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# The State of New York Does Exist: How States Control Compliance with International Law

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# THE STATE OF NEW YORK DOES EXIST: HOW THE STATES CONTROL COMPLIANCE WITH INTERNATIONAL LAW

JULIAN G. KU\*

*Although most courts and commentators presume that the states disappear when it comes to foreign relations, states actually play a crucial role in fulfilling U.S. obligations under international law. In many circumstances, state governments are the only institutions responsible for carrying out treaty and customary international law obligations on behalf of the United States. Not only have states always played this role, but state control over the implementation of such obligations is likely to become even more important in the future because the implementation of many private international law and international human rights treaties is controlled by the states. This role for states in controlling compliance with international law calls into question the widely held view that exclusive federal control over foreign relations is required or desirable. This Article suggests state-controlled implementation could actually bolster the development of international law.*

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## INTRODUCTION

In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist.<sup>1</sup>

The Supreme Court famously exterminated New York and the other states of the Union with respect to foreign affairs in 1937,<sup>2</sup> and, until recently, few courts and commentators have mourned their extinction. Doctrines such as the dormant preemption of state activity in foreign affairs,<sup>3</sup> customary international law as federal common law<sup>4</sup> and therefore “supreme over the law of the several States”;<sup>5</sup> and the federal government’s freedom to make international law through treaties and other international agreements

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

2. *Belmont* is only the most colorful example of this view of the states. See, e.g., *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889) (“For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575 (1840) (“It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation . . .”).

3. *Am. Ins. Ass’n v. Garamendi*, 123 S. Ct. 2374, 2387–88 (2003); *Zschernig v. Miller*, 389 U.S. 429, 441 (1968).

4. Customary international law (also referred to as the law of nations) results from the practice and beliefs of nations. Treaties form international law based upon binding agreements between nations. Under international law, treaties are any sort of binding agreement, but under U.S. law, treaties refer to agreements made by the President and ratified by two-thirds of the Senate. See generally *RESTATEMENT OF THE LAW, THIRD: THE FOREIGN RELATIONS LAW OF THE UNITED STATES* §§ 101–103 (1987) [hereinafter *RESTATEMENT (THIRD)*] (defining international agreements and discussing the scope of their authority in the United States); MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 41–55 (4th ed. 2003) (discussing customary international law).

5. *RESTATEMENT (THIRD)*, *supra* note 4, § 111; see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 886–87 (2d Cir. 1980) (ruling that U.S. courts are bound by the “law of nations”); *RESTATEMENT (THIRD)*, *supra* note 4, § 111 cmt. d (“[C]ustomary international law, while not mentioned explicitly in the Supremacy Clause, [i]s also federal law and as such [is] supreme over State law.”); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 238–39 (2d ed. 1996) (same); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1824–27 (1998) (defending status of customary international law as federal law). But see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816–22 (1997) (arguing that customary international law as federal common law is a “modern” view with no doctrinal or historical justification).

unconstrained by federalism and state's rights, reflect a strong academic and judicial consensus against state involvement in any matters related to foreign affairs and international law.<sup>6</sup>

These various strands of the "nationalist conception" share the same premise: states do not, and should not, have any independent role in matters relating to foreign affairs.<sup>7</sup> Although a recent wave of "revisionist" scholarship has questioned elements of the nationalist view, the intuitive appeal of the nationalist view remains compelling to many scholars, particularly with respect to compliance with international law obligations.<sup>8</sup> If states can control how and even whether the United States will comply with its international law obligations, scholars have argued, then it will fail to maintain "one voice" with respect to foreign affairs.<sup>9</sup> Such a system would be

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6. See RESTATEMENT (THIRD), *supra* note 4, §§ 302, 303; Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENTARY 33, 46 (1997); see also HENKIN, *supra* note 5, at 191 ("Many matters, then, may appear to be 'reserved to the States' as regards domestic legislation if Congress does not have power to regulate them; but they are not reserved to the states so as to exclude their regulation by international agreement." (quoting *Missouri v. Holland*, 252 U.S. 416, 432 (1920))); Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 530 (1991) ("[T]he treaty makers may make supreme law binding on the states as to any subject, and notions of states' rights should not be asserted as impediments to the full implementation of treaty obligations.").

7. See discussion *infra* notes 46–62 and accompanying text.

8. A recent wave of "revisionist" scholarship has initiated a lively scholarly debate over the nationalist view of international law with respect to both treaties and customary international law. "Nationalist" scholars tend to view federal control over all international law as constitutionally required. See, e.g., HENKIN, *supra* note 5, at 238–39 (observing that "it is established that [customary] international law is law of the United States" for purposes of federal court subject matter jurisdiction under Article III and for purposes of supremacy over state law in Article VI); Damrosch, *supra* note 6, at 530 (arguing that the treaty power is unlimited by federalism or states' rights). On the other hand, "revisionist" scholars have suggested that federal control is improper. See, e.g., Bradley & Goldsmith, *supra* note 5, at 816–22 (arguing that customary international law is not a source of federal law and that treating it as such could threaten traditional domestic lawmaking processes); A.M. Weisburd, *State Courts, Federal Courts, and International Law Cases*, 20 YALE J. INT'L L. 1, 8–14 (1995) (arguing that federal court cases incorporating customary international law as federal common law are wrongly decided). Moreover, in the case of the treaty power, the revisionists argue that federalism principles act to limit the scope of the federal power so that some treaty obligations must be implemented by states. See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 456–61 (1998) (arguing that the "nationalist" view of treaty power unlimited by federalism should be reconsidered); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 533 (2003) (arguing that limited federalism restrictions constrain the treaty power).

9. Koh, *supra* note 5, at 1850 (arguing for the "one voice" rationale); see also HENKIN, *supra* note 5, at 238–39 (noting that "[f]ifty states could have fifty different views on some issue of international law and the federal courts might have still another view"); Damrosch, *supra* note 6, at 530 (noting problems that arise during the Senate's ratification

“bizarre”<sup>10</sup> and “strikingly irresponsible.”<sup>11</sup>

Bizarre and irresponsible as it may seem, this Article argues that, in many circumstances, the states *already* control how and whether the United States will comply with certain obligations under international law. Not only are states often responsible for the integration and development of customary international law, but states are also often solely responsible for implementing U.S. obligations under many international treaties.

This Article does not claim that a system of state control over compliance with international law is constitutionally required, due to, for instance, limitations on the ability of the federal government to legislate via the Treaty Clause. In many instances, the federal government may choose to leave control over international law to the states. It is equally plausible, however, that federal policymakers have avoided exploring the limits of their constitutional powers over the states by deferring to state control over international law. In any case, the existence of this system strongly supports the constitutional legitimacy of a robust and independent state role in fulfilling international law obligations, and perhaps even participating in foreign relations.

States control compliance with international law in a number of ways. State governments often fulfill U.S. responsibilities under both customary international law and treaties, even self-executing treaties.<sup>12</sup> State courts have independently developed and incorporated doctrines of customary international law,<sup>13</sup> and state legislatures have implemented international law obligations through legislation.<sup>14</sup> When the federal government ratifies a treaty or declares adherence to a norm of customary international law that implicates state functions or interests, state governors are responsible for implementing those treaty obligations.<sup>15</sup>

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of treaties when states have pre-existing inconsistent statutes on the same subject matter).

10. See Koh, *supra* note 5, at 1850 (describing as “bizarre” the view that customary international law is not federal law).

11. 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, 1312 (2000) (describing the view that states would have enough independent control to implement treaty obligations as “strikingly irresponsible”).

12. See discussion *infra* notes 221–47 and accompanying text.

13. See Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT’L L. 265, 291–333 (2001) (describing how customary international law doctrines of diplomatic immunity in transit, extradition, and sovereign immunity were introduced and developed by state courts free of federal court review).

