

THE UPSIDE OF THE DOWNSIDE: LOCAL HUMAN RIGHTS AND THE FEDERALISM CLAUSES

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INTRODUCTION

The U.S. government has ratified three of the major international human rights treaties: the International Covenant on Civil and Political Rights (“ICCPR”), the Convention Against Torture (“CAT”), and the Convention on the Elimination of All Forms of Racial Discrimination (“CERD”).¹ In the course of each ratification process, the United States has asserted a package of “reservations, declarations or understandings” (known as “RUDs”) in order to condition the scope of the obligations that it undertakes with its ratification.² The Vienna Convention on the Law of Treaties defines a reservation as “a unilateral statement . . . made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”³ There is no formal definition of either a declaration or an understanding, but like reservations, they are generally understood to be statements by state parties intended to narrow or refine their treaty obligations.⁴

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1. International Covenant on Civil and Political Rights, Sept. 8, 1992, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD].

2. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 341 (1995) (describing the package of RUDs attached to the ICCPR, CAT, and CERD).

3. Vienna Convention on the Law of Treaties, art. 2, May 23, 1969, 1155 U.N.T.S. 331 (entered into force on Jan. 27, 1980).

4. The International Law Commission, a body of the United Nations, has recognized “interpretive declarations” in the context of treaty ratification. See INT’L LAW COMM’N, GUIDE TO PRACTICE ON RESERVATIONS TO TREATIES 3 (2011), http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/1_8_2011.pdf&lang=EF_ [https://perma.cc/C2GT-6CLG]. For a domestic definition of RUDs, see CONG. RESEARCH SERV., 66–922 CC, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 11 (2001) (setting out typology of RUDs).

RUDs are often controversial because they have the potential to undermine the integrity and impact of a treaty. The United States' extensive use of RUDs in its ratification processes has been widely criticized by UN bodies and by other UN member nations.⁵ Domestic U.S. human rights advocates have also challenged the United States' use of RUDs, sometimes arguing that it would be better to simply not ratify a treaty rather than riddle it with RUDs.⁶

As part of its package of RUDs, the United States has attached a so-called "federalism understanding" to each of the three ratified treaties cited above, which sets out the United States' understanding of its treaty obligations in light of the tiered federal nature of the U.S. government.⁷ Domestic advocates have expressed concerns about whether this understanding is intended by the federal government to avoid its treaty implementation obligations, and they have frequently criticized the scope of the federalism clause.⁸ Defenders and critics alike have suggested that the clause is designed to protect subnational prerogatives even as the federal government takes on treaty obligations through ratification.⁹

The federalism clause undoubtedly has the potential to undermine the cohesion of U.S. human rights obligations, as it might be construed to exempt the federal government from primary responsibility for significant areas of human rights realization. But I want to temporarily lay those concerns to one side for purposes of this Article. Instead of railing against RUDs, I seek to explore what happens if we suspend concerns about federal accountability under international human rights law and simply accept the federalism clause at face

5. See, e.g., Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. J. INTL HUM. RTS. 1, 5 (2005); see also M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169, 1177 (1993) (discussing other nations' objections to U.S. RUDs).

6. See, e.g., Antonia Chayes, *How American Treaty Behavior Threatens National Security*, 33 INT'L SEC'Y 45, 52–53 (2008); Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347, 347 (2000); see also Janet Benshoof, *Twisted Treaty Shafts U.S. Women*, ON THE ISSUES (2009), http://www.ontheissuesmagazine.com/2009winter/2009winter_5.php [<https://perma.cc/6H2U-3K6U>] (arguing that U.S. RUDs "make CEDAW worthless").

7. See Henkin, *supra* note 2, at 5.

8. See, e.g., Vienna Convention on the Law of Treaties, *supra* note 3, art. 2(1)(a) (defining a treaty as "an international agreement concluded between States"); Penny Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 ALA. L. REV. 97, 159 (2011).

9. Oona A. Hathaway et al., *The Treaty Power: Its History, Scope and Limits*, 98 CORNELL L. REV. 239, 319 (2013) ("[T]he established practice of adding federalism RUDs represents an effort to avoid constitutional confrontation between the states and federal treaty power."); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLO. L. REV. 403, 444 (2003) ("[F]ederalism RUDs might themselves establish a new constitutional norm respecting state sovereignty.").

value. In an era when subnational governments are increasingly engaged with human rights implementation, might the federalism clause have a more positive, affirmative aspect? Is it possible that, rather than articulating a limitation on federal responsibility, the clause endorses state and local governments' authority to pursue human rights strategies in areas within their jurisdiction and expressly limits federal interference with appropriate subnational human rights activities, perhaps even circumscribing the federal government's powers of preemption?¹⁰

This Article proceeds as follows. Following this introduction, Part I reviews the texts of the federalism clauses (in order of U.S. ratification) that have been attached to the CAT, ICCPR, and CERD, and those that have been proposed for two unratified treaties, the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), and the Convention on the Rights of Persons with Disabilities ("CRPD"). Part II then analyzes the domestic legal significance of these clauses, with particular reference to the decision in *Bond v. United States*.¹¹ Part III examines the potential relevance of federalism clauses in two contexts: (1) local adoption of the "Human Rights City" status; and (2) subnational adoption of the sanctuary jurisdiction status. Finally, a brief conclusion offers suggestions for local human rights actors in light of the United States' wide and repeated endorsement of the federalism clauses, and—still suspending concerns about gaps in federal accountability—considers how human rights advocates might work within that framework.

I. THE FEDERALISM CLAUSES

Federalism clauses appear in each of the three major human rights treaties ratified by the United States, and in two major human rights treaties that have been proposed but not ratified by the United States.¹² Each of these clauses has its own unique wording. The slightly different formulations give indications as to the meaning and intent of the provisions.

