

Human rights treaties offer an illuminating example of the intricacies involved in this determination. The case of human rights is also especially complex, and somewhat anomalous, because of the intimate role that international human rights instruments played in the construction of Canada's own constitutional bill of rights, the Charter of Rights and Freedoms.²⁰

Under one view, scholars have argued that the omission of an express reference signaling implementation of the International Covenant on Civil and Political Rights (ICCPR) and other treaties to which Canada is a party should not be dispositive in a determination of constitutional validity. This

19. Lee, *supra* note 14, at 401-02 (emphasis added).

20. Canada drafted its constitutional bill of rights concurrently with the proliferation of the major contemporary international human rights norms and conventions (1968-82). The country's parallel ratification of these treaties required a consideration of the adequacy of domestic law. Records of the drafting process reflect the degree to which international norms were enmeshed in the Charter's creation, revealing numerous suggestions (ultimately rejected due to provincial concerns) that the Charter make express reference to the international instruments that influenced its creation. Anne Bayefsky, *International Human Rights in Canadian Courts*, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 307 (Benedetto Conforti & Francesco Francioni eds., 1997) [hereinafter *Canadian Courts*]. A study of the drafting of individual provisions of the Charter leads to the conclusion that: a) international human rights law was an important motivating factor throughout the fifteen year effort to constitutionalize a bill of rights, and b) many specific Charter sections are directly indebted in both language and intent to specific international law provisions. See BAYESKY, *supra* note 14, at 59.

Since the introduction of the Charter, there has been a marked growth in the number of cases that refer to human rights law in the course of interpreting domestic law. See, e.g., *Slaight Communications v. Davidson* [1989] 1 S.C.R. 1038 (Dickson, C.J.) ("I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents that Canada has ratified."). The uncertain reach of the Court's interpretive technique has resulted in calls to rationalize this approach. See, e.g., BAYESKY, *Canadian Courts*, at 317-8; Stephen Toope, *Canada and International Law*, 27 PROC. CAN. COUNCIL INT'L L. 33, 35-6 (1998) (criticizing the Court's lack of interpretive approach). But see Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U.J. INT'L L. & POL. 501, 506 (discussing the virtues of a relevant and persuasive approach to interpretation, as opposed to the traditional "bindingness" model of interpretation, as "a process of translation from international to national"). Various Justices of the Supreme Court of Canada have also defended their use of international law as an interpretive tool. See, e.g., *Gerard V. La Forest, The Expanding Role of the Supreme Court of Canada in International Law Issues*, 34 CAN. Y.B. INT'L L. 89 (1996) (examining the role of the Court in fostering compliance with international law and promoting integration); Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L. J. 15 (1998) (discussing the declining international influence of U.S. law as a function of the failure of the Rehnquist Court, in particular, to join in the dialogue).

first approach proposes a model of "implicit incorporation," where the answer to the question of implementation must "be culled from a detailed assessment of the legislative history of human rights law in Canada, the position taken on the subject by Canadian representatives both in international and domestic fora, and the few Canadian cases."²¹ The conclusion of this integrative approach is that Canada's human rights treaties have been incorporated, in part, into domestic legislation.²²

A second view proposes an intermediate model of assessing interpretation, one that falls between the Court's "express reference" rule and the model of "implicit incorporation":

Canada's treaty obligations under human rights instruments can therefore bind the courts if they meet two tests. They must be reflected in legislation, *either expressly or by necessary implication*, and such legislation must be an enactment of the legislature having jurisdiction over the subject matter of the treaty.²³

These interpretive questions about implementing legislation extend to the Court's consideration of provincial laws. For instance, a 1994 decision found the Manitoba implementation scheme for the Hague Convention invalid because it contained both a general scheme for enforcement and an implementing provision.²⁴ It is in the context of these complexities that Canada's achievements as a world leader in human rights protection are best appreciated.

B. The United States

The treaty scheme in the United States differs from its Canadian counterpart in important ways. First, the U.S. Constitution provides explicit textual authority for, and delegation of, the treaty power. Second, to "make" a treaty, the President must obtain the consent of a super-majority of the Senate, a body that he does not control. Third, treaties, once ratified, have domestic legal force according to the Constitution. The U.S. Congress has no necessary role in treaty implementation subsequent to ratification; treaties are presumptively "self-executing" unless a condition requiring legislative implementation is attached prior to ratification. Finally, case precedent in the United States stands for the proposition that the treaty power is not subject to the ordinary division of powers under the Constitution, and therefore that federal treaty-making and implementing powers are coextensive.

21. BAYEFSKY, *supra* note 14, at 33.

22. *Id.* at 66.

23. WILLIAM SCHABAS, *INTERNATIONAL HUMAN RIGHTS LAW AND THE CANADIAN CHARTER 22* (2d ed. 1996) (emphasis added).

24. *Thomson v. Thomson* [1994] 3 S.C.R. 551. Implementation of the Hague Convention fell within provincial jurisdiction because it concerned matters of child custody.

Despite differences that appear to free this scheme from many of the complexities inherent in the Canadian process, the U.S. treaty process has been far from uncontroversial. Though the United States does not face the same constitutional problems that result from the Canadian treaty scheme, federalism concerns have produced similar political difficulties.

1. Historical Overview

The constitutional treaty scheme grew out of the Founders' prior experience, under the Articles of Confederation, with a federal government unable to ensure state compliance with the country's international obligations.²⁵ After significant dispute and compromise,²⁶ the Framers granted the President the power to make treaties with the advice and consent of two-thirds of the Senate;²⁷ they provided that treaties, like U.S. laws and the Constitution itself, would be the supreme law of the land, binding on the states;²⁸ and they expressly denied treaty-making authority to the states.²⁹ This system of procedural checks and balances sought to safeguard federalism, providing for the representation of national interests³⁰ while at the same time protecting those of the individual states.³¹

25. The Treaty Clause in the Articles of Confederation was silent on whether treaties would have domestic force. ARTICLES OF CONFEDERATION, art. IX.

26. Extensive historical scholarship reviews the debates on the treaty power at the 1787 Philadelphia Convention and the state ratifying conventions. See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 316 (Max Farrand ed., 1937); 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 363 (Jonathan Elliot ed., 1888). For a more concise review, see David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000).

27. "He shall have Power, by and with the advice and Consent of the Senate, to make Treaties, provided two thirds of the senators present concur[.]" U.S. CONST. art. II, sec. 2, cl. 2.

28. "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.* art. VI, sec. 1, cl. 2.

29. "No State shall enter into any treaty, alliance, or confederation[.]" *Id.* art. I, sec. 10, cl. 1. Like their Canadian counterparts, U.S. states can enter into "agreements" (cl. 3) with foreign powers. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 153 (1996). Despite these specifications, the treaty power left much undefined. The Framers did not distinguish treaties from other international agreements or obligations; they did not prescribe what purposes treaties might serve, nor did they provide for limitations on their scope. They also did not consider and suggest how to resolve potential conflicts between treaties and the Constitution, or between treaties and laws, or between the treaty-makers and the law-makers. *Id.* at 175.

30. See, e.g., THE FEDERALIST NO. 75 (Alexander Hamilton).

31. HENKIN, *supra* note 29, at 444, n. 4. Out of concern for state interests, one scholar has noted that the Framers:

created a procedure uniquely sensitive to, and capable of safeguarding, state interests . . . [T]he Senate, fortified by a minority veto, was charged with the special . . . task of refusing its consent to any treaty that trenched too far on the interests of the states without serving a sufficiently powerful countervailing national interest. . . . The political safeguard goes a long way in explaining why the Founders felt content with a system that delegated the whole treaty power to the national government.

2. In Practice

The President's formal role in treaty-making is clear. Like his Canadian counterpart, he elects the country's treaty partners, decides the subject matter of negotiations, appoints negotiators, and tracks their progress. Unlike his Canadian counterpart, he must seek the consent of the Senate if he approves of the result, and if he is successful, he can "make" the treaty.³²

The Senate's role in the process is more ambiguous. As originally conceived, the Senate was to "advise" the President as well as to "consent" to ratification, but in practice, its role has been confined to the latter function.³³ Although partisan politics historically influenced this check on the executive's treaty power,³⁴ in recent years, the system's safeguards have functioned more constructively to promote national interests. Both the practice of involving individual senators in negotiations and greater informal consultation between the branches have worked to facilitate the ratification of the majority of treaties submitted.³⁵ Nevertheless, due to the Senate practice of granting its consent subject to the package of "reservations," "understandings," and "declarations" (RUDs) commonly attached to treaties, differences between the Senate and the executive branch have continued to hamper the treaty process during the second half of the twentieth century.³⁶ While the President must ultimately enter these conditions upon U.S. ratification, the Senate can threaten to withhold its consent if the executive refuses to follow instructions. The constitutional authority of the Senate to insist on these conditions has been the subject of great debate and international criticism.³⁷

Once the Senate has granted its consent, the President again assumes the lead role. He may decide whether to make the treaty, and after ratification, attempts by the Senate to withdraw, amend or interpret its consent have no legal force. Although the Senate does not retain these powers in its "executive role" as co-treaty-maker, in its legislative capacity post-ratification, the Senate does participate in any congressional actions taken to affect the legal status of the treaty.³⁸ This role gains crucial significance in the context of the "non-self executing" declarations, routinely attached to human rights treaties, which strip the treaty of domestic legal force absent legislative implementation.

The Treaty Power has drawn particular fire³⁹ based on federalism concerns. The argument is one that resonates throughout the Canadian

Golove, *supra* note 26, at 1098-99.

32. HENKIN, *supra* note 29, at 177.

33. *Id.* at 177-78. Presidents have developed informal substitutes to fill this advisory void (consultation with senators and appointment of senators to negotiation delegations).

34. *Id.* at 176.

35. *Id.* at 177-79.

36. *Id.* at 180.