14. See discussion *infra* notes 248–67 and accompanying text.

15. See discussion *infra* notes 268–314 and accompanying text.

In the modern era, the most important role for the states in compliance with international law obligations stems from their ability to implement certain treaties, particularly “non-self-executing” treaties. Non-self-executing treaties do not have an immediate effect on the domestic laws of the United States.<sup>16</sup> Rather, some institution, typically Congress, must pass implementing legislation to fulfill U.S. obligations under that treaty. Where Congress has failed to take this action (or believes it unnecessary), the states are responsible for carrying out those treaty obligations, usually through legislation. Moreover, where the treaty-makers (meaning the President and the Senate) choose to limit the treaty’s effects on the states by means of a reservation, Congress may be limited from passing implementing legislation that would override state law. In these circumstances, the *states*, and not the federal government, control whether and how to implement a treaty obligation of the United States.

The response by the United States to a series of International Court of Justice (“ICJ”) orders requiring the suspension of state executions of foreign nationals provides a recent example of how a state can control compliance with international law.<sup>17</sup> In those cases, the U.S. government argued to the ICJ that because the United States is “a federal republic of divided powers . . . [f]ederal [g]overnment officials do not have the legal power to stop [a state action] peremptorily,” even when a serious breach of an international obligation might occur as a result of that state action.<sup>18</sup> Thus, according to the federal government itself, the states are free to decide whether to carry out treaty obligations embodied in the ICJ

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16. See RESTATEMENT (THIRD), *supra* note 4, § 111(4); *id.* § 111(4) cmt. h. For a careful and detailed discussion of the various rationales for non-self-execution, see David Sloss, *Non Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 1–44 (2002).

17. See Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) (Provisional Measures Order of Feb. 5, 2003) [hereinafter Avena Provisional Measures Order], [http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus\\_iorder\\_20030205.pdf](http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iorder_20030205.pdf) (on file with the North Carolina Law Review); LaGrand Case (F.R.G. v. U.S.) (Judgment of June 27, 2001) [hereinafter LaGrand Judgment], <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (on file with the North Carolina Law Review); Case Concerning the Vienna Convention of Consular Relations (Para. v. U.S.) (Provisional Measures Order of April 9, 1998), 1998 I.C.J. 248 (April 9) [hereinafter *Breard* Provisional Measures Order], available at <http://www.icj-cij.org/icjwww/icjwww/idocket/ipaus/ipausframe.htm>, *withdrawn*, Discontinuance Order of Nov. 10, 1998, 1998 I.C.J. 426 (Nov. 10), available at <http://www.icj-cij.org/icjwww/icjwww/idocket/ipaus/ipausframe.htm>.

18. Counter-Memorial of the United States of America (F.R.G. v. U.S.), paras. 121–24 (Mar. 27, 2000), [hereinafter LaGrand U.S. Counter-Memorial], [http://www.icj-cij.org/icjwww/idocket/igus/iguspleadings/iGUS\\_ipleading\\_CounterMemorial\\_US\\_20000327.htm](http://www.icj-cij.org/icjwww/idocket/igus/iguspleadings/iGUS_ipleading_CounterMemorial_US_20000327.htm) (on file with the North Carolina Law Review).

orders to suspend state executions.<sup>19</sup>

Leaving implementation of the ICJ orders to the states' discretion is not, as some scholars have suggested, a mere anomaly reflecting the politics surrounding the death penalty.<sup>20</sup> States have consistently fulfilled other kinds of international obligations that have intersected with areas of traditional state legislative authority. For example, states have played a central role in compliance with treaty and customary international law obligations affecting probate proceedings, local property and gasoline tax immunities, injuries to alien residents, notaries, family law, commercial law, and other areas. In sum, states play a much more significant and substantial role in the implementation of international law obligations than most commentators have recognized or endorsed.<sup>21</sup>

This unlikely role for states in the implementation of international obligations is only likely to increase in importance. At present, states play a leading role in the implementation of a number of important private international law conventions, which have increasingly been implemented via the "Model Code" system.<sup>22</sup>

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19. *Id.*; see also Brief for the United States as Amicus Curiae at 51, *Breard v. Greene*, 523 U.S. 371 (1998) (No. 97-8214 (A-732)) [hereinafter *Breard* Amicus Curiae Brief] ("[O]ur federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States. The 'measures at [the United States] disposal' . . . may in some cases include only persuasion . . ." (quoting *Breard* Provisional Measures Order, *supra* note 17, 1998 I.C.J. at 258))).

20. See, e.g., Malvina Halberstam, *The Constitutional Authority of the Federal Government in State Criminal Proceedings that Involve U.S. Treaty Obligations or Affect U.S. Foreign Relations*, 10 IND. INT'L & COMP. L. REV. 1, 1-13 (1999) (arguing that the U.S. government's failure to prevent *Breard*'s execution was a matter of policy, since it would be "unthinkable" for the federal government to lack the constitutional power to compel Virginia's compliance with an ICJ order); Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT'L L. 679, 681 (1998) (arguing that federal government had a legal obligation to make Virginia obey the ICJ's decision in *Breard*); Carlos Manuel Vazquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683, 690 (1998) (arguing that the U.N. Charter gave President Clinton the authority "to issue an executive order postponing *Breard*'s execution").

21. Professor Henkin has noted the role of states in the implementation of international treaties, see HENKIN, *supra* note 5, at 150-51, but he generally limits the role of states to their political influence and endorses the nationalist view of federal control over customary international law and the treaty power. See *id.* at 150-51, 191, 238-39.

22. The National Conference of Commissioners on Uniform State Laws ("NCCUSL"), a private organization, promulgates model codes in a variety of private law areas for adoption by state legislatures. See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 601-03 (1995) (describing structure and purpose of NCCUSL). For a discussion of "international private lawmakers" analogous to the NCCUSL, see generally Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681 (1997).



Additionally, the states hold the power to implement various important treaty obligations, including all of the major international human rights treaties.<sup>23</sup> Furthermore, states have also been granted special protections in the implementation of international trade agreements.<sup>24</sup> In the future, as international treaties begin to regulate activities previously considered within the traditional jurisdiction of the states, treaties that result in state control over international law obligations will likely become more commonplace.<sup>25</sup>

The continued existence and even expansion of a system of state control over compliance with international law obligations has at least two important implications. First, the states' role in guaranteeing compliance with international law obligations calls into question the oft-quoted view that the states "do not exist" with respect to foreign affairs and that the principle of maintaining "one voice" in foreign affairs overrides state interests. At least with respect to compliance with international law obligations, the states will continue to have a central, and sometimes independent, role. Moreover, the U.S. system has tolerated, and will likely continue to tolerate, inconsistencies between levels of state compliance with international law that hardly suggests a constitutional imperative for speaking with "one voice" in foreign affairs. Whether or not this account of state control heralds the rise of the states as "demi-sovereigns" on the world stage,<sup>26</sup> there seems little doubt that courts and commentators have exaggerated the imperative of excluding states entirely from matters involving foreign affairs.

Second, although some international law scholars and advocates have suggested that state control would result in little or no compliance with international law,<sup>27</sup> the present system could actually foster more, rather than less, development of international law within the United States. A clear understanding by institutional actors that state autonomy can be preserved simultaneously with the

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23. See *infra* notes 315–33 and accompanying text.

24. See Uruguay Round Trade Agreements Act, 19 U.S.C. § 3512(b)(2)(A) (2000) (barring anyone other than the United States from challenging U.S. or state action or inaction based on its consistency with the Uruguay Round Agreements); Uruguay Round Agreements Act: Statement of Administrative Action, H. R. DOC. NO. 103-316, at 675–77, 1043–44 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4054–56, 4327 (Y1.1/7: 103-316).

25. See Bradley, *supra* note 8, at 402–09 (describing treaties that could conflict with state regulation of commercial law, criminal procedure, and environmental protection).

26. Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121, 161–78 (1997).