10. Swaine off-handedly rejected the possibility that RUDs are the "source of a duty to implement." Swaine, *supra* note 9, at 442–43. This article, however, focuses on RUDs as a shield against federal preemption or other federal interference rather than a basis for an affirmative legal duty inuring to local governments. For more discussion of local human rights and preemption, see Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 *FORDHAM L. REV.* 411, 424–38 (2008). For an important but preliminary discussion of how the federalism understandings might affect preemption, see Johanna Kalb, *The Persistence of Dualism in Human Rights Treaty Implementation*, 30 *YALE L. & POL'Y REV.* 71, 85 n.57 (2011).

11. 134 S. Ct. 2077 (2014).

12. ICCPR, *supra* note 1, at U.N.T.S. 171; CERD, *supra* note 1, at 660 U.N.T.S. 195; CAT, *supra* note 1, at 1465 U.N.T.S. 85; G.A. Res. 34/180, U.N. Doc. A/34/46, Convention on the Elimination of All Forms of Discrimination against Women (Dec. 18, 1979) [hereinafter Women's Convention]; Convention on the Rights of Persons with Disabilities, 2515 U.N.T.S. 3 [hereinafter CPRD].

The CAT was opened for ratification in 1984 and now has 162 state parties, including the United States.¹³ In ratifying the CAT in 1990, the United States adopted the following federalism understanding:

[T]he United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing Articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention.¹⁴

The referenced articles of the CAT address the implementation of the Convention's provisions through education efforts directed to law enforcement and other relevant personnel, and integration of the provisions into all levels of criminal law decision-making, measures that would require independent state and local action under the U.S. federal system.¹⁵

Commenting on the CAT Federalism clause, David Stewart, a State Department official, called the understanding "convoluted."¹⁶ Perhaps in reaction to this observation, the federalism clause submitted with U.S. ratification of the ICCPR in 1992, took a somewhat more streamlined approach, stating that:

[T]he United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.¹⁷

13. CAT, *supra* note 1, at 1465 U.N.T.S. 85.

14. 136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990).

15. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 935 (1997) (striking down interim legislation enlisting local law enforcement officers in gun background checks as violating the Tenth Amendment).

16. David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1200 (1993).

17. 138 CONG. REC. S4784 (1992). For an excellent discussion of the legislative history and federal posture with regard to the ICCPR's federalism understanding, see David Kaye, *State Execution of the International Covenant on Civil and Political Rights*, 3 U.C. IRVINE L. REV. 95, 104-10 (2013).

Importantly, this understanding does not include limiting citations to particular articles of the treaty along the lines of the CAT understanding, but instead applies generally to the entirety of the treaty's subject matter. Given the absence of limiting language, this understanding seems to recognize the potential for subnational governments' independent human rights authority over a wide range of subject areas that lie beyond the federal government's legislative or judicial jurisdiction.¹⁸ For example, in its first monitoring report to the UN Human Rights Committee on United States compliance with the ICCPR, the United States averred that federal authority was constrained in "matters such as education, public health, business organization, work conditions, marriage and divorce, the care of children and exercise of the ordinary police power."¹⁹

Two years after the ICCPR ratification, in 1994, the Senate approved an even more streamlined federalism clause attached to U.S. ratification of the CERD:

[T]he United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.²⁰

Like the ICCPR's federalism clause, this provision seems to recognize limitations on federal jurisdiction over matters covered by the Covenant. At the same time, like the other understandings noted above, it provides assurances that the federal government will take "appropriate measures," "as necessary" to support state and local governments' fulfillment of their implementation obligations.²¹

In its initial report to the United Nations on CERD compliance, submitted in 2000, the United States noted the significant overlap of federal, state, and local jurisdictions over racial discrimination issues.²² The government specifically acknowledged local and regional variations, noting that "[i]n some states, courts have interpreted their state constitutions to provide even broader protections against discrimination than under federal law."²³ As interpreted by

18. See Kaye, *supra* note 17, at 108 ("One possibility is that ratification would provide a tool for federal, state, and local actors to ensure compliance with human rights law at an administrative level.").

19. Kalb, *supra* note 10, at 84 (citing U.N. Human Rights Comm., Initial Rep. of States Parties Due in 1993: United States of America, ¶ 3, U.N. Doc. CCPR/C/81/Add.4 (Aug. 24, 1994)).

20. 140 CONG. REC. S7634 (1994).

21. *Id.*

22. Comm. on the Elimination of All Forms of Racial Discrimination, Third Periodic Rep. of States Parties Due in 1999, Addendum: United States of America, ¶ 163, U.N. Doc. CERD/C/351/Add.1 (Oct. 10, 2000).

23. *Id.* ¶ 165.

the government, however, more rights-protective local initiatives were shielded, at least to some degree, by the treaty's terms. According to the United States, "[b]ecause the fundamental requirements of the Convention are respected and complied with at all levels of government, the United States concluded there was no need to pre-empt these state and local initiatives . . . through the exercise of the constitutional treaty power."²⁴

Two treaties submitted by the Executive branch for the Senate's consideration but never formally ratified also included proposed federalism clauses. CEDAW was approved by the Senate Foreign Relations Committee in July 2002, but it has never been submitted to the full Senate for consideration, which is necessary for final ratification.²⁵ CEDAW's proposed federalism understanding, which would be subject to additional Senate debate were the treaty to go forward, reads as follows:

[T]he United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered (by the Convention), and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.²⁶

The Senate Committee report endorsing CEDAW ratification explained that the federalism clause was necessary because:

Many of the specific areas covered by the Convention (such as education) are within the purview of state and local governments, rather than the federal government. Although U.S. law does not proscribe the federal government from committing its constituent units to the goal of non-discrimination, U.S. law does provide limitations on the federal role in some areas. To reflect this situation, this understanding makes clear that the United States will carry out its obligations under the Convention in a manner consistent with the federal nature of its form of government.²⁷

Through this understanding, the federal government acknowledged its "supreme" role in implementing anti-discrimination goals nationwide, but nevertheless noted federal "limitations" in some areas addressed by CEDAW. Education might be one such area.