37. See *infra* Part III.B.2.

38. HENKIN, *supra* note 29, at 184.

39. *Id.* at 189. For a discussion of other controversial areas, see *id.* at 185-89 (discussing limitations on treaty scope); *id.* at 194-96 (discussing separation of powers limitations).

experience: treaties cannot circumvent the Constitution's division of powers to implicate matters reserved to the states by the constitutional scheme and the Tenth Amendment. This claim was conclusively addressed in the U.S. analogue to Canada's *Labour Conventions* case, the 1920 landmark decision of *Missouri v. Holland*.⁴⁰ At issue in *Holland* was the validity of an act of Congress passed pursuant to the conclusion of a treaty between the United States and Canada that sought to protect migratory birds. The statute was contentious because Congress had tried once before to adopt the act in question through the ordinary legislative process. Two lower courts had found the statute invalid on grounds that it fell outside Congress's enumerated powers, and it was thought that a similar fate awaited the statute on appeal to the Supreme Court. As an alternate means to reach the same end, the government concluded the treaty, Congress enacted the statute, and the Act arrived, once again, at the courthouse door.⁴¹

In effect, the question in *Holland* involved the validity of the statute rather than the treaty itself. Writing for the Court, Justice Holmes upheld the act in a clear affirmation of the validity and supremacy of treaty provisions that implicate matters otherwise within the scope of state jurisdiction. In language that stands in stark juxtaposition to Lord Atkin's description of "watertight compartments," Justice Holmes explained:

It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action. . . [this power] . . . is not to be found. . . . The treaty in question does not contravene any prohibitory words to be found in the Constitution. *The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.* We must consider what this country has become in deciding what that Amendment has reserved.⁴²

In contrast to the Canadian scheme, which lacks a discrete treaty authority, the U.S. Treaty Power is a delegation to the federal treaty-makers additional to and independent of the delegations to Congress. For the purpose of domestic legislation, local subject matter may be "reserved to the states" when it falls outside the scope of Congress's enumerated powers; in the context of foreign affairs, these distinctions fall away.⁴³

That the *Holland* holding remains good law is not to say that the Treaty Power is free from limitations in favor of the states. Particular states' rights, activities, and properties are widely thought to be protected against federal

40. 252 U.S. 416 (1920).

41. HENKIN, *supra* note 29, at 190.

42. 252 U.S. at 432-34 (emphasis added).

43. HENKIN, *supra* note 29, at 191.

encroachment, even by treaty.⁴⁴ Unlike their Canadian counterparts, U.S. states cannot, as yet, assert a constitutional right to jurisdiction over these matters in the realm of foreign affairs.⁴⁵ This, of course, was *Holland's* central holding. Instead, dicta by justices and scholars have done the work, carving out hypothetical limitations on federal foreign affairs powers in explicit constitutional guarantees to the states and in implied state sovereignty and inviolability.⁴⁶ Although the Supreme Court's recent federalism jurisprudence has sparked fresh debate about whether *Holland* remains good law,⁴⁷ the principal influence of the states in international affairs remains that of partisan-political forces channeled through the federal structure.

It is in this political power that the states most resemble their Canadian counterparts. In principle, the Canadian and U.S. conceptions of their respective treaty schemes could not be more different. In practice, however, the conventional Canadian view of non-porous jurisdictional boundaries has been challenged by the fact of fluid interaction and collaboration among sub-unit "compartments." Likewise, in the United States, the traditional view of the states' irrelevance in foreign affairs⁴⁸ is untrue to practice:

The continuous existence of the states as governmental entities and their strategic role in the selection of the Congress and the President are so immutable a feature of the system that their importance tends to be ignored. . . . *The actual extent of central intervention in the governance of our affairs is determined far less by the formal power distribution than by the sheer existence of the states and their political power to influence the action of the national authority.* . . . Far from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse,

44. *Id.* at 193.

45. *Id.* at 165-66 (noting that the Tenth Amendment was "circumvented in principle when the Court accepted that the federal government has foreign affairs powers not expressly enumerated in the Constitution; little was left of it in fact when the courts recognized vast powers in Congress, and federal powers to make treaties and executive agreements, to do other executive acts, and to make law through judicial power, without regard to reserved states' rights.").

46. Justices have reasoned that a treaty cannot cede a state's territory without its consent, though this remains contentious. See, e.g., *Geofroy v. Riggs*, 133 U.S. 258 (1889). Presumably, the United States could not alter the republican character of state governments (by negative implication from art. IV, sec. 4) or abolish all state militia (by negative implication from art. I, sec. 8, cl. 16). Under the Eleventh Amendment, foreign governments and foreign nationals cannot sue a state in U.S. courts, absent its consent. Furthermore, though state immunities have been significantly reduced and state activities are generally subject to federal legislation, the sovereign immunity of states may contemplate some local activities within exclusive state jurisdiction in the realm of foreign affairs. HENKIN, *supra* note 29, at 166.

47. See *infra* Part III.B.4.

48. *United States v. Belmont*, 301 U.S. 324, 331 (1936) (stating that U.S. external powers are "exercised without regard to state laws or politics."). Numerous Justices and commentators have echoed this statement over the years—many of whom are known for their sensitivity to states' rights. HENKIN, *supra* note 29, at 149.

necessitating the widest support before intrusive measures of importance can receive significant consideration, reacting readily to opposition grounded in resistance within the states.⁴⁹

Nowhere has the political clout of the states created more of a barrier to the nation's international engagement than in the realm of human rights.

Here, an additional, critical difference between the two countries comes to light. Canada, faced with intricate constitutional and political obstacles, opted for a path of engagement and leadership on human rights issues. In contrast, the United States, faced with lesser intrinsic constraints on its treaty scheme, has resigned itself to a path of qualified adherence—a course that has earned it a reputation as a human rights laggard, not a leader, on the international stage.

III. FEDERALISM AND INTERNATIONAL HUMAN RIGHTS LAW

A. Canada: A Workable Balance

The political exigencies of Canada's constitutional scheme have meant that federal-provincial consultation has long been a *modus operandi* of Canadian politics, even before Lord Atkin's famous call in *Labour Conventions*. However, in the realm of international human rights instruments implicating subject matter of near-exclusive provincial jurisdiction, federal-provincial consultation was largely non-existent, and then, following the advent of the U.N. system,⁵⁰ largely ineffectual. During this period, Canada's response to the challenges posed by these treaties was a slightly more progressive version of the path pursued by United States: a route of non-adherence followed by limited adherence.

The early 1970s marked a period of growing friction in federal-provincial relations regarding external affairs.⁵¹ Writing at the time, Gerard Morris captured the widespread feeling of frustration with the country's constitutional scheme:

Under our present constitutional doctrine, it is just a little more difficult for any government of Canada, no matter how enlightened, to become an active world leader in the human rights

49. *Id.* at 168 (quoting Herbert Wechsler, *The Political Safeguards of Federalism: the Role of the States in the Composition and Selection of the National Government*, 54 COLUM L. REV. 543, 544, 558 (1966)) (emphasis added).

50. The first instruments included the U.N. Charter (1945); the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 8, 1948, 78 U.N.T.S. 277; and the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948) (nonbinding). The drafting of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], and the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 6 I.L.M. 360 (1967) [hereinafter ICESCR] began in 1949. See United Nations Treaty Collection, available at <http://untreaty.un.org>.

51. Morris, *supra* note 3, at 71.

field. The additional burden of a more cumbersome method of achieving the desired result may suffice, in fact, to render leadership impossible, so far as national compliance with evolving international standards is concerned.⁵²

Morris concludes that a new consultative mechanism is needed "to reassure the provinces about Ottawa's good faith and to instill in them a sense of meaningful involvement in the development of co-operative foreign policies."⁵³

Growing frustration with the inadequacies of the scheme led to a major development in joint participation in the promotion of human rights: the first Federal-Provincial Ministerial Conference on Human Rights. The Conference, convened in December 1975, marked a turning point in the understanding of the shared responsibilities of the federal and provincial governments in the field of human rights and represented the beginning of a new era in the development of human rights in Canada.⁵⁴

The Conference culminated in the establishment of a permanent mechanism for federal-provincial-territorial consultation on human rights. This discrete mechanism was designed to ensure that federal, provincial, and territorial governments interact closely at all stages of the human rights treaty process—from preparatory work to negotiation, drafting, ratification, implementation, and reporting. Among the main provisions of the mandate are: that extensive consultation occur through the Committee prior to Canada's ratification or denunciation of any international human rights instrument; that the Committee meet regularly to promote the progressive implementation of international human rights instruments (currently twice a year); and, more generally, that the Committee serve to ensure continuity in the inter-governmental dialogue on human rights by encouraging information exchange and research on topics relevant to human rights.⁵⁵

Beyond the provisions that ensure the provinces a voice in the human rights dialogue at the domestic level, the Committee mandate goes far to include the provinces in interactions on the international stage, without disrupting the international order of State legal personality. The mandate provides that each provincial and territorial government has the right to prepare its own reports on human rights treaty implementation in its jurisdiction to complement the federal government's report to the United Nations, and that the federal government, acting in concert with the

52. *Id.* at 63.

53. *Id.* at 68.

54. Philippe LeBlanc, *Canada's Experience with United Nations Human Rights Treaties 2* (1994), available at <http://www.unac.org/unreform/leblanc.html> (last visited Mar. 9, 2001).