27. See, e.g., Koh, *supra* note 5, at 1828 (suggesting that turning over customary international law to states would result in no international law at all).

development of international law may reduce political opposition to the United States' entry into new international treaties, especially those involving international human rights.<sup>28</sup> Advocates for the implementation of certain international law obligations may take their case to individual states, some of which may be significantly more receptive to their arguments than the United States Congress.<sup>29</sup> Indeed, states, and not the federal government, could actually participate in the process of "creating" norms of customary international law.<sup>30</sup>

Part I of this Article describes the nationalist conception of foreign affairs and international law, and the revisionist critique. It also explains how state control over international law undercuts the historic and functional basis for the nationalist conception. Part II describes the history of state control over international law obligations. Part III reviews the contemporary manifestation of this system of state control and argues that the modern scope of international law makes it likely that states will wield even greater influence over the implementation of international law in the future. Finally, Part IV examines the policy implications of the system described.

## I. THE NATIONALIST CONCEPTION AND THE REVISIONIST CRITIQUE

The notion that state governments can and should play an important and substantial role in the incorporation and implementation of international law may strike the casual observer as odd or implausible. The main reason for this lack of intuitive appeal is that many courts and commentators have endorsed a nationalist conception excluding states from *all* aspects of foreign affairs, including the incorporation and implementation of international law. This Part provides an overview of the doctrinal elements of the nationalist conception of both foreign affairs and international law, and the scholarly debate over these doctrines. The system of state

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28. See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 457–64 (2000).

29. See *infra* notes 243 and 373–93 and accompanying text; see also, e.g., Curtis A. Bradley, *California World War II Compensation and Foreign Relations Federalism*, 20 BERKELEY J. INT'L L. 282, 283–90 (2002) (suggesting progressive international human rights could develop through state-level litigation).

30. Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 245–55, 262–95 (2001) (describing virtues of state involvement in development of international human rights norms); Spiro, *supra* note 26, at 161–74.

control over international law described in this Article strengthens both the historical and functional foundations of the revisionist critique.

A. *The Nationalist Conception of Foreign Affairs*

The United States Supreme Court has often endorsed a nationalist conception that assumes the exclusion of states from any activities relating to foreign affairs. As early as 1840, the Court explained while evaluating a state extradition statute that "[i]t was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation . . . ."<sup>31</sup> This theme was elaborated upon in decisions invalidating state regulation of immigration when Justice Miller argued that "a silly, an obstinate, or a wicked [state] commissioner may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend."<sup>32</sup>

Fourteen years later, the Supreme Court reiterated this conception in *Chae Chan Ping v. United States*.<sup>33</sup> Although the case did not involve a state statute,<sup>34</sup> the Court took the opportunity to expound upon its conception of an exclusive federal control over foreign affairs:

The control of local matters being left to local authorities, and national matters being entrusted to the government of the Union, the problem of free institutions existing over a widely extended country . . . has been happily solved. For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.<sup>35</sup>

These kinds of broad declarations were often not necessary to the holdings of those cases,<sup>36</sup> which usually relied on a specific constitutional provision, federal statute, or executive agreement rather than on a generalized federal power over foreign affairs hinted

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31. *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575 (1840).

32. *Chy Lung v. Freeman*, 92 U.S. 275, 279 (1875).

33. 130 U.S. 581 (1889).

34. *Chae Chan Ping* involved a challenge to the validity of a federal statute excluding Chinese immigrants that conflicted with a treaty obligation with China. The Court held that an act of Congress can supersede an earlier treaty. *See id.* at 603.

35. *Id.* at 605-06.

36. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317-33 (1936) (holding that the delegation of power to the President to impose arms sanctions was constitutional and not considering any state law).

at in these opinions.<sup>37</sup> Thus, even though it eventually declared that the state of New York, and therefore all states, “did not exist,” implying a broad presumption of federal exclusivity over foreign affairs, the Court has generally relied on Congress or the President to actually override state activities through statute, treaty, or executive agreement.<sup>38</sup>

In the 1969 case of *Zschernig v. Miller*, however, the Court departed from this approach and invalidated a state law prohibiting inheritance by foreign nationals in communist countries.<sup>39</sup> It held that the statute was a violation of the federal government’s exclusive control over foreign affairs, even where there appeared to be no conflict with federal statutes and even where the President filed an amicus brief disavowing any conflict with foreign policy.<sup>40</sup> Thus, although the states “have traditionally regulated the descent and distribution of estates. . . . [t]hose regulations must give way if they impair the effective exercise of the Nation’s foreign policy.”<sup>41</sup>

*Zschernig*, therefore, announced openly what the Court had only suggested in its previous holdings: not only are Congress and the President authorized to override state activities that interfere with foreign affairs, but the states are excluded from any such activities even in the absence of congressional or executive action.<sup>42</sup> Although the lower courts have applied *Zschernig* sparingly,<sup>43</sup> the Supreme Court recently relied on *Zschernig* to invalidate a California statute forcing European insurance companies to disclose information about

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37. See, e.g., *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (relying on constitutional provisions granting federal government authority over interstate commerce and naturalization to invalidate state immigration law); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 547–51 (1840) (relying on constitutional prohibition on state treaty-making to invalidate extradition).

38. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (relying on federal statutes governing alien registration to preempt state registration statute); *United States v. Belmont*, 301 U.S. 324, 331–32 (1937) (relying on executive agreement to preempt inconsistent state law).

39. *Zschernig v. Miller*, 389 U.S. 429, 440–41 (1968).

40. *Id.* at 440.

41. *Id.*

42. *Id.* at 431.

43. See, e.g., *Tayyari v. N.M. State Univ.*, 495 F. Supp. 1365, 1377 (D.N.M. 1980) (preempting state university’s denial of admission to Iranian students on foreign affairs grounds); *Bethlehem Steel Corp. v. Bd. of Comm’rs*, 80 Cal. Rptr. 800, 802 (Cal. App. Dep’t Super. Ct. 1969) (preempting state buy-American statute on foreign affairs grounds); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 305 (Ill. 1986) (preempting state expulsion of South Africa from currency list); *New York Times v. City of New York Comm’n on Human Rights*, 361 N.E.2d 963, 968–69 (N.Y. 1977) (preempting cities’ ban on South African employment advertising).

policies owned by Holocaust victims.<sup>44</sup> The Court found that even though no specific federal statute or executive agreement conflicted with the California statute, the state law was invalid because it “ ‘compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments’ to resolve claims against European companies arising out of World War II.”<sup>45</sup>

*B. The Nationalist Conception of International Law*

A nationalist conception of foreign affairs naturally leads to a nationalist conception of international law. As the Third Restatement of United States Foreign Relations Law declares, “International law and international agreements of the United States are law of the United States and supreme over the law of the several States.”<sup>46</sup>

According to the Restatement, all forms of international law, which includes both customary law<sup>47</sup> and law created by international agreements, are the “law of the United States.”<sup>48</sup> The states naturally have no role in the development or incorporation of “the law of the United States,” or federal law, and thus are obliged to yield to customary international law in the face of inconsistent state law, as they do with all other federal law.<sup>49</sup> In fact, scholars have argued that the Founders created federal control of international law precisely in order to prevent states from interfering with foreign affairs.<sup>50</sup>

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44. *Am. Ins. Ass’n v. Garamendi*, 123 S. Ct. 2374, 2379 (2003).

45. *Id.* at 2391–92 (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381 (2000)).

46. RESTATEMENT (THIRD), *supra* note 4, § 111(1).

47. Customary international law refers to law developed through the practice and custom of states rather than by formal agreement. *See generally* JANIS, *supra* note 4, at 42–44 (explaining difference between treaty-based international law and customary international law). Historically, most international law was deemed customary but the modern era has seen an explosion of international law made through treaties between states. *See* J.L. BRIERLY, *THE LAW OF NATIONS* 57–58 (Sir Humphrey Waldock ed., 6th ed. 1963) (describing increased reliance on treaties to “make” international law); *see also* Julian Ku, *The Delegation of Federal Powers to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 79–88 (2000) (discussing “new” international law that is developed by international organizations through multilateral treaties).

48. *See* RESTATEMENT (THIRD), *supra* note 4, § 111 cmt. d; *id.* § 111 n.2.

49. *Id.* § 111 cmt. d n.2.