24. *Id.* ¶ 166.

25. James Dao, *Senate Panel Approves Treaty Banning Bias Against Women*, N.Y. TIMES, July 31, 2002, at A3; *see generally* LISA BALDEZ, *DEFYING CONVENTION: U.S. RESISTANCE TO THE U.N. TREATY ON WOMEN'S RIGHTS* (2014).

26. Claiborne Pell, Comm. on Foreign Relations, S. EXEC. REP. NO. 102-23, at 18 (2002); *see also* Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?*, 23 HASTINGS CONST. L.Q. 727, 753-54 (1996) (discussing political aspects of treaty reservations in the United States)

27. Joseph Biden, Comm. on Foreign Relations, S. EXEC. REP. NO. 107-9 (2002).

Like the CEDAW, the Disabilities Convention has not been ratified, but it has gone farther along in the process, as it reached the Senate floor before failing to achieve the requisite two-thirds majority of votes on December 4, 2012.²⁸ That vote did not end the matter for all time, but rather put the Convention back in the queue for reintroduction at some point in the future should Senate sponsors put it forward.²⁹ The proposed CRPD also included federalism language, but the provision was designated as a reservation rather than an understanding:

To the extent that state and local governments exercise jurisdiction over issues covered by the convention, U.S. obligations under the convention are limited to the U.S. government taking measures appropriate to the federal system, such as enforcement under the ADA, with the ultimate objective of full implementation of the convention.³⁰

Notably, the CRPD reservation addresses specific boundaries between federal and state responsibilities, stating that ADA enforcement is an obligation of federal authorities while state and local governments retain jurisdiction over other issues covered by the Convention.

In the case of the CRPD, the explanation for the Reservation offered by the U.S. executive branch and endorsed by the Senate, clearly invokes the Bricker Amendment, a by-gone legislative effort to limit the domestic impact of treaty ratification.³¹ The Senate's report prepared in support of ratification explains the Reservation as follows:

Because certain provisions of the Convention concern matters traditionally governed by state law rather than federal law, and because in very limited instances some state and local standards are less vigorous than the Convention would require, a reservation is required to preserve the existing balance between federal and state jurisdiction over these matters.³²

28. See S. TREATY DOC. NO. 112-7 (2012); LUISA BLANCHFIELD & CYNTHIA BROWN, CONG. RESEARCH SERV. R42749, UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: ISSUES IN THE U.S. RATIFICATION DEBATE I (2015) (recording vote number 219, with sixty-one yeas and thirty-eight nays).

29. COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at 43 (2013) (Rule XXX: Proceeding on Treaties); BLANCHFIELD & BROWN, *supra* note 28; Thomas D. Grant, *The U.N. Convention on the Rights of Persons with Disabilities (CRPD): Some Observations on U.S. Participation*, 25 IND. INT'L & COMP. L. REV. 171, 172 (2015).

30. S. TREATY DOC. NO. 112-7, at 1 (2012).

31. In the 1950s, at the height of concern about international encroachment on domestic law, U.S. Senator John Bricker proposed a constitutional amendment that would have made all treaties non-self-executing. The proposal narrowly failed. The term "Bricker Amendment" has subsequently come to signify a wider range of proposals that would limit the domestic impact of treaties. See, e.g., Eric Chung, Note, *The Judicial Enforceability and Legal Effects of Treaty Reservations, Understandings and Declarations*, 126 YALE L.J. 170, 177-78, nn.18-20 (2016) (citing articles on Bricker and RUDs); Henkin, *supra* note 2, at 341, 348-49.

32. COMM. ON FOREIGN RELATIONS, CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, S. REP. NO. 112-6, at 21 (2012). See also *Public Hearing on Convention on the*

Alone among the federalism clauses, this one – the sole federalism provision designated as a reservation – is explicitly intended to protect local derogation from the impact of federal treaty obligations. Importantly, this reservation would not only sanction derogation but would also presumptively allow more vigorous local human rights implementation in areas outside of federal purview.

This brief survey of federalism clauses indicates that the most extreme of the provisions under consideration as part of U.S. treaty ratification—the reservation attached to the CRPD—is intended to insulate subnational governments that fall short of treaty standards. Other federalism clauses do not go so far, and instead, carve out particular spheres for subnational leadership on treaty compliance. All of the clauses preserve for states and localities the possibility of treaty compliance efforts that exceed federal efforts, while providing assurance that the federal government will not impede such efforts.

II. DOMESTIC LEGAL SIGNIFICANCE OF FEDERALISM CLAUSES

Recent scholarship on RUDs has focused on their domestic enforceability, finding through exhaustive case analysis that domestic court majorities have almost always recognized RUDs to be operative and enforceable when domestic treaty implementation is at issue.³³ For example, a recent survey of case law reports that “lower courts have repeatedly upheld RUDs stating that certain treaties or treaty provisions are non-self-executing, most prominently in cases involving the ICCPR.”³⁴

Unlike the non-self-executing RUDs, federalism understandings in U.S.-ratified treaties have not been specifically interpreted in domestic litigation.³⁵ However, the U.S. Supreme Court’s decision in *Bond v. United States*, while not explicitly addressing a federalism understanding, elucidates the structural limitations of federal implementation of an international treaty.³⁶

The *Bond* facts are memorable. In brief, a woman involved in a romantic triangle tried to use a highly toxic chemical to threaten and potentially harm her romantic rival.³⁷ Among other things, she smeared the chemical on her rival’s mailbox, triggering the concern of the U.S. Postal Service and thus, the federal government.³⁸ A zealous federal prosecutor charged the woman with violating Section 229 of the Chemical Weapons Convention Implementation Act of 1998

Rights of Persons with Disabilities before the Senate Comm. on Foreign Relations, 112th Cong., at 42 (2012) (statement of Eve Hill, Senior Counselor to Assistant Attorney General for Civil Rights) (explaining how reservations prevent the convention from impacting domestic parental rights); BLANCHFIELD & BROWN, *supra* note 28, at 10–11.