55. The Human Rights Program of the Department of Canadian Heritage (formerly the Department of the Secretary of State) acts as the permanent secretariat for the Committee and as the primary information-exchange gateway between the international and domestic human rights scenes and between the federal, provincial, and territorial governments. *How Canada Works with the United Nations*, at <http://www.pch.gc.ca/ddp-hrd/english/ipcda.htm> (last visited Mar. 9, 2001) (on file with the Yale Human Rights and Development Law Journal).

provinces, will continue to exercise overall responsibility for the presentation of these reports.⁵⁶ Finally, the mandate stipulates that provinces and territories can, if they desire, send a representative as part of any delegation to an international meeting on Canada's reports; that the federal government will keep the provinces and territories regularly informed of international developments in human rights that could impact their jurisdictions; and that provinces can, when called for, send communications to international bodies through federal channels.⁵⁷

In this way, the first Federal-Provincial Ministerial Conference gave substance to Morris's call for a new consultative mechanism that would assure the provinces "meaningful involvement" in the human rights treaty process. Moreover, this regular, dialectical interaction has proved to be an efficient and effective means to advance Canada's treaty ratification and implementation. Canada's reports have been the most complete of any member state, and the U.N. has referred to them as models for the international community.⁵⁸ Today, Canada is a party to all of the principal United Nations human rights conventions and covenants. The Continuing Committee was essential to the ratification of all but one of these instruments.⁵⁹

1. The Federal-Provincial-Territorial Continuing Committee on Human Rights

Canada's ratification of two progressive human rights instruments, the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR), the same year that they entered force at the U.N. marked an important first victory for Lord Atkin's vision of fluid consultation. The additional ratification of the Optional Protocol to the ICCPR, despite serious opposition from the Departments of

56. Both Covenants, as well as other international human rights instruments, establish "measures of implementation": international methods for the supervision of compliance by states parties. In the case of the Covenants, 18-member Committees review the periodic reports required of countries, evaluate country compliance, and publish their findings in an annual document circulated to the General Assembly. Thomas Buerghental, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1, 12 (1988).

57. *How Canada Works with the United Nations*, *supra* note 55.

58. See LeBlanc, *supra* note 54.

59. Canada ratified the ICCPR, the ICESCR, and the Optional Protocol to the ICCPR (1976); The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1981); The Convention Against Torture (CAT) (1987); The Convention on the Rights of the Child (CRC) (1991); and the Optional Protocol to the CRC (2000). The International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (1965), is the one major human rights instrument that was signed (1966) and ratified (1970) by Canada before the Continuing Committee was established, but the process of acquiring provincial assent was far from easy. BAYEFKY, *supra* note 14, at 50 (noting that ratification required five years of federal-provincial negotiation). Moreover, it is perhaps under this Convention that Canada has been found in the most significant breach of a human rights instrument by an international monitoring Committee. See LeBlanc, *supra* note 54.

Justice and External Affairs,⁶⁰ sent a clear message of commitment to the international community that was further vindication for Canada's new consultative machinery.

Following ratification, the Committee has played an important role in coordinating implementation efforts. Chief among these was the Committee's role in the drafting of section 15, the equality rights provision of the Canadian Charter of Rights and Freedoms.⁶¹ At a 1981 Conference, the ministers issued a joint statement reminding the Government that "each government undertook to ensure that current and future legislation is compatible with Canada's international obligations." At the same Conference, the ministers reviewed a document entitled "Areas of Deficiency Requiring Ministerial Attention with Respect to International Covenants" which emphasized that the equality or non-discrimination provision of the ICCPR and other provisions of the ICESCR

prohibit discrimination on the grounds of status. This concept is extremely wide and could include discrimination on grounds of physical and mental handicap. . . . Consideration should, therefore, be given to increasing the number of prohibited grounds of discrimination if Canada is to meet its obligations under the two Covenants.⁶²

Proof of the Committee's ability to serve as an engine of progressive change on the domestic front came in the form of Mr. Chrétien's response: on February 17, 1981, the Minister of Justice presented in the House of Commons a revised Proposed Resolution to amend the Constitution to include "mental or physical disability"⁶³ as a protected status.

The Committee's role also has been important to the expedient ratification of other principal human rights instruments. Of particular note is the small time lapse between signature and ratification of human rights treaties since the Committee's inception, in contrast to the longer five-year span that was required to complete the process for the Convention on the Elimination of All Forms of Racial Discrimination (1965), the one major Convention ratified before the establishment of the Committee.⁶⁴

In addition, the post-ratification facilitative role of the Committee has been crucial to Canada's adherence to these instruments. In Canada's first report on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in May 1983, the Committee

60. The Optional Protocol was controversial because it allows individuals to bring complaints against their country before an international body for violations of their rights under the ICCPR. The Department of Justice worried, in particular, that Canada would suffer international embarrassment if a province were to be found in breach of an article. See LeBlanc, *supra* note 54 (describing the complaints filed and Canada's response).

61. See *supra* note 20 for a discussion of the influences of international law on its drafting.

62. BAYEFSKY, *supra* note 14, at 46 (quoting Federal Document: 830-89/008 at 2, n. 1 and 3 (Ottawa, February 2-3, 1981)).

63. *Id.*

64. See *supra* note 59.

could assert that, due to its machinery, "all governments in Canada have undertaken to give effect to the provisions of the Convention by amending domestic law to make it consistent with the Convention if . . . necessary. . . . The provincial and federal human rights acts/ codes are important statutes implementing the Convention."⁶⁵ Another successful example is the ratification of the Convention Against Torture (CAT), pursuant to which Canada undertook to amend the Criminal Code to make torture an indictable offense.⁶⁶ In a bold move, the amendment was coupled with another provision granting Canadian courts universal jurisdiction over defendants accused of torture. Two additional provisions were enacted to give effect to obligations that required states, under other international instruments and customary law, to cooperate in the prosecution of those responsible for gross violations of human rights, crimes against humanity, and war crimes.⁶⁷

The case of the Convention on the Rights of the Child (CRC) represents a slightly less successful example of the Canadian consultative machinery at work. Following Committee consultation with the governments and the non-governmental sector, Canada ratified the Convention with two reservations⁶⁸ and a statement of understanding.⁶⁹ Moreover, Canada's ratification of the Covenant broke precedent by moving ahead without unanimity. When the province of Alberta declined to consent to ratification, the Government chose to proceed with the process.⁷⁰ Since ratification, implementation has encountered similar difficulties: neither the provincial legislatures nor the federal Parliament have undertaken adoption of implementing legislation.⁷¹

65. BAYEFSKY, *supra* note 14, at 52, 55 (quoting Department of the Secretary of State, Report of Canada, Convention on the Elimination All Forms of Discrimination Against Women, May 1983, No. S2-104/1983E (Ottawa: 1983), at xi, 3).

66. LeBlanc, *supra* note 54.

67. SCHABAS, *supra* note 23, at 28-29.

68. Reservations are to Article 37(c) and to article 21. LeBlanc, *supra* note 54, at 7.

69. Canada entered a statement of understanding regarding the rights of minority groups to ensure that these rights are considered in the interpretation and application of the Convention. *Id.*

70. Alberta's position seemed to arise from a concern that the rights enshrined in the Convention could infringe the rights of parents. In a press release announcing the ratification, the Government explained: "the provinces and territories have reviewed their existing legislation. . . some provinces and territories have in fact indicated their support for ratification formally, and others may do so in the very near future." *Id.*

71. Gibran Van Ert, International Law in Canada: Principles, Customs, Treaties and Rights 116 (2000) (unpublished Master of Laws thesis, University of Toronto) (on file with the author). Van Ert notes that the usual practice for implementing legislation in the federal Parliament is for it to be drafted by a government department and brought to the floor of the House by that department's Minister. In the case of this Convention, an opposition member brought a private member's bill to implement the treaty. The bill died on the Order Paper after the parliamentary secretary to the Prime Minister spoke for the government against the bill. *Id.* at 90 (summarizing House of Commons Debates on bill C-254, (25 April 1995) at 11794-11800).

2. *Baker v. Canada*: Implications of the Consultative Process

One recent case, *Baker v. Canada*,⁷² affords an illuminating, concrete assessment of the Continuing Committee's contributions. At issue in *Baker* was the exercise of administrative discretion, pursuant to Section 114(2) of the Immigration Act, to deport a Jamaican woman who was a long-term undocumented resident with Canadian children. The Minister had denied Ms. Baker's appeal for permanent residence status on "humanitarian and compassionate grounds."

Ms. Baker asked the Court to interpret the Charter to protect a range of rights enshrined in the CRC, as well as in the ICCPR and the ICESCR. To reach the conclusion that the Minister's exercise of discretion had been discriminatory and unreasonable,⁷³ the Court addressed a crucial question: were the Minister's discretionary powers under the Act constrained by Canada's international obligations under the treaty, despite the fact that Parliament had not implemented the CRC into Canadian law?

In a 5-2 decision, the Court reasoned that the Minister's discretion under the Act was limited by the CRC on the grounds that the presumption of compliance with international law⁷⁴ extends to unimplemented, as well as implemented, treaties. The majority explained: "the reasons of the immigration officer show that his decision was inconsistent with the values underlying the grant of the discretion," values that included the importance of children's rights in Canada, as enshrined in international law. For the majority, this use of the CRC was merely an orthodox application of the treaty presumption to section 114(2) that did not implicate the well-established rule requiring implementation for treaties to have legal effect. In dissent, two justices contended that this use of the presumption gave domestic force to international obligations assumed without legislative consent.

Importantly, the dissent's argument that the majority's decision violated separation of powers principles can be extended to questions of federalism. Though the Court did not reach this issue, the holding would likely be applicable to provincial statutes,⁷⁵ such that the "values underlying [provincial officers'] grant of discretion" would include unimplemented treaties as well. In light of the consultative machinery of the Continuing Committee, this scenario gives reason for pause.

On the one hand, the majority's use of the treaty presumption would seem to undermine the dialectical process through which the federal

72. [1999] 2 S.C.R. 817.

73. Records show that the Minister had used factors such as Ms. Baker's problems with mental illness, her position as a single mother, her recourse to the welfare system, and her failure to contribute to Canadian society due to a lack of skills other than those of a domestic worker, as grounds for the denial of her petition. Craig Scott, *Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?*, 10 CONST. F. 97, 100 (1999).