50. *See, e.g.*, Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 38 (1952) (“The Convention was in substantial agreement that there must be a national judiciary and that it must have, at least in the last resort, a paramount authority with respect to the Law of Nations and treaties.”); Koh, *supra* note 5, at 1825–27 (stating that “every schoolchild knows” that the Framers supported federal control over foreign affairs and international law); Jules Lobel, *The*

The federal government incorporates international law as federal law through a variety of institutional mechanisms. For instance, the President, with the advice and consent of two-thirds of the Senate, may make treaties, which have the status of federal law.<sup>51</sup> Additionally, the President may enter into an executive agreement, and Congress may implement or approve of such an agreement through normal legislation.<sup>52</sup> Both the executive agreement and the approving legislation are equivalent to a treaty and therefore have the status of federal law as well.<sup>53</sup> As such, Congress is understood to possess the power to implement such international agreement obligations free of federalism constraints.<sup>54</sup> Similarly, on this view, the President should also possess the independent constitutional authority to enforce any obligations arising out of international agreements.<sup>55</sup>

Some commentators have also suggested that Congress may codify customary international law through normal legislation.<sup>56</sup> The constitutional basis of its power to do so has been inferred from its general powers over foreign affairs,<sup>57</sup> its delegated power to regulate

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*Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1093 & n.110 (concluding that framers intended that "international law was to be federal law"); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 463 (2000) ("[T]he framers consistently expressed a strong commitment to a federal government that would regulate domestic enforcement of international law norms.").

51. U.S. CONST., art. II, § 2, cl. 2.

52. See *id.* art. VI.

53. See *id.*; RESTATEMENT (THIRD), *supra* note 4, § 303. The view that such congressional-executive agreements are interchangeable with a treaty has been the subject of longstanding debate among academics. See generally Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (advocating interchangeability thesis as example of "constitutional moment"); Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998) (offering functional attacks on interchangeability of treaties and executive agreements); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998) (offering an originalist resolution of the interchangeability debate); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (rejecting the interchangeability thesis and the theory of "constitutional moments").

54. RESTATEMENT (THIRD), *supra* note 4, § 302; HENKIN, *supra* note 5, at 206–07.

55. RESTATEMENT (THIRD), *supra* note 4, § 111 cmt. c.

56. See HENKIN, *supra* note 5, at 68–69; see also Stephens, *supra* note 50 at 453–54 (suggesting that the Offenses Clause provides a means for Congress to codify customary international law).

57. See HENKIN, *supra* note 5, at 70–71.

foreign commerce,<sup>58</sup> and its authority to “define and punish . . . offenses against the Law of Nations.”<sup>59</sup> In the absence of congressional action, many courts and commentators have held that federal courts can incorporate customary international law as part of their federal common lawmaking powers.<sup>60</sup> Federal courts could then apply customary international law to override inconsistent state statutes and decisions.<sup>61</sup> Although this last aspect of the nationalist conception has come under the heaviest scholarly, and even judicial, criticism,<sup>62</sup> no court has refused to recognize customary international law as federal law.

### C. *The Revisionist Critique*

The nationalist view of federal supremacy in the incorporation and integration of international law has come under attack in recent years by a wave of “revisionist”<sup>63</sup> scholarship. Revisionist scholars

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58. *Id.* at 65.

59. Stephens, *supra* note 50, at 461; *see also* HENKIN, *supra* note 5, at 70–74 (discussing the sources of congressional authority to legislate in the international arena).

60. RESTATEMENT (THIRD), *supra* note 4, § 111 cmt. d. *But cf.* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that “[t]here is no federal general common law”).

61. *See, e.g.,* Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 295–99, 308 (arguing for application of customary international law to preempt state law permitting execution of juvenile defendants).

62. *See, e.g.,* Bradley & Goldsmith, *supra* note 5, at 817–22; *see also* *Al Odah v. United States*, 321 F.3d 1134, 1148 (D.C. Cir. 2003) (holding that the concept of overriding state law with customary international law is at odds with the principle of separation of powers); *cf.* *United States v. Yousef*, 327 F.3d 56, 91–96 (2d Cir. 2003) (holding that federal courts may interpret customary international law).

63. This term has been used to describe scholars who have questioned various doctrines of foreign affairs law and the assumptions behind them. The key animating principle appears to be opposition to what Professor Bradley calls “foreign affairs exceptionalism” in the analysis of foreign affairs doctrines. *See* Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1096 (1999). My colleague Peter Spiro has coined the phrase “new sovereigntist” to describe this approach, although this may cast a more normative color to the revisionist scholarship than is justified. *See* Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L. J. 649, 654 n.16 (2002) [hereinafter Spiro, *Globalization*]; Peter J. Spiro, *The New Sovereigntists*, FOREIGN AFF., Nov.–Dec. 2000, at 9. True “sovereigntists” are likely to reject any attempt to use international institutions and law to constrain American policy and law. *See, e.g.,* REPORT ON THE INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, ADDITIONAL VIEWS OF SENATOR JESSE HELMS OF NORTH CAROLINA, SEN. EXEC. REP. NO. 98-50, at 42–45, 98th Cong. 2d Sess. (1984) (Y1.1/6:98-50) (sharply criticizing the Genocide Convention as ineffective and arguing for various reservations to limit its authority over the United States); JEREMY RABKIN, WHY SOVEREIGNTY MATTERS 34–38 (1998) (critiquing various forms of international law as applied to the United States). None of the so-called “New

have challenged the various doctrinal strands of the nationalist conception along both historical and functional grounds. For instance, Professors Ramsey<sup>64</sup> and Goldsmith<sup>65</sup> have argued that, as a historical matter, the Constitution does not confer on the federal government an inherent exclusive power over foreign affairs.<sup>66</sup> Rather, they argue that despite broad Supreme Court statements suggesting otherwise, the federal government may exclude the states from foreign affairs only through the exercise of a specific power, such as the treaty or legislative power, delegated to Congress or the President. Professor Goldsmith has further argued that such a system would have the functional benefits of conferring the power to decide whether a state activity interferes with foreign relations on the political branches of the federal government rather than the federal courts.<sup>67</sup> In contrast to the nationalist emphasis on the importance of “one voice,” the revisionist critique argues that states should be permitted to speak, and thus create many voices, unless and until Congress or the President decides to silence them.<sup>68</sup>

Other scholars have applied this same critique to the central doctrines of the nationalist conception of international law. Professors Bradley and Goldsmith have argued that contrary to the Restatement, customary international law is not federal common law and cannot override inconsistent state law.<sup>69</sup> Professor Bradley has also argued that the treaty power should be subject to the same federalism limitations that restrain Congress’s powers under Article I of the Constitution.<sup>70</sup>

An underlying theme of these critiques is that the nationalist conception results in a broad federal power to incorporate and

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Sovereignists” can be fairly said to share this much broader, even ideological opposition to international law and institutions.

64. Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 369–90 (1999).

65. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1618 (1997).

66. See *id.* at 1664; Ramsey, *supra* note 64, at 388–90.

67. Goldsmith, *supra* note 65, at 1664–89.

68. See Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1259–70 (1999). Although Professor Spiro would not classify himself as a “revisionist,” he has consistently argued against a strict nationalist conception of foreign relations based on his view that the modern “globalization” context obviates the need to maintain one voice in foreign affairs. See Spiro, *Globalization*, *supra* note 63, at 673–715.

69. Bradley & Goldsmith, *supra* note 5, at 817.

70. Bradley, *supra* note 8, at 450–56. Professor Bradley’s fundamental argument that there must be some federalism limitations on the treaty power has found support from Professor Swaine. See Swaine, *supra* note 8, at 499–510 (accepting some federalism limitations and exploring option of reviving state compacts with foreign countries).



implement international law.<sup>71</sup> Given the ambitious scope of modern international law, revisionist scholars have argued that broad federal power could make notions of federalism in the domestic sphere irrelevant.<sup>72</sup>

The revisionist conception of international law, however, has drawn its own critique. Most prominently, scholars defending the nationalist conception have argued that exclusive federal control over international law, both customary and treaty law, has deep roots in historical practice and, as a practical matter, is essential to maintaining a coherent system of international law compliance.