33. Chung, *supra* note 31, at 176.

34. *Id.* at 188–96, n.74 (citing cases).

35. *Id.* at 182–92.

36. 134 S. Ct. 2077, 2081 (2014).

37. *Id.* at 2085.

38. *Id.*

(“CWCIA”), which criminalizes, among other things, the possession or use of “chemical weapons.”³⁹ In response, the defendant argued that the Chemical Weapons Convention could not constitutionally support a congressional act that federalized simple assault and impinged on state criminal law prerogatives.⁴⁰ Because the domestic statute at issue was enacted to implement the international Chemical Weapons Convention, the U.S. government’s intent in ratifying the Convention played an important role in the Supreme Court’s consideration of the issues.⁴¹

Ultimately, the Supreme Court issued a decision written by Chief Justice Roberts that carved out a middle ground.⁴² The Court adopted a narrowing construction of the statute in order to save the CWCIA, determining that Congress did not intend ratification of the Chemical Weapons Convention to federalize such minor and personal possession and use of dangerous chemicals.⁴³ By taking this approach, the Court indicated that a broader construction of federal authority under the CWCIA would be untenable because it would federalize areas of law reserved to states.⁴⁴ Such an overreach would extend beyond Congressional authority and upset the “constitutional balance” between states and the federal government.⁴⁵ In other words, the *Bond* court read into the treaty a federalism clause that circumscribed the federal ability to implement the treaty at every level of government and reserved such implementation activities for state and local governments.⁴⁶

The calibrated approach taken by Chief Justice Roberts in *Bond* avoided overruling the venerable 1920 case of *Missouri v. Holland*, which adopted a much broader view of federal authority to implement international obligations.⁴⁷ In 1918, Congress enacted a federal law to regulate the hunting of migratory birds throughout the United States.⁴⁸ The state of Missouri challenged the law,

39. Tess deLiefde, Note, *Filling in the Gaps: A New Approach to Treaty Implementation Reconciling the Supremacy Clause and Federalism Concerns*, 66 U. MIAMI L. REV. 567, 574–75 (2012) (discussing *Bond* litigation leading up to Supreme Court review).

40. *Id.* at 568.

41. *Bond*, 134 S. Ct. at 2083–84 (reviewing drafting and ratification of Chemical Weapon Convention).

42. David Sloss is critical of the interpretation adopted by the majority opinion but accepts it as the lesser of two evils when compared with Justice Scalia’s concurring opinion. See David Sloss, *Bond v. United States: Choosing the Lesser of Two Evils*, 90 NOTRE DAME L. REV. 1583, 1584 (2015).

43. *Bond*, 134 S. Ct. at 2088–90.

44. *Id.* at 2083.

45. *Id.* at 2091.

46. *Id.* at 2092.

47. See, e.g., Sloss, *supra* note 42, at 1595.

48. 252 U.S. 416, 430–31 (1920).

arguing that it impinged on traditional areas of state control.⁴⁹ The U.S. government countered that the domestic statute implemented the terms of an international treaty on migratory birds entered into by Great Britain (acting for Canada) and the United States.⁵⁰ Citing the strength of the Constitution's Supremacy Clause and its designation of treaties as "the Supreme law of the land," the U.S. Supreme Court upheld Congress's authority to enact the federal implementing statute in the face of Missouri's challenge.⁵¹

Missouri v. Holland has been both criticized and praised for its broad view of federal power vis-à-vis states.⁵² *Bond* certainly takes a narrower view of federal power. Yet by reading an implicit federalism understanding into the Chemical Weapons Convention, the Supreme Court was able to preserve *Missouri v. Holland* while avoiding the admittedly absurd result of prosecuting an isolated personal vendetta as chemical warfare of international dimensions.⁵³

That is not to say that *Missouri v. Holland* could not be factually and legally distinguished from *United States v. Bond*. Even had the migratory bird treaty included an explicit federalism clause (much less an implicit one), the analysis would not have been the same as that in *Bond*, given the inherently national (and transnational) nature of migratory birds.⁵⁴ In contrast, in *Bond*, the implicit federalism understanding led the Court to conclude that the prosecutor had overreached, and that the treaty could not support federal prosecution of such a local crime.⁵⁵ In sum, the Court took the position that, consistent with the text of the explicit federalism clauses that the United States has attached to ratified and unratified international treaties, some aspects of treaty implementation are left to states and states alone.⁵⁶

49. For background on this law, see Margaret E. McGuinness, *Foreword to Symposium: Return to Missouri v. Holland: Federalism and International Law*, 73 MO. L. REV. 921, 921–25 (2008).

50. *Id.* at 924.

51. *Holland*, 252 U.S. at 432.

52. Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 421–25 (1998) (criticizing proposition that Congress can enact laws beyond the scope of its Art. I powers).

53. See, e.g., Roger P. Alford, *Bond and the Vienna Rules*, 90 NOTRE DAME L. REV. 1561, 1574 (2015) (noting the absurdity of reading "chemical weapons" broadly).

54. Franz Bairlein, *The study of bird migrations – some future perspectives*, 50 BIRD STUDY 243, 244 (2003) (mapping transnational bird migration routes).

55. *Bond v. United States*, 134 S. Ct. 2077, 2091–92 (2014).

56. The result in *Medellin* provides an additional gloss on this. There, the Court found that the Executive was powerless to mandate state compliance with the Vienna Convention on Consular Affairs, but it indicated that Congress might enact a law that would require compliance with the Convention's terms, presumably preempting any conflicting local laws. *Medellin v. Texas*, 552 U.S. 491, 519 (2008). Like the issue in *Missouri v. Holland*, the consular notification at issue in *Medellin* was clearly international in nature, and thus within appropriate federal purview.