74. For an explanation of this rule of statutory interpretation, see *supra* note 17.

75. The treaty presumption is applied to all statutes, federal and provincial, based on the fact that all legislatures are presumed not to violate international law. See *id.*

government and provincial sub-units opted to ratify, but not to implement, the CRC. This scenario might be especially problematic in the case of Alberta, given the province's failure to assent to ratification. Under a different view, however, the Committee would serve to justify the Court's extension of the treaty presumption to unimplemented treaties, precisely because the provinces (save Alberta) had entered the "interpretive community" of the treaty by assenting to ratification via the Committee machinery.⁷⁶ The application of the values enshrined in the treaty to those underlying provincial officers' discretionary powers, then, should pose few problems for Canada's constitutional scheme. In this view, the Committee process legitimates the majority's use of the presumption by resolving the "democratic deficit" that might have otherwise resulted from a treaty-making scheme that did not involve dialectical consultation with the sub-units. The process also functions as a safety net that allows for the integration of human rights norms into the domestic legal system through a multitude of channels, without circumventing the representative process. In the interim between *Baker* and the Court's consideration of the question in the provincial context, this analysis of the Committee should reassure those who worry that progressive respect for international human rights jeopardizes the integrity of the federal system.

B. The United States

1. A Zero-Sum Approach

As in Canada, the international human rights instruments⁷⁷ that emerged following World War II presented new challenges for the U.S. constitutional system because they implicated the relationship between the individual and the sub-unit governments. In light of *Holland*, and in the context of the early years of the civil rights movement and the Cold War, debate centered on the domestic implications of ratifying progressive human rights instruments that involved matters otherwise within the scope of state jurisdiction. The main concern of states' rights advocates in the United States mirrored that of their Canadian counterparts: the treaty power would provide the federal government with a pretext to circumvent constitutional limitations on its power.

In the face of the new U.N. instruments, the anti-civil rights and states' rights forces voiced two main contentions: first, that the U.N. Charter's human rights provisions would grant Congress the power to enact civil rights legislation otherwise outside the scope of its constitutional powers;

76. Admittedly, this reasoning works better in theory than in practice. As the lengthy *Baker* litigation illustrates, it is not always easy to separate assent to the values underlying a treaty from the assumption of practical financial and administrative burdens that occurs through the formal legislative process.

77. See *supra* note 50.

and second, that the U.N. Charter would preempt state laws by virtue of the Supremacy Clause. In addition, these advocates expressed unease about the erosion of U.S. sovereignty and independence that might result from international engagement on these issues.⁷⁸ From 1950-53, these concerns converged in an attack on *Holland* that included proposed amendments to the Constitution to prevent U.S. ratification of the human rights instruments and, in particular, desegregation by international treaty. Known jointly as the "Bricker Amendment," these proposals included a provision to overrule *Holland* and make all treaties non-self-executing: "A treaty shall become effective in the United States only through legislation which would be valid in the absence of a treaty."⁷⁹

In the end, the amendment failed but its proponents achieved their goals through other means. In exchange for the amendment's defeat, the Eisenhower Administration agreed to refuse to sign the emerging human rights conventions.⁸⁰ And, although the administration continued to seek the Senate's advice and consent for the Genocide Convention, a 1955 State Department circular affirmed the arrangement in no uncertain terms. "Treaties," it stated, "are not to be used as a device for the purpose of effecting internal social changes or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern."⁸¹

In retrospect, the bargain proved a poor one for the proponents of human rights. If adopted, the Bricker Amendment would have constricted the treaty power, but it would not have impeded U.S. ratification of the human rights instruments or their implementation by Congress. Indeed, as the civil rights movement gained domestic ground, the fear of progressive change through international treaty ceased to be an issue.⁸²

Unfortunately, history was set upon a different course. The price to be paid for the defeat of the Bricker Amendment was a high one indeed: nearly three decades of non-adherence to human rights instruments.⁸³ And, as distinguished from the similar course pursued by Canada during this period, the Eisenhower Administration's promise of non-adherence

78. Curtis Bradley & Jack Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 411 (2000) [hereinafter *Treaties*].

79. Louis Henkin, *The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 348 (1995) [hereinafter *Ghost*].

80. Thomas Healy, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726, 1732-33 (1998).

81. Bradley & Goldsmith, *Treaties*, *supra* note 78, at 413 (quoting U.S. State Department Circular No. 175, ¶ 2 (Dec 13, 1955)).

82. Following the 1954 *Brown v. Board of Education* decision, 347 U.S. 483 (1954), the courts enforced desegregation without any human rights act or congressional legislation. "Within a few years it became clear that the powers of Congress—notably the Commerce Power and the power to implement the Fourteenth Amendment—were broad enough to encompass civil rights legislation, without recourse to the Treaty Power." Henkin, *Ghost*, *supra* note 79, at 349.

83. While the United States continued to attend the debates in the Commission and the Third Committee of the General Assembly concerning the drafting of the ICCPR, the country did not play an active role and abstained from voting. William Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOKLYN J. INT'L L. 277, 279 (1995).

marked a regression in the nation's initial course of constructive engagement in the drafting process—a clear example of a national authority captive to the constraints of its federal system.

2. Reservations, Understandings, and Declarations

As the Eisenhower arrangement proved to be increasingly inconvenient for U.S. foreign policy interests, successive administrations gradually moved away from the practice. Finally, the official policy of non-adherence to human rights instruments changed with the Carter Administration's submission of a package of treaties to the Senate in 1978⁸⁴—an initiative that met with opposition reminiscent of earlier debates.

Faced with the package of human rights treaties, Senator Bricker's successors responded with a package of their own: a set of reservations, understandings and declarations (RUDs) to condition their consent, accommodating domestic concerns while allowing the United States to reap the foreign policy benefits of adherence. These RUDs respond to concerns about substance, scope, and structure: reservations are attached to withhold U.S. commitment to particular substantive treaty provisions; declarations are attached to make treaties non-self-executing so that they require implementation through the bicameral process to gain domestic force; and understandings are attached to clarify the scope of U.S. consent and to alert treaty partners that the implementation of certain provisions will be subject to the country's federal structure.⁸⁵

For Senator Bricker's successors, the RUDs have proved to be the perfect solution to the problem—one that has, in many ways, allowed the U.S. to "have its cake and eat it too." Once set upon this second course of qualified adherence, ratification has been far from expedient, and necessary implementation and reporting sub-standard.⁸⁶ To this day, the United States has yet to ratify major human rights instruments.⁸⁷ As one scholar recounts:

The belated ratification of the [ICCPR] . . . completed a process

84. The package included the International Convention on the Elimination of All Forms of Racial Discrimination (1966); the ICESCR (1966); the ICCPR (1966); and the American Convention on Human Rights (1969). See <http://www1.umn.edu/humanrts/treaties.htm>. In 1980, the Administration submitted the CEDAW (1980) to the Senate. Bradley & Goldsmith, *Treaties*, *supra* note 78, n. 78.

85. *Id.* at 401. RUDs cover a variety of subjects and take different forms. For the text of these RUDs, see <http://www1.umn.edu/humanrts/usdocs/usres.html> (last visited Jan. 28, 2002).

86. Conversation with Harold Koh, Professor of Law, Yale Law School (Mar. 2001). See also Ann Fagan Ginger, *The Energizing Effect of Enforcing a Human Rights Treaty*, 42 DEPAUL L. REV. 1341 (1993) (discussing laggard implementation and reporting in the case of the ICCPR).

87. The United States has yet to ratify the Optional Protocols to the ICCPR and the ICESCR (signed Oct. 5, 1977), CEDAW (signed July 17, 1980), CRC (signed Feb. 16, 1995), or the Optional Protocol to the CRC (signed July 5, 2000).

begun forty-five years earlier by Eleanor Roosevelt . . . In February 1978, President Jimmy Carter submitted the Covenant to the Senate. . . . However, the matter was not further pursued under the Reagan administration. Finally, . . . President Bush resubmitted the treaty to the Senate, accompanied by . . . no less than five reservations, four interpretive declarations and five "understandings"—an unprecedented number.⁸⁸

That this second course of qualified adherence has not been a dramatic change from the years of non-adherence has not escaped watchful eyes at home and abroad. Though U.S. courts have enforced the package without assessing its legality in any detail,⁸⁹ extensive literature has criticized the Senate practice and questioned the validity of each of the component parts on grounds of international and U.S. law, both substantive and symbolic.⁹⁰ Scholars have also considered whether the current path of qualified adherence is actually an improvement.

At one extreme, Louis Henkin contends that the United States would have done better to follow its initial course of non-adherence. U.S. RUDs, he explains, achieve "virtually what the Bricker Amendment sought, and more. . . . Senator Bricker lost his battle, but his ghost is now enjoying

88. Schabas, *supra* note 83, at 280.

89. This is because the text of the Constitution gives little information about the treaty-making process, and because the creation and enforcement of treaties are heavily influenced by political factors and are thus "political questions." Bradley & Goldsmith, *Treaties*, *supra* note 78, at 440-41.

90. For a fierce critique of each of the five categories of RUDs, see generally Henkin, *Ghost*, *supra* note 79. But see Bradley & Goldsmith, *Treaties*, *supra* note 78 (defending each of the five categories of RUDs). For a discussion of RUDs in the context of the ICCPR, see Schabas, *supra* note 83 (surveying the RUDs to conclude that many are invalid). But see Jack Goldsmith, *Should International Human Rights Law Trump U.S. Domestic Law?*, 1 CHI. J. INT'L L. 327 (2000) (defending the RUDs under the ICCPR).

For a survey of the doctrine of non-self executing treaties, see Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995). For a historical analysis of the validity of the non-self-executing declaration, see John Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) (challenging the legal orthodoxy that the "Supremacy Clause requires courts to automatically enforce treaties subject to narrow exceptions."). But see, e.g., Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land"*, 99 COLUM. L. REV. 2095 (1999) (rebutting Yoo's contention on historical grounds); Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) (rebutting Yoo on doctrinal and structural grounds).