### 1. Customary International Law

For instance, Professor Koh has suggested that the absence of federal court control over customary international law would violate the basic constitutional understanding that the federal government controls all matters related to foreign affairs, especially the interpretation and incorporation of customary international law.<sup>73</sup> He declares that “the Constitution created the institutions of federal government precisely to avoid such balkanization of foreign policy and international affairs.”<sup>74</sup> As a functional matter, he argues, the lack of federal control would result in fifty different state interpretations of customary international law.<sup>75</sup> For example, if customary international law is not federal law, Professor Koh argues that Massachusetts could “deny the customary international law protection of head-of-state immunity to Queen Elizabeth on tort claims arising out of events in Northern Ireland, whereas the forty-nine other states could choose instead to grant the Queen every conceivable variant of full or partial immunity.”<sup>76</sup>

Professor Koh uses this example to illustrate what he believes would be the absurdity and impracticality of a regime of state control over customary international law.<sup>77</sup> He further argues that “the

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71. See Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98, 105–11 (2000); see also Bradley & Goldsmith, *supra* note 5, at 838–49 (calling the nationalist view a “radical doctrine”).

72. See Bradley, *supra* note 8, at 402–09 (describing tension between international law and domestic state law in areas such as criminal law, commercial law, and human rights); Bradley & Goldsmith, *supra* note 5, at 838–44 (describing a new customary international law “regulating many matters that were traditionally regulated by domestic law alone”).

73. Koh, *supra* note 5, at 1840–41.

74. *Id.*

75. *Id.* at 1828–29.

76. *Id.* at 1829.

77. As I have explained elsewhere, Professor Koh’s ad absurdum example is actually

capacity of federal courts to incorporate customary international law into federal law . . . is absolutely critical to maintaining the coherence of federal law in areas of international concern.”<sup>78</sup>

## 2. Treaty Power

Attacks on state control over international law also have been advanced in the treaty making context. The most recent proponent of the nationalist view of the treaty power, Professor Golove, has strenuously attacked the idea that states could be relied upon to implement international treaty obligations independent of federal supervision.<sup>79</sup> He argues that “[t]he Founders acted in no uncertain terms to obviate the possibility that the states would interfere with the nation’s ability to comply with its treaty obligations.”<sup>80</sup> He cites the Supremacy Clause’s declaration that treaties “were to be ‘the supreme Law of the Land’ ” and the textual affirmation that “ ‘the Judges in every State shall be bound’ ” as evidence that all treaties would have the status of supreme federal law.<sup>81</sup>

Professor Golove does concede, however, that non-self-executing treaties do not become federal law by virtue of the Supremacy Clause and require legislative implementation.<sup>82</sup> Citing Congress’s power “ ‘[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States,’ ” he declares that “there has never been any question but that Congress has the power under the Necessary and Proper Clause to implement any (constitutional) treaty made by the President and Senate.”<sup>83</sup> Professor Golove does not, however, address the consequences of Congress failing to exercise this “necessary and proper” power even though, presumably, this failure leaves implementation of the treaty obligations to the states.<sup>84</sup>

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not so unthinkable. State and federal courts have inconsistently applied the customary international law protection of sovereign immunity, which is related to head-of-state immunity, in a manner not too different from Professor Koh’s example. See Ku, *supra* note 13, at 307–22 (describing state and federal application of doctrine of sovereign immunity).

78. Koh, *supra* note 5, at 1838. Although conceding states do have the ability to construe their own law in light of customary international law, he emphasizes that such an ability is only justifiable because it is subordinate to a definitive ruling from a federal court. *Id.* at 1851 n.157.

79. Golove, *supra* note 11, at 1310.

80. *Id.*

81. *Id.* at 1310–11 (quoting U.S. CONST. art. VI, § 2).

82. *Id.* at 1312.

83. *Id.* at 1311 (quoting U.S. CONST. art. I, § 8, cl. 18).

84. Professor Henkin is the only scholar adhering to the nationalist view who appears

Instead, Professor Golove argues that “[t]here is absolutely no evidence in the text . . . that the states were to have any role *whatsoever* in their implementation.”<sup>85</sup> Further, the idea of independent state implementation of treaties is “strikingly irresponsible” because “[i]t would leave the President and Senate with no way to know in advance whether they could keep the promises they made to foreign nations, and it would render them subject to state changes of heart at any point along the way.”<sup>86</sup>

Other defenders of the nationalist conception of the treaty power<sup>87</sup> have suggested that state implementation of treaties would actually violate the Tenth Amendment’s prohibition on commandeering state officials and legislatures to implement national policies.<sup>88</sup> Thus, as Professor Vazquez has argued, a system of state implementation of the treaty power would result in commandeering within the meaning of recent Supreme Court precedent such as *Printz v. United States*.<sup>89</sup> For this reason, he argues:

[T]he power to implement non-self-executing treaties has always been thought to reside in the federal government. To apply the anticommandeering principle to the treaty power would be to hold that the federal government not only has the *power* to implement non-self-executing treaties, but also, as a constitutional matter, the sole and exclusive *duty* to do so—a *duty that may not be delegated to the states*.<sup>90</sup>

According to Professor Vazquez, if such a duty were delegated to the states, however, such a result would be “in deep tension with our

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to have recognized the possibility that states could play a meaningful role in the implementation of treaties. See HENKIN, *supra* note 5, at 150–51. Elsewhere he appears to conclude that this role is mainly limited to political influence. See *id.* at 169.

85. Golove, *supra* note 11, at 1310 (emphasis added).

86. *Id.* at 1312.

87. Professor Bradley suggests that Professor Golove’s self-described “nationalist” position is misleading because Professor Golove actually accepts more federalism limitations on the treaty power than other defenders of the treaty power have conceded. See Bradley, *supra* note 71, at 99–105 (suggesting Golove actually accepts many federalism restrictions on treaty power). For my purposes, however, Professor Golove’s somewhat restricted view of the treaty power is still part of the “nationalist view” because, as his vociferous criticism of state implementation illustrates, it depends on a fairly strong normative theory of the necessity of national control.

88. Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630, 1647–49; Carlos Manuel Vazquez, Breard, Printz and the Treaty Power, 70 U. COLO. L. REV. 1317, 1354–57 (1999); see also HENKIN, *supra* note 5, at 168–69 (noting the argument that treaties that assign responsibility for state and local compliance to the federal government violate the Tenth Amendment).

89. 521 U.S. 898 (1997).

90. Vazquez, *supra* note 88 at 1354 (emphasis added).

constitutional scheme” because the Constitution was intended to alter the system of state-controlled implementation.<sup>91</sup> Thus, in order to avoid “commandeering” while still preserving “our constitutional scheme” he argues that the treaty power should be understood to operate directly against the states and to require federal control over such implementation.<sup>92</sup>

In sum, nationalist defenders of the treaty power have rejected the proposition that states can have any role in the implementation of international treaty obligations. Professor Golove’s quip that proposals in favor of state control over treaty implementation are “‘monstrous’ ” and “‘preposterous’ ” captures this attitude nicely.<sup>93</sup>

#### *D. The Significance of State Control Over International Law Compliance*

At the heart of the nationalist conception is a basic premise: maintaining one voice with respect to foreign affairs requires maintaining one voice with respect to the incorporation of and compliance with international law. In both the customary international law and treaty power context, nationalist scholars have argued that the alternative to federal control over international law is a sort of incoherence at odds with our constitutional system that would result in a messy hodgepodge of inconsistent state interpretation and application of international law.<sup>94</sup> If, for instance, a state refuses to carry out an international law obligation, such as refusing to obey a treaty obligation to suspend an execution as interpreted by an international tribunal, the United States fails to maintain one voice with respect to foreign relations. In such circumstances, at least one commentator has suggested that the federal courts can enforce a uniform foreign policy by overriding a state’s refusal to fulfill an international law obligation.<sup>95</sup> The same argument undergirds almost all defenses of the nationalist conception of international law.