III. PRACTICAL IMPLICATIONS FOR HUMAN RIGHTS CITIES AND SANCTUARY JURISDICTIONS

In furtherance of U.S. obligations under ratified human rights treaties, some local governments have adopted policies that explicitly or implicitly seek to realize the human rights of their residents. Below, I discuss two examples of this local take-up of human rights: (1) human rights cities; and (2) sanctuary jurisdictions.

A. *Human Rights Cities*

Human rights cities are local governments that have adopted the principles of the Universal Declaration of Human Rights or another formal human rights document as a guiding principle for local governance.⁵⁷ There are dozens of human rights cities around the world, with several located in the United States, including Boston, Washington, D.C., Pittsburgh, and Mountain View, California.⁵⁸ While San Francisco has not formally declared itself a human rights city, it has adopted CEDAW as part of its municipal law and is widely considered to be a leader in local human rights implementation.⁵⁹

Taking the federalism understandings and relevant case law at face value, there are several areas where local governments such as human rights cities might take the lead in treaty implementation and human rights realization in the

57. For additional background on human rights cities, see GLOBAL URBAN JUSTICE: THE RISE OF HUMAN RIGHTS CITIES (Barbara Oomen, Martha F. Davis & Michele Grigolo eds., 2016); STEPHEN P. MARKS, KATHLEEN A. MODROWSKI & WALTER LICHEM, HUMAN RIGHTS CITIES: CIVIC ENGAGEMENT FOR SOCIETAL DEVELOPMENT 46 (2008); Jackie Smith, *Responding to Globalization and Urban Conflict: Human Rights Cities Initiatives*, 11 STUDIES IN SOC. JUST. 347 (2017).

58. See, e.g., CITY COUNCIL OF BOSTON, RESOLUTION PROCLAIMING BOSTON AS A HUMAN RIGHTS CITY (2011), <http://meetingrecords.cityofboston.gov/sirepub/cache/2/z3dzg0rz40j5chp5mptuahhk/1039503172018032548314.PDF> [<https://perma.cc/94FB-SNUG>]; *Washington, D.C. Human Rights City Resolution*, AM. FRIENDS SERV. COMM., <https://www.afsc.org/resource/washington-dc-human-rights-city-resolution> [<https://perma.cc/39TS-P63R>]; Mark Noack, *Council Votes to Make Mountain View a Human Rights City*, MOUNTAIN VIEW VOICE (Dec. 20, 2016), <https://www.mv-voice.com/news/2016/12/20/council-votes-to-make-mountain-view-a-human-rights-city> [<https://perma.cc/K6HQ-7KR7>]; CITY COUNCIL OF MOUNTAIN VIEW, REPORT: HUMAN RIGHTS CITY DESIGNATION (Dec. 13, 2016), <https://mountainview.legistar.com/LegislationDetail.aspx?ID=2904855&GUID=6C57A4DE-84CE-4053-B7EC-93D389242C97> [<https://perma.cc/7AFJ-X7AS>]; PITTSBURGH HUMAN RIGHTS CITY ALLIANCE, <http://pgh-humanrightscity.wikispaces.com/> [<https://perma.cc/E5C5-64NM>]. See generally Kenneth Neubeck, *In a State of Becoming a Human Rights City: The Case of Eugene, Oregon*, in Oomen, et al., *supra* note 57, at 240 (listing cities).

59. See Stacy Lozner, *Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative*, 104 COLUM. L. REV. 768, 777–79 (2004).

United States. Addressing the issue of homelessness is one example.⁶⁰ The National Law Center on Homelessness and Poverty has detailed the many ways in which local criminal sanctions imposed for loitering, camping, and other incidents common to lack of housing amount to criminalization of homelessness in violation of many provisions of the ICCPR to which the United States is a party.⁶¹ The international community has confirmed that such measures violate international human rights norms.⁶² But since the particular regulatory measures involved—e.g., zoning ordinances, local criminal laws—are primarily the province of subnational regulation in our federal system, meeting these national human rights obligations requires local participation and even leadership.⁶³

At times, the United States has used international mechanisms as a means to show its support for such local initiatives. For example, in 2014, the U.S. government invited Salt Lake City Mayor Ralph Becker to attend the UN Human Rights Committee's review of United States compliance with its obligations under the ICCPR. Mayor Becker testified to the international body regarding Salt Lake City's progressive approach to resolving chronic homelessness of veterans.⁶⁴

60. See generally NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES* 11 (2014), https://www.nlchp.org/documents/No_Safe_Place [https://perma.cc/6VUS-AXYT].

61. See, e.g., NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *CRUEL, INHUMAN, AND DEGRADING: HOMELESSNESS IN THE UNITED STATES UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (2013), https://www.nlchp.org/documents/Cruel_Inhuman_and_Degrading [https://perma.cc/V5HQ-SKBJ].

62. See, e.g., Leilani Farha (Special Rapporteur), *Rep. of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, at 7, Hum Rts. Council, U.N. Doc. A/HRC/31/54 (2015).

63. See, e.g., YALE LAW SCHOOL ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC, "FORCED INTO BREAKING THE LAW": THE CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT 2–4 (2016), https://law.yale.edu/system/files/documents/pdf/news/criminalization_of_homelessness_report_for_web_executive_summary.pdf [https://perma.cc/9R3B-6V2B] (describing city ordinances contributing to criminalization of homelessness). Significantly, the U.S. Interagency Council on Homelessness, a U.S. federal agency that leads federal implementation of policies to address homelessness, has adopted a human rights frame in its work after hearing from policy advocates about the issue of criminalized poverty. See U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *SEARCHING OUT SOLUTIONS: CONSTRUCTIVE ALTERNATIVES TO THE CRIMINALIZATION OF HOMELESSNESS* 6–7 (2012), https://www.usich.gov/resources/uploads/asset_library/Searching_Out_Solutions_2012.pdf [https://perma.cc/G2EL-2ZKE]; Eric S. Tars, et al., *HUMAN RIGHTS TO HUMAN REALITY: A 10 STEP GUIDE TO STRATEGIC HUMAN RIGHTS ADVOCACY* 13–14 (Nat'l Law Ctr. on Homelessness & Poverty, 2014), https://www.nlchp.org/documents/Human_Rights_to_Human_Reality [https://perma.cc/T3FD-TU9J].