Reservations raise the complex issue of what operative effect a treaty has for a reserving party, once their reservations have been declared invalid. Schabas, *supra* note 83, at 278 ("[I]f the invalid reservations can be severed or separated from U.S. accession to the treaty, then the United States remains bound by the Covenant, including its provisions dealing with the death penalty Alternatively, if the invalid reservations cannot be separated from the U.S. accession, then the United States is not a party to the instrument."). But see HENKIN, *supra* note 29, at 452, n. 29 (arguing that "if the Senate gave its consent only on condition . . . the treaty could take effect only subject to that condition"); Bradley & Goldsmith, *Treaties*, *supra* note 78, at 438 ("U.S. RUDs were clearly a condition of U.S. ratification . . . either the United States is not a party to the treaty provisions with respect to which it has reserved (which yields the same result as if the RUDs were enforced), or the United States is not a party to the treaty at all.").

victory in war. . . . U.S. ratification practice threatens to undermine a half-century of effort to establish international human rights standards in international law."⁹¹ Professors Bradley and Goldsmith disagree. They counter that RUDs are a "reasonable and largely successful response to . . . competing [international and domestic] pressures"⁹² that have exposed U.S. human rights practices to international scrutiny, while at the same time protecting important domestic prerogatives. In their view, the Senate practice has saved the United States from incurring international legal commitments that it "cannot" meet for constitutional or political reasons, and it has protected the principles regarding the separation of powers and federalism.⁹³

A moderate view is expressed by Thomas Buerghenthal, the U.S. representative to the ICCPR Human Rights Committee, a body that has been vocal in its opposition to RUDs. Buerghenthal distinguishes himself from Henkin's position, noting that conditioned ratification has made important substantive and symbolic contributions:

it is clear that the U.S. assumed significant international human rights obligations under international law *with regard to those international human rights that do not conflict with U.S. law*. This is so because ratifications have the effect of internationalizing these rights, thus obligating the United States to protect such rights both as a matter of domestic and international law. . . . [This] is a major step forward.⁹⁴

Nevertheless, he concedes that RUDs are "neither constitutionally necessary nor compatible with the long-term interest of the United States in promoting the world-wide observance of human rights." Indeed, he faults this practice for the country's laggard reputation: "the United States has moved from being a pioneer in [the area of human rights] to being a country that . . . puts increasing obstacles in the way of giving domestic effect to its international legal obligations."⁹⁵

Despite different interpretations, these three scholars share assumptions that have been drawn to effect a zero-sum choice between respect for the federal system and international human rights law. And yet, the Canadian experience tells a different, valuable story of two principles that are not mutually exclusive, but mutually constructive. In short, RUDs are neither a good way to promote human rights, nor the best way to ensure respect for the federal system.

91. Henkin, *Ghost*, *supra* note 79, at 349.

92. Bradley & Goldsmith, *Treaties*, *supra* note 78, at 467.

93. *Id.* at 468.

94. Thomas Buerghenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 211-12 at n. 3 (1997) (emphasis added).

95. *Id.* at 212.

3. Understanding Federalism Understandings

The ambiguous language of the federalism understandings⁹⁶ systematically attached to human rights treaties has produced uncertainty and discord about what these conditions actually mean. At one end of the spectrum, Louis Henkin has argued that these understandings serve "no legal purpose." In his view, the statements are "deeply ambiguous" because the federal government necessarily exercises jurisdiction over all matters covered in human rights instruments pursuant to the Treaty Power and is free to implement treaties in the manner it sees fit.⁹⁷ As such, understandings are just "another sign" of U.S. resistance to human rights agreements, "setting up obstacles to their implementation and refusing to treat human rights conventions as treaties dealing with a subject of national interest and international concern."⁹⁸ Though seconding Henkin's views, Gerard Neuman sees this sign in a different light. For him, the understanding does "signal the political reality" to U.S. treaty partners "that some members of Congress are reluctant to exercise existing federal power to enforce" treaties in areas otherwise within state jurisdiction.⁹⁹ Jordan Paust attributes to the "signaling function" a meaning even slightly more robust: "federal clauses allow state participation through law affirming or effectuating choice while assuring concurrent duties to implement the treaties through federal and state processes."¹⁰⁰

Official statements from the former Bush and Clinton administrations adopt a view that fuses the Neuman and Paust readings. The Senate explained that the Bush Administration's understanding attached to the ICCPR "serves to emphasize domestically that there is no intent to alter the constitutional balance of authority between the State and Federal governments."¹⁰¹ The Clinton Administration seconded: "there is no

96. The phrasing of the understandings attached to the CAT and the CERD closely parallels that of the ICCPR:

[T]his Convention shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that the 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 Convention.

Understanding No. 5 Concerning the International Covenant on Civil and Political Rights, reprinted in 31 I.L.M. 659 (1992) (emphasis added). The U.S. federalism understanding to the Charter of American States is less ambiguous than those conditioning the human rights instruments. OAS Charter, Apr. 30, 1948, 2 U.S.T. 2394, 2484.

97. Henkin, *Ghost*, *supra* note 79, at 345-46. See also Gerald Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENTARY 33, 52 (1997).

98. Henkin, *Ghost*, *supra* note 79, at 346.

99. Neuman, *supra* note 97, at 52-53 (referring specifically to the ICCPR).

100. Jordan Paust, *Customary International Law and Human Rights Treaties are the Law of the United States*, 20 MICH. J. INT'L L. 301, 328 (1999).

101. Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23 (2^d Sess. 1992) reprinted in 31 I.L.M. 645, 649

disposition to preempt these state and local initiatives or to federalize the entire range of anti-discriminatory actions through the exercise of the treaty power."¹⁰² Importantly, the Bush Administration clarified, "the intent is not to modify or limit U.S. undertakings under the Covenant but rather to put our future treaty partners on notice with regard to the implications for our federal system concerning implementation."¹⁰³

Finally, Professors Bradley and Goldsmith offer an interpretation more deeply ambiguous than the provision itself. They concede that the understandings do not relieve the federal government of responsibility for implementation but at the same time contend that the conditions "are not intended to compel state action." They conclude that "it is wrong to assume that it is the understandings that might make treaty compliance 'a matter of the states' option—the understandings merely highlight the possibility *that the federal structure of the Constitution may have this effect.*"¹⁰⁴ In effect, Bradley and Goldsmith present the federal government and individual states' governments as beholden to an all-powerful, monolithic "federal system" that will, alone, decide the fate of a non-self-executing treaty. But what is this "system" but its component parts in dynamic interaction?

Yet, Bradley and Goldsmith are not the only commentators who adopt this flat view of the federal system in conceptualizing the tension between federalism and international human rights law. To an extent, all of these interpretations evince a simplistic view of "the system" as the constraint to substantive adherence to these treaties. Here, the Canadian experience is again instructive: by recognizing the fluid multiplicity of political forces channeled through the federal system, "the system," as a unit, ceased to impede human rights treaty-making and implementation. Instead, the component forces became flexible, partner-participants in the human rights goals of the federal government, exerting their political power through negotiation and cooperation, as well as conflict and opposition. The important lesson from the Canadian experience is that by recognizing the independent agency of the system's sub-units and granting them authorship in the creative process, the antagonism between federalism and human rights treaties dissolves, and both values benefit.

(1992) [hereinafter ICCPR Report].

102. Senate Comm. on Foreign Relations, Report on the International Convention on the Elimination of All Forms of Racial Discrimination, S. EXEC. REP. NO. 103-29 at 24 (1994). An executive order by President Clinton evinces a similar equivocal attitude towards implementation: "it shall be the policy and practice of the Government of the United States. . . to fully respect and implement its obligations under the international human rights treaties to which it is a party." Though the choice of the word "shall" suggests an obligatory command, the Order goes on to state that it "does not impose any justifiable obligations on the executive branch." Exec. Order No. 13107, 63 Fed. Reg. 68991 (1998).

103. ICCPR Report, *supra* note 101.

104. Bradley & Goldsmith, *Treaties*, *supra* note 78, at 455-6 (emphasis added).

4. The Court and the Treaty Power: Federalism Jurisprudence and *Breard v. Greene*

Ironically, the debate over the meaning of ambiguous federalism understandings and their effect on treaty-implementation may only find decisive resolution in the voice that has yet to weigh in: the Supreme Court. The United States' conditioned ratification of human rights treaties has coincided with the Court's growing concern about the integrity of the federal system.¹⁰⁵ In recent jurisprudence, the Court has expressed the view that the safeguards of the political system do not adequately protect federalism.¹⁰⁶ These decisions have widened the divide between the treaty-making and legislative powers,¹⁰⁷ raising questions about whether *Holland* will remain good law. Of particular concern is whether the principle prohibiting the "commandeering" of state governments might be used to invalidate treaties implemented through congressional legislation that directs state officials to execute federal regulations pursuant to obligations incurred.¹⁰⁸ Though academe's hypotheses will have to await confirmation from the Court, there has been at least one recent sign that the Court's federalism jurisprudence might be extended to foreign affairs. The 1998 decision in *Breard v. Greene*¹⁰⁹ offers an illuminating case study of how federalism has been used as an obstacle to the respect for, and adherence

105. This jurisprudence has coincided with the increasing involvement of state and local governments in foreign affairs, and a shift away from foreign affairs exceptionalism. See Curtis Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1097, 1105 (1999) (exploring reasons for this shift).