The system of state control over international law compliance described in the next Part undercuts this argument in two ways. First, the historic importance of the states in fulfilling international law

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91. *Id.* at 1358.

92. *Id.* at 1358.

93. Golove, *supra* note 11, at 1310 (quoting Supreme Court Justice William Johnson, *Philonimus No. 7*, CHARLESTON MERCURY (S.C.), Sept. 13, 1823).

94. See *supra* notes 75–82 and accompanying text.

95. See Frederick L. Kirgis, *Zschernig v. Miller and the Breard Matter*, 92 AM. J. INT’L L. 704, 706 (1998).

obligations in the absence of federal compulsion or supervision suggests that the historical foundations of the nationalist conception are less sturdy than commentators have believed and that the Supreme Court has recognized. Second, and more importantly, the existence of this system, both in the past and in the contemporary era, belies the nationalist claim that the revisionist conception is functionally unworkable. If, as this Article argues, the revisionist conception of international law *already* exists in many areas of international law compliance, then the functional arguments for the nationalist conception are seriously weakened.

## II. THE SYSTEM OF STATE CONTROL OVER INTERNATIONAL LAW COMPLIANCE

According to the nationalist view, states should not play a significant independent role in the process of complying with international law obligations because such a role would conflict with the historical practice of developing uniform international law rules within the United States.<sup>96</sup> However, state courts have certainly played a more substantial and independent role in the development of customary international law than is commonly recognized.<sup>97</sup> This Section argues that, in addition to state courts, other branches of state government have also played an important role in the implementation of customary and treaty obligations, a role that appears at odds with the nationalist view.

### A. *The Mechanisms of State Control Over International Law*

States control the implementation of international obligations in several different ways. First, state courts have always exercised substantial control over the interpretation of international law largely free from federal supervision. For instance, state courts applying the doctrine that "the law of nations is part of the common law" have incorporated customary international law through their independent common lawmaking powers.<sup>98</sup> State courts have actually played a

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96. See *supra* notes 46–62 and accompanying text.

97. See *Ku*, *supra* note 13, at 291–332.

98. See, e.g., *Kershaw v. Kelsey*, 100 Mass. 561, 572–73 (1868) (applying customary international law narrowly to uphold contract between belligerents); *Manning v. State of Nicaragua*, 14 How. Pr. 517, 517 (N.Y. Sup. 1857) (applying customary international law to question of whether to grant Nicaragua sovereign immunity from private lawsuit); *Wilson v. Blanco*, 4 N.Y.S. 714, 714 (N.Y. Super., Apr. 15, 1889) (applying customary international law to give immunity to diplomat in transit to third country); *State v.*

crucial role in the initiation as well as development of certain doctrines of customary international law without any supervision or intervention from the federal courts.<sup>99</sup>

Second, state legislatures may enact legislation intended to comply with international obligations stemming from either customary international law<sup>100</sup> or treaties. In some cases, state legislatures have passed such measures at the urging of the federal government and, in other cases, they have acted at the urging of foreign governments themselves.<sup>101</sup> State implementation of treaties is often crucial from a functional perspective, if the treaty is either non-self-executing or involves areas of law, such as probate law, for which federal institutions are poorly equipped to regulate. Additionally, state legislatures may adopt “model codes” or “uniform laws” promulgated at either the national or international level that are intended to create a uniform system of laws across national borders.<sup>102</sup> Although this last mechanism does not technically involve the “incorporation of” international law, it is one example of how states are participating in an international effort—independent of the federal government—to unify certain areas of the law.

Third, state governors exercise their powers to enforce or comply with international obligations, both customary and treaty-based. In some cases, governors act to enforce customary international law obligations while in other cases, governors have acted to enforce treaty obligations.<sup>103</sup> Sometimes the governors have acted at the request of the federal government while at other times, the governors

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Brewster, 7 Vt. 118, 121 (1835) (applying customary international law to take jurisdiction over kidnapped criminal defendant). See generally Ku, *supra* note 13, at 291–333 (surveying the contributions that state courts have made to the development of commonly accepted customary international law doctrines).

99. Ku, *supra* note 13, at 291–99 (discussing origins in state courts of rule granting diplomats immunity in transit to third countries).

100. Additionally, states have always been understood to hold the power through legislation to override doctrines of customary international law that may have been adopted through the common law. See QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* § 98 (1922).

101. See *infra* note 136 and accompanying text (discussing legislation guaranteeing distribution of workman’s compensation benefits to consuls).

102. Forty-three states and the District of Columbia have, for instance, adopted the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on Electronic Commerce, <http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm> (last visited Jan. 6, 2004) (on file with the North Carolina Law Review). See UNCITRAL Status of Conventions and Model Laws, <http://www.uncitral.org/english/status/status-e.htm> (last updated (on file with the North Carolina Law Review)).

103. See, e.g., *infra*, notes 145–46 and accompanying text (discussing taxation of foreign consulates).

appear to be exercising their own independent judgment on whether and how to comply with international law obligations.<sup>104</sup>

### *B. Historical Examples of State Control Over International Law*

This Section reviews the historical development of three areas of international law: consular powers in estate proceedings, the immunity of foreign states from taxation, and the treatment of aliens. In contrast to the nationalist conception, the states, and not the federal government, took the lead in the implementation of international law obligations in each of these cases.

#### 1. Consular Powers in Estate Proceedings

One of the most important functions of consuls is the participation in estate proceedings arising out of the death in the foreign state of one of its nationals.<sup>105</sup> The exact scope of consular powers in this area, however, was not always clear.<sup>106</sup> Because estate law has traditionally been left to the states, the development of the international law governing consuls has also been largely left to the states.<sup>107</sup> Even when the federal government regulated consular powers through treaty law, however, the states have been afforded broad discretion in the implementation of these treaty obligations with little or no federal oversight.

##### a. Consular Powers of Administration

The rights of consuls to protect the property interests of their nationals was recognized as early as 1821 by the Supreme Court as a principle of customary international law.<sup>108</sup> The Court held, however, that this right of representation under international law did not grant to consuls a right to *receive* the proceeds of any property determined to belong to their nationals.<sup>109</sup>

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104. See *infra* note 161 and accompanying text (discussing governors' role implementing tax immunity obligations).

105. See 2 CHARLES CHENEY HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* §§ 477–482 (2d ed. 1945); LUKE T. LEE, *CONSULAR LAW AND PRACTICE* 262–75 (2d ed. 1991); Willard L. Boyd, *Consular Functions in Connection with Decedents' Estates*, 47 IOWA L. REV. 823, 824–28 (1962).

106. Boyd, *supra* note 105, at 824.

107. *Id.* at 832–33.

108. *The Bello Corrunes*, 19 U.S. 152, 168 (1821) (“[T]his court feels no difficulty in deciding [that a consul] is a competent party to assert or defend the rights of property of the individuals of his nation, in any court having jurisdiction of causes affected by the application of international law.”).

109. *Id.* at 168–69. The Court suggested that this question was governed by the

The Supreme Court faced this issue in the context of a property dispute under admiralty law, but the scope of a consul's right of representation arose most frequently in state courts. In particular, state courts were faced with claims by consuls seeking the right to *administer* the estates of deceased foreign nationals who had intestate.<sup>110</sup> This much more controversial right was claimed as a matter of customary international law and, eventually, as authorized by certain bilateral treaties.<sup>111</sup> The development and eventual resolution of these issues triggered all the various mechanisms of state control over the implementation of international law.

State courts, for instance, took the lead role in analyzing consular claims under customary international law and treaties to administer their deceased nationals' estates. The key issue was whether consuls had the right merely to be heard or whether treaties and other forms of international law authorized them to administer the entire estate. As the subsequent discussion indicates, these courts' analysis reflected a robust sense of their responsibility for the interpretation of international obligations, especially given the near complete absence of federal guidance on these issues.