64. COLUMBIA LAW SCH. HUMAN RIGHTS INST., *BRINGING HUMAN RIGHTS HOME: THE BIRMINGHAM MAYOR'S OFFICE HUMAN RIGHTS DIALOGUE* 3 (2015), http://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/birmingham_outcomes_document_september_2015.pdf [https://perma.cc/3CWX-NEJX] (noting Salt Lake City Mayor Ralph Becker's testimony before the UN Human Rights Committee).

Generally, however, cities develop policies on homelessness outside of federal human rights oversight. For example, Eugene, Oregon, an aspiring human rights city, has been explicit in relying on human rights frames to address homelessness consistent with the Universal Declaration of Human Rights and the ICCPR.⁶⁵ An important component of Eugene, Oregon's approach has been to ensure that the voices of homeless individuals are heard, and that homeless individuals are able to participate in city decisions that will affect them.⁶⁶ Eugene has also adopted a unique decision-making framework, the Triple Bottom Line, that includes an assessment of human rights impacts of municipal decisions.⁶⁷ These initiatives have all been taken without direct federal engagement.

Could Congressional ICCPR implementation be a vehicle for federal preemption of local human rights measures such as those adopted in Eugene? Theoretically, yes; the result in *Missouri v. Holland*, broadly construed, indicates that such preemption would be possible. Relying on *Holland*, Congress might enact the "ICCPR Implementation Act" to impose common standards on the treatment of homelessness nationwide, grounding the legislation in the treaty power.⁶⁸

However, the federalism clause in the ICCPR may provide a backstop for such federal action, since it pledges that preemption can occur only when the federal intervention is "appropriate."⁶⁹ The term "appropriate" in the federalism understanding is not defined. There is a common-sense argument that only a federal approach that is more rights-protective than the state regime that it replaces would pass muster under this test. This seems to be the presumption adopted by the U.S. government in its first CERD report, where it expressly declined to preempt more aggressive state-level anti-discrimination measures. Indeed, it is a basic precept of international human rights law that states' signatories to a treaty may not take actions that would defeat the object and purpose of a treaty or regress in their implementation of relevant treaty norms,

65. See Kenneth J. Neubeck, *In a State of Becoming a Human Rights City: The Case of Eugene, Oregon*, in HUMAN RIGHTS CITIES AND REGIONS: SWEDISH AND INTERNATIONAL PERSPECTIVES 59, 66 (Martha F. Davis *et al.*, eds. 2017), <http://rwi.lu.se/app/uploads/2017/03/Human-Rights-Cities-web.pdf> [https://perma.cc/2L73-XZUN].

66. *Id.* See also HRC Homelessness Work Group Meeting Minutes 11/14/17, EUGENE HUM. RTS. COMMISSION HOMELESSNESS WORK GROUP (Nov. 14, 2017), <https://hrchwg.wordpress.com/2017/11/16/hrc-homelessness-work-group-meeting-minutes-11-14-17/> [https://perma.cc/2URZ-5AKZ] (discussing ways to ensure that homeless individuals can meaningfully address policy issues, citing human rights frames).

67. Neubeck, *supra* note 65, at 63–64.

68. As in *Bond* and *Holland*, there would likely be other Article I vehicles that would also support Congressional action, such as the Commerce Clause. See, e.g., Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland*, 73 MO. L. REV. 1105, 1115 (2008).

69. For full discussion of federalism clauses, see *supra* Part I.

even though they have stopped short of ratification.⁷⁰ By domesticating that international standard through the condition that any federal intervention be “appropriate,” the federalism understanding may provide support (and protection from preemption) for local human rights cities’ initiatives that further the broad goals of the ICCPR, CERD, and the CAT beyond the baseline of federal standards.

B. Sanctuary Jurisdictions

Sanctuary jurisdictions are not explicitly grounded in human rights norms, but are local governments that resist federal efforts to redirect local law enforcement resources to assist the federal government in identifying and deporting undocumented residents.⁷¹ While the phrase “sanctuary city” is in wide use, it is not a legal term; some cities and other jurisdictions with sanctuary-type policies designate themselves as “safe communities.”⁷² Further, jurisdictions identified as “sanctuaries” may adopt varying levels of resistance to federal pressure, depending upon local political will.⁷³ Self-proclaimed sanctuary jurisdictions in the United States include Boston, San Francisco, Chicago, and hundreds of other cities, counties, and other subnational jurisdictions across the country.⁷⁴ A few sanctuary jurisdictions are also human rights cities; Boston is an example of this dual identification.⁷⁵

Sanctuary jurisdictions are under considerable pressure from the federal government to cooperate with immigration enforcement efforts, including by

70. Vienna Convention on the Law of Treaties, *supra* note 3, art. 18.

71. See Jasmine C. Lee, Rudy Omri & Julia Preston, *What are Sanctuary Cities?*, N.Y. TIMES (Feb. 6, 2017), https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html?_r=0 [https://perma.cc/J4ZQ-29XS].

72. For example, pending sanctuary legislation in Massachusetts is denominated the Safe Communities Act. See, e.g., *The Time to Act is Now: Support the Safe Communities Act!*, MIRA COALITION, <https://miracoalition.org/welcomingnh/164-about-us/664-support-safe-communities> [https://perma.cc/MK3X-J232] (describing Safe Communities Act). For a philosophical analysis that grounds sanctuary cities in human rights norms, see SERENA PAREKH & MARTHA F. DAVIS, WHITE PAPER: BOSTON’S SANCTUARY CITY PROTECTIONS: A PHILOSOPHICAL PERSPECTIVE (2017), <https://www.northeastern.edu/law/pdfs/academics/phrge/whitepaper-sanctuary.pdf> [https://perma.cc/HUP3-MP5L].