106. Healy, *supra* note 80, at 1727-28 (describing the Court's recent jurisprudence as adopting "a new overriding approach to federalism that protects the states from a broad range of overreaching."). In a string of decisions, the Court has restricted the scope of legislative power under Article I, section 8 and section 5 of the Fourteenth Amendment, *see, e.g., Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); *College Sav. Bank v. Florida Prepaid Post-Secondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); it has reinforced the sovereign immunity of states in federal as well as state courts on questions of federal law; *see e.g., Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); and, it has prohibited the "commandeering" of state governments; *see Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

107. The Court's bold federalism jurisprudence, demonstrated by the anticommandeering principle, has not produced similarly bold deference to state sovereignty in preemption law. *See, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). Among others, Mark Tushnet has warned that the Court's failure to address the disparate treatment of affirmative and "negative" commandeering will work to undermine the reach of the anticommandeering principle. *See Mark Tushnet, Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11, 14 (2000).

108. Numerous prominent scholars have pondered the effect of this federalism jurisprudence, mainly the "anticommandeering" principle, on the treaty scheme. *See, e.g., Healy, supra* note 80; Flaherty, *supra* note 90; Curtis Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 409 (1998); Carlos Manuel Vazquez, *Breard, Printz, and the Treaty Power*, 70 U. COLO. L. REV. 1317, 1336 (1999); HENKIN, *supra* note 29, at 467, n. 75; Neuman, *supra* note 97, at 52.

109. 523 U.S. 371 (1998). For a detailed account of the complex proceedings surrounding the case, *see Jonathan Charney & Michael Reisman, Breard: The Facts*, 92 AM. J. INT'L L. 666 (1998).

to, international human rights law.

Breard is a complex case, unique because of its unprecedented proceedings. Among the distinguishing features of the case are a claim by a foreign government against a U.S. state, a conflict with the International Court of Justice (ICJ), the important involvement of two components of the executive branch,¹¹⁰ and almost universal rebuke from the international community and academic commentators.¹¹¹ An overview of the proceedings speaks volumes about how the federal government has provoked, and invoked, an antagonistic relationship between federalism and international human rights law.

Angel Breard was a Paraguayan national arrested in 1992 by the Virginia authorities for murder and attempted rape. The Virginia authorities failed to advise Breard of his right under the Vienna Convention to inform the Paraguayan consulate of his arrest.¹¹² Subsequently, Breard was convicted of the charge and was sentenced to death. The Virginia Supreme Court affirmed his conviction, and the U.S. Supreme Court denied certiorari.¹¹³

In 1996, Paraguayan officials learned of Breard's conviction and sought to advise him. In August of the same year, Breard filed a petition for a writ of habeas corpus in federal district court, contending mainly that Virginia's violation of the Vienna Convention rendered his conviction invalid.¹¹⁴ In a move deferential to state sovereignty, the court denied relief on the grounds that Breard had procedurally defaulted his claim by failing to present it in state courts, and the court of appeals later affirmed.¹¹⁵

In September of 1996, the Republic of Paraguay brought suit in federal district court against the Commonwealth of Virginia. Among other claims, Paraguay asserted that Virginia's failure to advise the consulate of Breard's arrest had violated the Vienna Convention. This time, the district court dismissed the case for lack of subject-matter jurisdiction on grounds of

110. Curtis Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 532 (1999).

111. Criticism focused on the symbolic aspects of the case, see, e.g., Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708 (1998); the political aspects, see, e.g., Carlos Manuel Vazquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683 (1998); and the legal aspects, see, e.g., Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT'L L. 679 (1998); Lori Damrosch, *The Justiciability of Paraguay's Claim of Treaty Violation*, 92 AM. J. INT'L L. 697 (1998); Jordan Paust, *Breard and Treaty-Based Rights Under the Consular Convention*, 92 J. AM. INT'L L. 691 (1998) and Frederic L. Kirgis, *Zschernig v. Miller and the Breard Matter*, 92 AM. J. INT'L L. 704 (1998). But see Curtis Bradley & Jack Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675 (1998) (arguing that, although these critiques are understandable, they give insufficient consideration to state sovereignty as protected in the Constitution).

112. Bradley, Breard, *supra* note 110, at 532-33.

113. *Breard v. Commonwealth*, 445 S.E.2d 670, 682 (Va. 1994), cert. denied, 513 U.S. 971, 971 (1994).

114. Bradley, Breard, *supra* note 110, at 534.

115. *Breard v. Netherland*, 949 F.Supp. 1255, 1263-65 (E.D. Va. 1996), *aff'd sub nom.*, *Breard v. Pruett*, 134 F.3d 615, 619-20 (4th Cir. 1998).

Eleventh Amendment immunity, and the court of appeals affirmed.¹¹⁶ In 1998, Paraguayan officials and Breard filed petitions for writs of certiorari in the Supreme Court. Virginia announced the date for Breard's execution as April 14 of the same year.¹¹⁷

Eleven days before the date of execution, Paraguay filed suit against the United States in the ICJ. Pursuant to Paraguay's request for provisional measures, the ICJ indicated that "the United States should take all measures at its disposal to ensure that . . . Breard is not executed pending the final decision of these proceedings."¹¹⁸ Subsequent to the ICJ indication, Breard and the Paraguayan authorities filed two motions for relief in the Supreme Court. These motions argued that, as "supreme law of the land," the Vienna Convention trumped the procedural default doctrine, and that the Court had a duty to enforce the ICJ decision as binding domestic law.¹¹⁹

In response, the Justice Department filed an amicus brief requesting that the certiorari petition and related motions be denied. The Solicitor General argued that, pursuant to Virginia's violation of the Convention, the United States had accorded Paraguay the traditional remedy (a formal apology and a pledge to improve future compliance); that the Vienna Convention provided no basis for vacating the conviction; and that the ICJ order was not binding on the United States.¹²⁰ Moreover, the Solicitor General contended that even if the ICJ order were binding, the federal government, including the Supreme Court, lacked the authority to stay the execution. He explained: "our federal system imposes limits on the federal government's authority to interfere with the criminal justice system of the States The 'measures at our disposal' under our Constitution may in some cases include only persuasion . . . that is the situation here."¹²¹

The Department of State signed the brief,¹²² voicing approval for this robust view of state sovereignty, and the Supreme Court declined to stay Breard's execution.¹²³ The same day, the Secretary of State's attempt to reach a diplomatic solution betrayed the Administration's sympathies. After describing the government's vigorous attempts to defend Virginia's right to execute Breard before the ICJ, Albright requested a stay "with great reluctance" — based not on respect for international law, but on her "responsibility to bear in mind the safety of Americans overseas" and the "possible negative consequences for the many U.S. citizens who live and

116. *Republic of Paraguay v. Allen*, 949 F.Supp. 1269, 1273 (E.D. Va. 1996), *aff'd*, 134 F.3d. 622, 627-8 (4th Cir. 1998).

117. Bradley, Breard, *supra* note 110, at 535.

118. 37 I.L.M. 810, 819 (1998).

119. Bradley, Breard, *supra* note 110, at 537.

120. *Id.*

121. Charney & Reisman, *supra* note 109, at 673 (quoting Brief for the United States as Amicus Curiae at 51, *Breard v. Greene*, 523 U.S. 371 (1998) (Nos. 97-1390)).

122. *Id.* at 672.

123. The Court noted that while it was "unfortunate that [the motion for a stay] comes before us while proceedings are pending before the ICJ," it was the prerogative of the Governor of Virginia to decide the matter, and "nothing in [the Court's] existing case law allows us to make that choice for him." 523 U.S. at 378.

travel abroad."¹²⁴

Armed with support for his prerogative from all sides, Virginia's Governor rejected the Secretary of State's request. Indeed, the Governor's decision was made so as to prevent what was, in his eyes, a more troubling alternative: the delay of the execution "would have the practical effect of transferring responsibility from the courts of the Commonwealth and the United States to the International Court."¹²⁵ According to schedule, Angel Breard was executed on April 14, 1998.¹²⁶

In *Breard*, politics—not law—was the central issue. "The system" afforded the politically-convenient scapegoat that has enabled the federal government to avoid more costly efforts to balance federalism and respect for international human rights. In effect, the Administration's recalcitrant performance sent a clear signal that states do have the "option" of respecting international human rights obligations because the federal government is unwilling to step in to insure compliance. This failure of political will is one with troubling ramifications for human rights treaty implementation.

5. An Uncertain State of Affairs

Despite clear textual authority in the Constitution and unambiguous case precedent, the future course of human rights treaty-making and implementation in the United States is uncertain. Various factors—legal, political, and practical—form layers of resistance to the treaty process. In the context of the evolving doctrine of anticommandeering,¹²⁷ the real meaning of the federalism understanding, read with the non-self-executing declaration, becomes even more uncertain. Two possibilities arise for human rights treaty implementation: either the federalism understandings instruct state legislatures to pass the laws required by Congress—an interpretation plainly in tension with the anticommandeering principle; or states are left with the option of complying with the instruction—an interpretation plainly in tension with the constitutional scheme erected to prevent a repeat of this very problem as it occurred under the Articles of Confederation.¹²⁸ As a matter of law, the understandings cannot mean the

124. Charney & Reisman, *supra* note 109, at 671 (quoting Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998)).

125. *Id.* at 674 (quoting Commonwealth of Virginia, Office of the Governor, Press Office, Statement by Governor Jim Gilmore Concerning the Execution of Angel Breard (Apr. 14, 1998)).

126. Bradley, *Breard*, *supra* note 110, at 538.

127. The questionable fate of an expansive preemption doctrine adds an additional layer of complexity. *See supra* note 107.

128. Vazquez, *Breard*, *supra* note 108, at 1357-58. Note that, as the law now stands, even if the anticommandeering principle were applied to the treaty context, Congress would retain substantial authority to "encourage" states through federal funding, *see, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987), or by threatening preemption, *see Vazquez, Breard, supra* note 108, at 1336 (explaining that, in this scenario, the federal government could conclude treaties imposing affirmative obligations on the states in relation to activities they already perform because states would be left with a choice between compliance with the instructions, or

latter. And yet, if the former interpretation is adopted, how can the tension be resolved?