In a typical early case, *Succession of Thompson*, the Supreme Court of Louisiana rejected the claim of the Swedish consul seeking the right to administer an estate under both the consular convention with Sweden and customary international law.<sup>112</sup> Suggesting that this issue was controlled solely by the state as a matter of state autonomy, the court declared that the consul's claim of a right to administer an estate to be "incompatible with the sovereignty of the State whose jurisdiction extends over the property of foreigners as well as citizens found within its limits."<sup>113</sup> But it also appeared to read the consular treaty, which did not specifically grant the right to administration, as failing to grant such a right.<sup>114</sup> Moreover, no federal statute or "principle of the law of nations" appeared to require a different

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domestic law of the sending state. *Id.* at 169.

110. See 1 J.G. WOERNER, A TREATISE ON THE AMERICAN LAW OF ADMINISTRATION (INCLUDING WILLS) § 10 (William F. Woerner, ed., 3d ed. 1923).

111. See, e.g., Consular Convention, May 4, 1850, U.S.-New Granada, art. III(1), 10 Stat. 900, 904 [hereinafter Treaty with New Granada]; Treaty of Amity, May 27, 1818, U.S.-Swed., art. V, 8 Stat. 232, 236 [hereinafter Treaty with Sweden].

112. *Succession of Thompson*, 9 La. Ann. 96, 96 (La. 1854).

113. *Id.*

114. *Id.* at 97; see Treaty with Sweden, *supra* note 111, art. 5, 8 Stat. at 236 ("The high contracting parties grant mutually the liberty of having in the places of commerce and ports of the other, consuls, vice consuls, or commercial agents, who shall enjoy all the protection and assistance necessary for the due discharge of their functions.").



result.<sup>115</sup> Thus, the court refused to read a treaty or customary international law broadly enough to interfere with subjects within the sovereignty of the State. Notwithstanding the court's narrow reading of this particular argument, it did not foreclose the possibility that a treaty could explicitly permit regulation with subjects that would otherwise fall under the exclusive sovereignty of the state. One year later, a New York court reached a slightly different result, finding that treaty and customary international law allowed a French consul the right to appear in an estate proceeding, but not as an administrator.<sup>116</sup>

At about the same time, the U.S. Attorney General and the U.S. Secretary of State reached different opinions on this issue. In 1855, Secretary of State Marcy instructed American consuls overseas to "act as administrators on the estate of all citizens of the United States dying intestate in foreign countries,"<sup>117</sup> but Attorney General Cushing informed Secretary Marcy a year later, in response to an inquiry from the Brazilian Ambassador, that "[t]he consul of the decedent's country can intervene of right only by way of surveillance [sic], and without jurisdiction."<sup>118</sup>

Probably because of this uncertainty, or even because of a principled position against asserting this authority over the states,<sup>119</sup> the federal government added language to consular conventions stipulating that a consul "shall not discharge these functions in those States whose peculiar legislation may not allow it."<sup>120</sup> Eventually, the standard clause addressing this issue stated, more cryptically, that the consul shall have the right to "intervene in the possession, administration, and judicial liquidation of the estate of the deceased, *conformably with the laws of the country*."<sup>121</sup> But this language hardly clarified matters, and state courts continued to struggle with how to reconcile the treaty obligations with their control over estate proceedings.

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115. *Thompson*, 9 La. Ann. at 97.

116. *Ferrie v. Public Administrator*, 3 Brad. 249, 265 (1855).

117. 5 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 722 (1906).

118. *Estates of Foreign Decedents*, 8 Op. Att'y Gen. 98 (1856).

119. See Boyd, *supra* note 105, at 832 (suggesting that language that limits the effect of this customary international legal principle against the states reflects the view that the federal government lacks authority to regulate real property succession by treaty).

120. Treaty with New Granada, *supra* note 111, art. III(10), 10 Stat. at 904; see also Boyd, *supra* note 105, at 832 (discussing limiting language in treaties).

121. Treaty of Friendship, Commerce, and Navigation, July 27, 1853, U.S.-Arg., art. IX, 10 Stat. 1005, 1009 (emphasis added). For a comprehensive discussion of various analogous treaty clauses, see Boyd, *supra* note 105, at 834-40.

For example, the Surrogate's Court of Westchester County in New York issued a lengthy opinion rebutting the refusal of the Surrogate's Court of New York County to recognize a consul's right to administration under both treaty and customary international law.<sup>122</sup> While a number of other state courts analyzed the same issue within the context of the treaty language, few appeared willing to recognize a right under customary international law to administer estates, nor did many courts read the treaty language to create such a right.<sup>123</sup> The United States Supreme Court eventually concurred in this narrow reading of the treaty, suggesting that clearer language was necessary in order for the treaty to be read to override state law.<sup>124</sup> It did not consider the question of whether customary international law on its own could support the right to administration.<sup>125</sup>

For the purposes of this Article, it is sufficient to point out the decentralized system of control over the development of international law. Instead of uniformity, the system tolerated disuniformity among the states over the powers held by consuls in estate proceedings under customary international law and treaties. This disuniformity was caused largely by the federal government's doubts regarding its constitutional authority to interfere in estate proceedings by treaty. Thus, the difficult interpretation of the treaty language was largely left to state courts, again because of uncertainty as to the scope of the treaty power.

#### b. Consular Notice Rights

While the dispute over the right to administer their deceased nationals' estates under customary international law and treaty law fell largely within the province of state courts, certain related legal developments were handled by state legislatures. In particular,

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122. See *In re Lobrasciano's Estate*, 77 N.Y.S. 1040, 1042-44 (N.Y. Surr. Ct. 1902). Cf. *In re Logiorato's Estate*, 69 N.Y.S. 507, 509 (N.Y. Surr. Ct. 1901) (arguing that the consul has no "right to set aside the laws of the state" of New York).

123. See, e.g., *In re Ghio's Estate*, 108 P. 516, 523 (Cal. 1910) (refusing to read a treaty to "materially abridge the autonomy of the several states and to interfere with and direct the state tribunals in proceedings affecting property within their jurisdiction"); see also *In re D'Adamo's Estate*, 106 N.E. 81, 84-86 (N.Y. 1914) (Cardozo, J.) (refusing administration); *In re Estate of Costanzo*, 15 Ohio N.P. (n.s.) 225, 230-31 (Ohio Prob. 1912) (same). But see *In re Succession of Rabasse* 47 La. Ann. 1452, 1454 (1895) (granting consuls right to administer estates); *In re Wyman*, 191 Mass. 276, 278-79 (1906) (same).

124. See *Rocca v. Thompson*, 223 U.S. 317, 332 (1912) ("Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms.").

125. *Id.*

consuls began to claim the right, under both customary international law and treaties, to receive notice of any probate proceedings involving their deceased intestate nationals<sup>126</sup> and the right to collect workman's compensation benefits for non-resident beneficiaries.<sup>127</sup> Treaty provisions requiring notice typically required that:

In case of the death of a national of either High Contracting Party in the territory of the other without having in the territory of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest consular officer of the State of which the deceased was a national of the fact of his death, in order that necessary information may be forwarded to the parties interested.<sup>128</sup>

Despite complaints from foreign governments, the federal government took no action to carry out these obligations, other than requesting the governors of the various states to adopt measures guaranteeing these consular rights under customary international law and treaties.<sup>129</sup> Perhaps because of the federal government's inaction, foreign consular officials made requests directly to state authorities for such notice rights as well.<sup>130</sup> A number of states eventually adopted legislation requiring probate courts to give notice to consular officials of the death of foreign nationals who had died intestate.<sup>131</sup> A typical statute provided that:

Whenever it shall appear upon application to any probate court for letters of administration, or to prove the will of any deceased person, that the heirs at law of said deceased, or any of them, are residents of a foreign country, it shall be the duty of the judge of such probate court to notify the consul, vice-

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126. 1 WOERNER, *supra* note 110, § 160.

127. See Julius I. Puente, *Consular Protection of the Estates of Deceased Nationals*, 23 ILL. L. REV. 635, 645 (1929).

128. Treaty of Friendship, Commerce, and Consular Rights, U.S.-Nor., June 5, 1928, U.S.-Nor., art. XXIII, 47 Stat. 2135, 2153. For other treaties with similar provisions, see treaties cited in Willard L. Boyd, *Constitutional, Treaty, and Statutory Requirements of Probate Notice to Consuls and Aliens*, 47 IOWA L. REV. 29, 32-33 nn.14-18 (1961).