73. See generally Jennifer C. Critchley & Lisa J. Trembly, *Historical Review, Current Status and Legal Considerations Regarding Sanctuary Cities*, 306 N.J. LAW. 32, 32–33, 35–36 (2017) (describing variations among sanctuary cities).

74. Inez Friedman-Boyce et al., *Sanctuary Cities: Distinguishing Rhetoric from Reality*, 61 BOS. B.J. 8, 10–11 (2017) (describing Boston’s sanctuary policy and pending litigation filed by San Francisco and others); Richard Gonzales, *Mayor Rahm Emmanuel: ‘Chicago Will Always be a Sanctuary City,’* NPR (Nov. 14, 2016 7:57 PM), <https://www.npr.org/sections/thetwo-way/2016/11/14/502066703/mayor-rahm-emmanuel-chicago-always-will-be-a-sanctuary-city> [https://perma.cc/L5BJ-ME5J].

75. See CITY COUNCIL OF BOSTON, *supra* note 58 (discussing Boston’s identification as a human rights city).

detaining immigrants without a warrant.⁷⁶ In part, the pressure arises from the Executive Order issued by President Trump asserting that federal law enforcement funding will be withheld from jurisdictions that fail to meet the demands of federal authorities.⁷⁷ Pressure also arises from ongoing Immigration Control and Enforcement Authority (ICE) raids and other surveillance methods that specifically target sanctuary jurisdictions.⁷⁸

In response to this pressure, sanctuary jurisdictions typically argue that reporting on immigration status will undermine local law enforcement effectiveness by instilling fear in immigrant residents and discouraging individuals in immigrant communities from having positive interactions with law enforcement authorities.⁷⁹ Further, the chilling effect of such reporting may discourage both documented and undocumented immigrants from accessing local education and social services to which they are entitled.⁸⁰ For example, citizen children may be afraid to attend school if they believe that it may lead to their parents' deportation.⁸¹ Victims of domestic violence may be afraid to obtain assistance from courts or agencies if it will mean a risk of deportation given reports of ICE officials making arrests at the courthouse door.⁸²

76. In many jurisdictions, city police coordinate with county jails, and it is the county officials who actually make the determination of whether to honor a federal detainer request. *See, e.g.*, Darla Cameron, *How Sanctuary Cities Work and How Trump's Blocked Executive Order Could have Affected Them*, WASH. POST (Nov. 21, 2017), <https://www.washingtonpost.com/graphics/national/sanctuary-cities/> [<https://perma.cc/LA88-M3N6>]; *see also* LENA GRABER & NIKKI MARQUEZ, IMMIGRATION LEGAL RES. CTR., *SEARCHING FOR SANCTUARY 6* (2016), https://www.ilrc.org/sites/default/files/resources/sanctuary_report_final_1-min.pdf [<https://perma.cc/C8DG-5AE3>] (“Counties, not cities, are the most important policy-makers in terms of establishing sanctuary policies.”).

77. *Enhancing Public Safety in the Interior of the United States*, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 30, 2017).

78. *See, e.g.*, Joel Rubin, *ICE Arrests Hundreds of Immigrants in ‘Sanctuary Cities’ Around the Nation, California*, L.A. TIMES (Sept. 28, 2017, 6:00 PM), <http://www.latimes.com/local/lanow/la-me-ice-raids-sanctuary-20170928-story.html> [<https://perma.cc/M7X2-DF26>].

79. *See* GRABER & MARQUEZ, *supra* note 76, at 24 (describing rationales for sanctuary policies); *see also* Benjamin Gonzales, et al., *The Politics of Refuge: Sanctuary Cities, Crime, and Undocumented Immigration*, URBAN AFFAIRS REV. (May 7, 2017), <https://doi.org/10.1177/1078087417704974>.

80. Lindsay Bever, *Hispanics ‘Are Going Further into the Shadows’ Amid Chilling Immigration Debate, Police Say*, WASH. POST (May 12, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/05/12/immigration-debate-might-be-having-a-chilling-effect-on-crime-reporting-in-hispanic-communities-police-say/?utm_term=.5e01e5eba36e [<https://perma.cc/YHJ3-X9XE>].

81. *See, e.g.*, Catalina Amuedo-Dorantes & Mary J. Lopez, *The Hidden Educational Costs of Intensified Immigration Enforcement*, 84 SOUTHERN ECON. J. 120, 124–125 (2017).

82. Richard Gonzales, *ICE Detains Alleged Victim of Domestic Abuse at Texas Courthouse*, NPR (Feb. 16, 2017, 10:33 PM), <https://www.npr.org/sections/thetwoway/2017/02/16/515685385/ice-detains-a-victim-of-domestic-abuse-at-texas-courthouse> [<https://perma.cc/J5ZT-H6E7>]. *See generally* THE FUND FOR MODERN COURTS, *PROTECTING THE ADMINISTRATION OF JUSTICE IN*

In adopting sanctuary policies, subnational governments are acting in spheres that are reserved to them under principles of domestic federalism, i.e., police power, education, and community social services.⁸³ Further, the principles underlying local sanctuary policies are consistent with international human rights obligations accepted by the United States through its formal treaty ratification, such as the right to security, the right to equal treatment, and the right to fair and equal procedures.⁸⁴ These rights, protected by the ICCPR, the CERD, and the CAT, extend to all residents of a territory, regardless of citizenship.⁸⁵ While national-level immigration restrictions are per se valid as core exercises of national sovereignty, that does not mean that undocumented individuals present within a jurisdiction forego all rights.⁸⁶ Importantly, many of the rights held by undocumented residents are the province of local governments, which recognize and uphold them in part through their sanctuary policies.⁸⁷

Jordan Paust has argued that the federalism clauses serve to delegate and guarantee a competence of state and local authorities to act affirmatively to implement human rights and to have those choices protected as long as they are otherwise in fulfillment of the treaties. Thus, the federal clauses support state and local competencies to participate in treaty effectuation in ways that might otherwise have been suspect under more inhibiting notions of federal preemption.⁸⁸ At least one scholar, Brad Roth, has labeled Paust's reading of the federalism clauses "far-fetched."⁸⁹ According to Roth, the ICCPR provisions addressed through the federalism understanding "pertain precisely to those exercises of the police power that are least likely to be federally preempted."⁹⁰

NEW YORK STATE: IMPACT OF ICE ARRESTS ON NEW YORKERS' ACCESS TO STATE COURTHOUSES (2017).