This complex legal web creates a treaty scheme that is unworkable on a conceptual level, and even more so in its real-world application. It is in this light that these theoretical considerations are revealed as highly abstract, and largely irrelevant. Whatever the legal meaning of federalism understandings and the theoretical discord that may exist between these conditions and the Court's federalism jurisprudence, the *modus operandi* of this treaty scheme has been shaped by the politics of the federal system. *Breard* is a powerful reminder that, regardless of formal authority, the federal government is unwilling to encourage—much less to ensure—substantive compliance at the local level.

A trio of revisionist scholars¹²⁹ has seized upon this uncertain state of affairs to argue that the broad understanding of the Treaty Power reflected in *Holland* should be reconsidered. These commentators have engaged in a self-conscious attempt to develop a “new foreign affairs law,”¹³⁰ portrayed as a noble effort to rescue federalism, locked in a zero-sum struggle with “foreign affairs orthodoxy.” Curtis Bradley explains:

Faced with this conflict...we could, of course, abandon our commitment to protecting federalism...In any event, we must make a choice. As we continue with what is in essence an “international New Deal,” we must decide whether federalism is worth preserving. If it is, the nationalist view of the treaty power should be reconsidered.¹³¹

Leading scholar-advocates in the field have joined to defend the other side in this zero-sum debate, affirming the conventional wisdom about treaty-making and implementation on historical, textual, and structural grounds.¹³² Their strongest argument is a structural one: that the political safeguards of federalism have worked well—indeed, too well—to protect state sovereignty in human rights treaty-making and implementation. The Senate's standard package of RUDs attests to the force of these formal structural safeguards, further strengthened by the many informal protections afforded state sovereignty by the readiness of federal actors to invoke the constraints of the “federal system” and pass the buck on implementation and enforcement.

Yet, the very fact that the conventional process has allowed for these

withdrawal from the activity).

129. Curtis Bradley, Jack Goldsmith, and John Yoo.

130. Curtis Bradley, *A New Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1104 (1999) (describing this novel law as “more tolerant of state involvement in foreign affairs, more willing to impose limits on the national government's exercise of power, and less reliant on the judiciary to maintain foreign affairs uniformity.”).

131. Curtis Bradley, *Treaty Power*, *supra* note 108, at 461-62.

132. The work of these scholars have been included throughout the discussion. Prominent among them are Louis Henkin, Carlos Manuel Vazquez, and Martin Flaherty.

perverse results suggests that human rights treaty-making and implementation is not best served by assuming an antithetical relationship between federalism and foreign affairs orthodoxy. The rigid structure of the debate has made defenders reluctant to recognize that the challenges posed by human rights treaty-making and implementation are unique in ways that make the states necessary partner-participants. That an increased role for the states has been squared against respect for international human rights law has done a disservice to a treaty process badly in need of rationalization and reform.

IV. RECOGNIZING A DISCRETE ROLE FOR THE STATES

As the Canadian experience instructs, the first step towards reform is the recognition that "the system" is not a monolithic whole, antagonistic to the treaty process, but a multiplicity of parts, each with a role in the project of substantive rights protection. In his discussion of international norms, Harold Koh offers a useful conceptual framework for the consideration of this new role. Koh argues that international legal rules become integrated into national law as binding domestic obligations in a three-part "transnational legal process" of interaction, interpretation, and internalization.¹³³ This process is a "constructivist activity" whereby a "nation's repeated participation...is internalizing, normative, and constitutive-of-identity."¹³⁴ Through repeat participation in processes of "'vertical domestication' whereby international law norms 'trickle down' and become incorporated into domestic legal systems," nations come to obey international law.¹³⁵ Because "nation states are far more likely to comply with international law when they have accepted its legitimacy through some internal process," Koh concludes that human rights activists must work these vertical mechanisms by adopting new techniques, seeking new fora, and, importantly, empowering more actors to participate in the process.¹³⁶

Conspicuously absent from Koh's list of relevant actors, or "process activators," are the individual states. Nevertheless, Koh's model is relevant to conceptualizing a new role for the states in two important ways. First, the unique character of human rights, the RUDs attached to treaties, and the federal government's abdication make the states a necessary "process activator" in the "vertical domestication" through which the United States comes to obey international law. Second, Koh's understanding of the processes by which nations "obey" is applicable to a strategy that seeks to promote "internalized compliance" at the state level. But how can the states be afforded a meaningful role in the treaty scheme—one that complements the formal process established by the Constitution and

133. Harold Hongju Koh, *Bringing International Law Home*, 35 Hous. L. Rev. 623, 625-26 (1998).

134. *Id.* at 641.

135. *Id.* at 627.

136. *Id.* at 680.

Holland?

A. Lessons from Canada

The Canadian Committee affords an exemplary model of a mechanism that has reconciled federalism with respect for international human rights law by making three central contributions to Canada's human rights treaty scheme. First, the Committee has addressed the pragmatic problems with consultation during the 1960s and 1970s, coordinating complex interaction among the levels of government to ensure that all voices are heard at every phase of the treaty process. The Committee has oiled and ordered the machinery of inter-governmental interaction, facilitating a constructive dialogue that has contributed to a general culture of respect for human rights. As a continuous body that supports this dialogue, the Committee has ensured expedient implementation and organized reporting post-ratification.

Second, the Committee has performed an important symbolic role, communicating to the provinces that the federal government recognizes their shared responsibility in the realm of human rights and values provincial voices as a relevant and influential part of the conversation. Through the Committee, the federal government and provinces have become teammates, rather than antagonists, in progressive human rights protection. Importantly, this consultative "dialectical federalism" has afforded the provinces a new, robust authority that goes beyond their effective "veto" power (through refusal to implement), allowing the sub-units to influence the shape and scope of international treaty creation.

Moreover, the dialectical federalism facilitated by the Committee forms the real-world, institutional analogue to the symbolic dialogue among human rights norms and across human rights categories, necessary for a rich understanding of these rights.¹³⁷ Cooperative interaction works to encourage integrated consideration of rights that are themselves interrelated and only fully complete when viewed in their normative intersection with other rights.¹³⁸ In this way, the Committee draws on the central principle that underlies the U.N. as an institution and the noble human rights instruments that it has produced: that "interactive diversity . . . facilitates universalism."¹³⁹

This dialectical interaction between the different governments is

137. Craig Scott, *Reaching Beyond (Without Abandoning) the Category of "Economic, Social, and Cultural Rights,"* 21 HUM. RTS. Q. 633, 659.

138. Examples of intersectionality draw on concepts from North American "critical race theory" analysis. Applying these principles to the international context, the CEDAW and CRC would interact intersectionally when their combined mandate focuses on the "girl child," producing "the potential for analysis in which gender is brought to race and race to gender." *Id.* at 655 (making this same argument for the ICCPR, the ICESCR, and other human rights instruments).

139. Craig Scott, *Bodies of Knowledge: A Diversity Promotion Role for the UN High Commissioner for Human Rights*, in THE FUTURE OF UN HUMAN RIGHTS MONITORING 403, 406 (1998).

integrally related to the third substantive contribution that this institution has made. The Committee has worked to include the provinces as members of the "interpretive community" of human rights treaties by engaging them in the creative process through which their international obligations are negotiated, articulated, adopted, implemented and supervised. These stages of the treaty exercise generate the "interpretive community," creating what has been called in the literary context "assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance."¹⁴⁰ "[T]he process of producing and living under a treaty," one scholar explains, "generates a community... of people and institutions associated with the treaty."¹⁴¹ By granting the provinces a meaningful role in the creation of human rights obligations, provincial actors gain a stake in giving substance to ideals through implementation and supervision. As the collective authors of the instrument, the international values and rules enshrined seem relevant and important to the everyday lives of Canadians living in their jurisdictions.

That this is the case is shown by the high responsiveness of the provinces to obligations they have incurred by assenting to ratification through the Committee mechanism. Legislative implementation has, for the most part, been prompt, and legislative language and action demonstrate that the provinces view themselves as members of the "interpretive communities" of human rights treaties.¹⁴² Over the years, the pragmatic, symbolic, and substantive contributions of the Committee have been the engine behind Canada's new era of human rights leadership.

B. Towards a U.S. Analogue

The three main contributions that the Committee has made to the treaty process in Canada speak to the constructivist processes of interaction, interpretation, internalization, and identity-constitution that

140. STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 141 (1989). The notion of "interpretive communities" holds that "interpretation is constrained not by the language of the text, nor its context, but by the 'cultural assumptions within which both texts and contexts take shape for situated agents.'" Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 MICH. J. INT'L L. 371, 378 (1990) (paraphrasing Fish's argument).

141. *Id.* at 385-86.

142. Examples include the Ontario Human Rights Code and the Yukon Territory Human Rights Act, which make explicit reference to the Universal Declaration of Human Rights. Additionally, the Saskatchewan Court of Appeals has ruled that the province's human rights legislation implements, in a general sense, Canada's and Saskatchewan's international obligations. Similarly, a provision of Quebec's Labour Code and three provisions of its Labour Standards Act were said to have been "inspired by a Recommendation of the International Labour Organization." Perhaps most notable is Quebec's 1993 amendment of the Charter of the French Language after Canada was found to be in breach of Article 19 (freedom of expression) of the ICCPR by the Human Rights Committee. SCHABAS, *supra* note 23, at 29-30. The province's action is testimony to the fact that, as members of the "interpretive community" that created this international supervisory body, Quebec views the Committee's judgment on sensitive issues as legitimate.

Koh identifies as essential for effective compliance in the United States. Indeed, a U.S. analogue is easily envisioned: a Continuing Committee, composed of representatives appointed by the state attorneys general, which would convene biannually to include the states in the creative process through which their international obligations are negotiated, articulated, adopted, implemented, and reported.¹⁴³ The U.S. Committee would not alter the formal treaty scheme in which state interests are represented by the Senate supermajority's advice and consent, and the national government would remain responsible for implementation on the international stage. Instead, like its Canadian counterpart, the U.S. Committee would make informal but far-reaching modifications in the process to cut back the layers of resistance that currently impede "internalized compliance."