83. See, e.g., Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 747–48 (2007); see also *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40–44 (1973) (deferring to traditional state authority over education).

84. See GRABER & MARQUEZ, *supra* note 76, at 23.

85. On human rights extending to non-residents, see Hope Lewis & Rachel Rosenbloom, *The Boston Principles: An Introduction*, 1 NOTRE DAME J. INT'L COMP. & HUM. RTS. L. 145, 153–56 (2011); see also G.A. Res. 40/144, Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live (Dec. 13, 1985).

86. David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 372 (2003). See also PAREKH & DAVIS, WHITE PAPER, *supra* note 72, at 9–12.

87. See Lewis & Rosenbloom, *supra* note 85, at 154–55.

88. Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT'L L. 301, 330–31 (1999).

89. Bradley Roth, *Understanding the "Understanding": Federalism Constraints on Human Rights Implementation*, 47 WAYNE L. REV. 891, 905 (2001).

90. *Id.*

Roth's position has some logic to support it. As set out above, the ICCPR's federalism understanding may, by the nature of the underlying treaty, target areas overlapping with state police power where the federal government is more likely to acknowledge that subnational jurisdictions have some independent authority.⁹¹

But that is where the logic ends. The ICCPR is not the only treaty that carries a federalism understanding; the provisions of CERD and CEDAW, for instance, extend beyond areas of police power, indicating that federalism understandings also have broader implications.⁹² Further, even under the ICCPR, the current Presidential administration is pursuing preemption of local rights-protective sanctuary policies that are within the scope of traditional police power, undermining the premise on which Roth's narrow reading of the federalism clause is based.⁹³ This operational reality invites a re-evaluation of the precise meaning of the federalism understanding, if only to protect the United States from regressing in its compliance with human rights obligations.

Consistent with Professor Paust's view, then, the federalism understanding can be seen as a response to the broadest interpretation of *Missouri v. Holland*, e.g., an effort to balance local and federal authority in the human rights arena after the *Missouri v. Holland* Court's assertion of federal preeminence. Rather than permit general federal preemption of state prerogatives through purported exercise of treaty power, the federalism understanding would shield "appropriate" rights-protective measures taken by local governments within their sphere of authority.

Despite obvious tensions, this approach is not necessarily inconsistent with the implications of the Supreme Court's decision in *Arizona v. United States*.⁹⁴ The Court there struck down several of Arizona's anti-immigrant measures as pre-empted by federal law, but stopped short from striking a state law that required state police to investigate the immigration status of individuals who were stopped, detained, or arrested.⁹⁵ The logic of the opinion leaves open the possibility that more rights-protective local measures that operate in areas reserved to states, beyond the scope of a domestic federal scheme, could also be upheld.⁹⁶ That would seem to be the clear import of the federalism clauses,

91. Kaye, *supra* note 17, at 110–14.

92. CERD, *supra* note 1, art. 5, § e.

93. See Exec. Order No. 13768, *supra* note 77, at 8801.

94. *Arizona v. United States*, 567 U.S. 387 (2012).

95. *Id.* at 411–15.

96. See Peter J. Spiro, *Preemption After Arizona: Rebuttal: State Action on Immigration (Bad and Good) After Arizona v. United States*, 161 U. PA. L. REV. ONLINE 100, 108 (2012) ("So long as they don't go too far . . . the states can roll out something like a welcome mat by opting for more generous benefits for immigrants."); Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 705–06 (2013) (heralding opportunities for "immigrant inclusionary" local rulemaking in the wake of *Arizona v. United States*).

which of course are themselves attributable to the federal government just as the “comprehensive schemes” cited by the Arizona Supreme Court in support of preemption.⁹⁷

CONCLUSION

The federalism clauses have been widely criticized as an effort to limit federal obligations under ratified treaties. However, a closer look at their exact language and usage in U.S. treaty debates suggests the possibility of other interpretations. In this essay, I take the federalism clauses at face value and examine their potential impact on local human rights implementation—both when human rights norms are invoked explicitly, as in the human rights city context, and when human rights arguments are simply available, as in the context of sanctuary jurisdictions.

This preliminary examination suggests the possibility of a more positive perspective on the federalism clauses as expressly protective of rights-expanding local initiatives. While the federalism understandings preserve the federal-state balance, they suggest that the federal government should usurp state-level human rights initiatives only when the federal substitute is more “appropriate” or rights-protective than the local policy it eclipses.

This analysis would suggest that the United States violates its treaty obligations, as filtered through the federalism clauses, when it interferes with local human rights initiatives that are furthering U.S. treaty objectives and that are within the purview of local actors. These U.S. treaty violations should be critiqued on the international stage by treaty monitoring bodies even as they are challenged at home in domestic fora.⁹⁸

Local actors might glean from this analysis that there is some utility to framing rights-protective initiatives through a human rights lens in order to clarify the shield that the federalism clause potentially provides against federal interference with such subnational initiatives.

97. *Arizona*, 567 U.S. at 406–07.

98. See, e.g., Vivian Yee, *California Sues Justice Dept. Over Funding for Sanctuary Cities*, N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/us/california-sues-trump-administration-over-sanctuary-city-policy.html> [<https://perma.cc/532P-83X3>].