1. Symbolic Contributions

Like its Canadian analogue, the U.S. Committee would make a symbolic contribution to the process, signaling to the states that the treaty power is not locked in a zero-sum struggle with state sovereignty and facilitating the interactive consideration of rights that are, themselves, best conceptualized holistically. For skeptics who fear that this cooperative dialogue would instead create a chaotic cacophony, adding another level of resistance to the treaty process, experience is instructive. Both the success of the U.N. in the creation of these instruments and that of Canada's Continuing Committee in effecting treaty adherence, implementation, and reporting attest to the fact that interactive diversity can work to facilitate universalism. While the smaller number of provinces and the existence of a domestic rights-protecting instrument heavily influenced by human rights law¹⁴⁴ facilitate this goal in Canada, "universalism" need not contemplate consensus pre-ratification, but rather good-faith, collaborative partnership in a common human rights project.

2. Pragmatic Contributions

Like its Canadian counterpart, the U.S. Committee would make a

143. This Continuing Committee might even begin as one of the Standing Committees of the National Association of Attorneys General (NAAG). NAAG was founded in 1907 to facilitate interaction among the Attorneys General and chief legal officers of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico and associated Territories (as well as the U.S. Attorney General, an honorary member). Annual working groups, seminars, and conferences aim to disseminate information, provide a forum for cooperation, promote coordination on interstate matters, and increase citizen understanding of the law. Among the Standing Committees that NAAG supports is one on civil rights. *See generally* <http://www.naag.org> (last visited Jan. 16, 2002). Thus, NAAG might offer a natural place to house a Continuing Committee on Human Rights, though the proposed Committee would have a more robust role than the existing Standing Committees due to the discrete nature of human rights treaty-making and implementation.

144. *See supra* note 20.

pragmatic contribution to the treaty process, coordinating inter-governmental dialogue and information exchange, and organizing implementation and reporting post-ratification. At present, the federal government lags in publicizing new human rights commitments and notifying the public and local officials of their rights and enforcement duties under these instruments.¹⁴⁵ Moreover, because the federal government has refused to ensure implementation, there is little support for follow-up legislation. In the absence of a formal reporting mechanism, supervision is conducted in a haphazard and disorganized fashion that fails to check for substantive compliance.¹⁴⁶

In these respects, the Committee's pragmatic contributions would have several positive effects. First, by facilitating repeat interaction on human rights, the mechanism would promote a local culture of respect for internationally recognized rights that would stimulate and support ratification, implementation, and systematic reporting. Second, by providing a forum for information sharing, the Committee would clarify the specifics of treaty obligations and disseminate creative strategies for implementation and reporting. In turn, this information exchange might effect a "competitive federalism,"¹⁴⁷ whereby the progressive performance of some states sets an exemplary standard that raises the bar for others. Third, by creating a permanent mechanism for organized reporting, the Committee would signal to the international community and to the states that the nation and its component parts care about substantive compliance. Finally, through the Committee, the government could afford states an opportunity to defend challenges against its laws before the Human Rights Committee.¹⁴⁸

3. Substantive Contributions

Like its Canadian counterpart, the Committee would make a substantive contribution to the treaty process, granting the states a meaningful voice in the interpretive community of rights and duties formed by these treaties across stages of the process. This substantive role

145. Ginger, *supra* note 86, at 1355-56 (1993) (noting that "few of us . . . are aware that President Jimmy Carter signed the ICCPR and the ICESCR in 1977. . . . Neither the Senate nor the U.S. media has mentioned that . . . the U.S. Senate . . . consented to the ratification of the Covenant [nor that] . . . President George Bush had this treaty deposited at the United Nations To date no high (or low) federal government official has 'publicized' the Covenant in order to familiarize the authorities responsible for human rights enforcement with the content of the Covenant.").

146. Conversation with Harold Koh, *supra* note 86.

147. This is Peter Spiro's term. Peter Spiro, *The States and International Human Rights*, 66 *FORDHAM L. REV.* 567, 590-96 (1997) (arguing for a new doctrine of sub-national responsibility in the realm of human rights). In particular, "[l]egal responsibility should mirror actual responsibility. . . . [S]ome sub-national officials will come to respect human rights only when it shames their jurisdiction and hits their pocketbooks." *Id.* at 596.

148. Through the Committee Mechanism, Canada afforded Quebec like opportunity to defend its sign law in front of the Human Rights Committee. When found in breach of article 19, Quebec amended the law. See *supra* note 141.

speaks to Koh's notion of the constructivist activity through which continuous participation "is internalizing, normative, and constitutive-of-identity."¹⁴⁹ As collective authors of the instruments, state actors would come to view the international values and rules that the treaties enshrine as relevant and important to the lives of ordinary Americans living in their jurisdictions. The substantive effects of this interpretive community are several.

First, by recognizing the individual agency of the states in the creation of this "interpretive community," the Committee would allow for progressive departure from the standard package of RUDs. States with laws that already conform to reserved treaty requirements, and others willing to adapt local law, would be afforded the independent choice to agree unconditionally to the reserved provisions (outside of the Senate, where various factors distort decision making).¹⁵⁰ The progressive example set by these states might spark a positive "competitive federalism," raising the bar for other states. Moreover, as collective authors of the interpretive community, these states would be less inclined to view the reserved provisions as threatening to inconsistent state laws and would, in turn, be more likely to adopt legislative changes that would enable unconditional agreement to the treaty terms. The Committee would then serve to channel these individual expressions of assent through the national government, which might condition acceptance of the treaty provisions on the international stage, except in those sub-federal jurisdictions assenting to the terms. Importantly, the failure of a state to assent to ratification would change neither national nor local binding obligations under the treaty, and the federal government would accept responsibility for the breach of the conditioned provisions by states that assented to the terms unconditionally.¹⁵¹ For skeptics who worry that this scheme would create inconsistent standards of implementation across jurisdictions, today's status quo has had a like effect. RUDs and government abdication have produced inconsistency, without the Committee scheme's corresponding incentives and opportunities for unconditioned treaty accession. The notion is that "one would prefer any number of such sub-national participants, relative to the alternative of no coverage as prevails under the existing system of treaty accession."¹⁵²

A second substantive effect of the Committee is one of process legitimacy. By affording states a meaningful role in the formulation of their obligations, state actors will not only be more inclined toward unconditioned ratification, but they will gain a stake in giving effect to the treaties post-ratification through implementation, supervision, and

149. Koh, *supra* note 133, at 641.

150. See Spiro, *supra* note 147, at 590 (citing the example of the ICCPR's ban on execution of juvenile offenders as a case where about half of the states already prohibit such executions).

151. *Id.* at 592. Spiro notes that this "opt-in" model of treaty accession has been adopted in the WTO Agreement on Government Procurement, whereby the national government is held responsible for only the sub-national governments with respect to which acceptance was notified.

152. *Id.* at 590-91.

systematic reporting. In this way, the Committee would work to promote internalized compliance with treaty obligations at the local level by including states as members of the interpretive community.

The third substantive effect of the Committee relates to its role in identifying the states as a key strategic link in the process of "vertical domestication." Internalized compliance at the local level is fundamental to substantive compliance nationally. Indeed, because of the role states must play in implementing human rights obligations, it is largely sub-unit cooperation that will determine whether the United States improves on its "laggard" reputation in future years. It is also state governments that have a more direct relationship with the individual rights-bearers, and thus the greatest power to effect internalization of human rights norms at the local level. Today, few people take account of their "human rights" in everyday life because the process of their articulation is insular and far-removed, confined to the federal machinery. And yet, the human rights regime is only fully meaningful when it touches the lives that it seeks to protect and ameliorate. By including state representatives as members of the interpretive communities formed through the treaty process, the Committee would promote the diffusion of human rights consciousness at the grassroots level¹⁵³ and a sense of local interconnectedness to the greater world community.

V. CONCLUSION

This paper has argued that the creation of a discrete mechanism for human rights treaty-making and implementation in the United States would make symbolic, pragmatic, and substantive contributions to a scheme badly in need of rationalization and reform. Both the official policy of qualified adherence and academic criticism on each side of the debate have done the values of federalism and international human rights law a disservice by adopting a zero-sum view of the relationship between the two, restricting the range of creative solutions in play. And yet the resulting arrangement has satisfied neither the states' rights advocates nor the defenders of the treaty power.

The Canadian experience offers an instructive model of a human rights treaty mechanism that has reconciled federalism with deep respect for international human rights law by recognizing a role for the provinces as partner-participants at all stages of the process. Drawing on this model, the proposed U.S. analogue offers improvements in the process that respond to both camps of concern. For states' rights advocates, the scheme provides a more robust role for sub-federal authority, granting states authorship of their treaty obligations. For defenders of foreign affairs orthodoxy, the U.S. Committee offers a chance to move beyond the limiting effects of the RUDs and the federal government's abdication by tapping the individual states as

153. For a discussion of human rights at the local level, in the context of the ICCPR, see generally Ginger, *supra* note 86.

“process activators” in substantive human rights protection.

In the face of the incoherence of the present scheme and the uncertain course of the Court’s jurisprudence, a new human rights treaty mechanism is in order and within reach. The creation of a U.S. analogue to Canada’s Committee would demand perseverance and impose costs. And yet, the unique quality of human rights demands nothing less. By recognizing a new role for the states in human rights treaty-making and implementation, the United States may find the key to a successful transition from human rights laggard to leader. Only one crucial distinction between the Canadian and U.S. experiences blocks this path: the honest will to invest in a workable solution, beneficial to federalism and international human rights law.