129. See Boyd, *supra* note 128, at 64-68 (noting State Department recognition of non-compliance); see also 2 HYDE, *supra* note 105, § 478 (describing letter from Secretary of State to state governors formally requesting that they comply with consular notification procedure).

130. See ERNEST LUDWIG, CONSULAR TREATY RIGHTS 117-18 (giving example of request made by Austro-Hungarian Consul at Cleveland to States within his consular district seeking notice rights).

131. See Boyd, *supra* note 128, at 52-65.

consul, or consular agent, resident in this state, if there be one of such foreign nation, of the pending of, and the day appointed for hearing such application.<sup>132</sup>

In this way, the treaty obligation to provide notice to foreign consular officials was implemented by the state governments rather than through federal legislation or through the operation of the treaty itself.<sup>133</sup> One commentator has pointed out that it is unclear that federal legislation would be more effective than a federal treaty and has suggested implementation through a uniform or model state law.<sup>134</sup> While not specifically providing for notice to consuls, other states followed the Model Probate Code's broad notice requirements to all interested parties, including consuls, who are specifically empowered to waive the notice right on behalf of their non-resident nationals.<sup>135</sup>

Moreover, as workman's compensation programs became more widespread and important in the early twentieth century, treaties began to require notice to consuls of workman's compensation hearings. A typical treaty provided:

A consular officer of either High Contracting Party may in behalf of the non-resident nationals of the country he represents, receipt for [their distributive shares derived from estates in process of probate or] accruing under the provisions of so-called workmen's Compensation Laws or other like statutes provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees, and provided further that he furnish to the authority or agency making distribution through him reasonable evidence of such remission.<sup>136</sup>

Despite these treaty provisions, contemporary commentary

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132. MICH. COMP. LAWS § 702.65 (1948) (repealed 1979).

133. See IOWA CODE ANN. § 633.41 (West 1992); MICH. COMP. LAWS § 702.65 (West 1948) (repealed 1979); MINN. STAT. § 525.83 (1945) (repealed 1976); NEB. REV. STAT. ANN. § 30-333 (Michie 2001); N.D. CENT. CODE § 30-02-13 (1943) (repealed 1973); OHIO REV. CODE ANN. § 2113.11 (West 1991); WIS. STAT. § 310.05 (1969) (repealed 1971).

134. See Boyd, *supra* note 128, at 64.

135. LEWIS M. SIMES & PAUL E. BAYSE, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE § 16 (1946).

136. Consular Convention, Apr. 22, 1926, U.S.-Cuba, art. xiv, 44 Stat. 2471, 2478-79. For similar examples, see Treaty of Friendship, Commerce, and Consular Rights, Dec. 23, 1925, U.S.-Est., art. 24, 44 Stat. 2379, 2388; Treaty of Friendship, Commerce, and Consular Rights, June 24, 1925, U.S.-Hung., art. 21, 44 Stat. 2441, 2459; Treaty Friendship, Commerce and Consular Rights, Dec. 8, 1923, U.S.-Germ., art. 25, 44 Stat. 2132, 2154 [hereinafter Treaty with Germany].

suggests foreign consuls engaged in direct lobbying of state governments to fulfill these treaty obligations.<sup>137</sup> States laws expanded the right of consuls to appear in workman's compensation hearings involving their nationals or where their nationals were beneficiaries.<sup>138</sup> Such provisions were viewed by a contemporary commentator as a natural extension of the basic rule described in *Bello Corrunes* guaranteeing a consul the right to represent the interests of his nationals in a property proceeding.<sup>139</sup> Such statutes thus contributed to the development of the customary international law on powers of consular officials and also implemented the specific treaty obligations at issue.<sup>140</sup>

The states' activity in clarifying and expanding the rights of consuls stands in sharp contrast to the federal government's passivity. Although federal legislation could theoretically have been enacted to secure compliance with customary international law and treaty obligations,<sup>141</sup> the federal government has instead limited itself to requesting that state governors bring these treaty provisions to the notice of local authorities.<sup>142</sup>

Foreign commentators recognized the federal government's apparent powerlessness in this respect with one early twentieth century commentator observing that although an 1871 German treaty provision required notice to consuls, "it is practically impossible for the American federal government to assure in the states the

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137. Foreign consuls appear to have appealed to state legislatures to enact laws "facilitating the exercise of consular rights conferred by existing conventions, or of explaining the nature of proposals in contravention of treaty provision, or of exposing the evils . . . of particular discrimination against aliens and their dependents, both resident and non-resident. 2 HYDE, *supra* note 105, at 802.

138. See, e.g., MICH. STAT. ANN. § 12151 (5 Howell 1912) (stating that if a non-resident alien is an heir of a descendent, the probate judge shall notify the consul of the probate hearing); Minn. Workmen's Compensation Act of 1913, MINN. GEN. LAWS ch. 467 § 23 (1913) (appointing consular official to be representative of alien dependent); 1 OHIO GEN. CODE § 1465-108 (1946) (consul to supply information of killed employee residing in foreign country for purposes of Ohio Compensation Act); PENN. STAT. § 22007 (1920) (consular office may officially represent non-resident alien dependents and may receive compensation awards for distribution to alien dependents); W. VIR. CODE ANN., ch. 15-P, § 39 (Michie 1923) (non-resident aliens may be officially represented by consular office in country where they are residents, but consular agent cannot make appeals for compensation on behalf of aliens).

139. Puente, *supra* note 127, at 650.

140. See also NICHOLAS PENDLETON MITCHELL, STATE INTERESTS IN AMERICAN TREATIES: A STUDY IN THE MAKING AND SUBSTANTIVE CONTENT OF CERTAIN INTERNATIONAL AGREEMENTS, app. XXVIII (1936) (listing treaties that ensure a consul's right to collect worker's compensation payments due to a national).

141. See Boyd, *supra* note 128, at 64.

142. 2 HYDE, *supra* note 105, § 478.

execution of the [notice] provision[] . . . .”<sup>143</sup>

In light of these public complaints, the federal government’s unwillingness to take direct action is somewhat surprising. According to the nationalist conception, the federal government had ample power to ensure treaty compliance through legislation, an executive order, or a lawsuit in federal court. Instead, the federal government relied on the states to carry out the international obligations of the United States to grant consular rights under both customary international law and treaties. Recognizing this, foreign governments adjusted their efforts to communicate with state legislatures directly.

## 2. Taxation of Foreign State Property

In 1968, the federal government declared in a filing before New York’s highest court:

[T]axation by political subdivisions of the United States of foreign government-owned real property used for official purposes has been a growing irritant in the conduct of the foreign relations of the United States. If left unchecked, such taxation will prejudice and hamper the effective conduct of our foreign relations.<sup>144</sup>

Despite this assertion, the federal government has rarely exercised the powers it supposedly holds under the nationalist conception to force the states to end this “irritant in the conduct of foreign relations,” preferring in most cases to leave the tax question to the states or to express its views on the subject via correspondence with state authorities.

States have long played a central role in determining a foreign sovereign’s right to immunity from taxation, a right derived from customary international law. For instance, in 1859, the State Department informed the consul from Bremen that any tax exemption he received was “‘through the courtesy of the authorities of the several States.’”<sup>145</sup> Even when later State Department pronouncements endorsed the principle of consular exemption, the State Department was careful to limit this understanding to federal

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143. See ELLERY C. STOWELL, *LE CONSUL, FUNCTIONS, IMMUNITES, ORGANISATION EXEQUATUR* 82 n.3 (1909), *translated in* Boyd, *supra* note 128, at 64 n.137.

144. *Republic of Argentina v. City of New York*, 250 N.E.2d 698, 700 (N.Y. 1968) (internal quotations omitted).

145. 5 MOORE, *supra* note 117, § 715 (quoting Letter from Mr. Appleton, U.S. Assistant Secretary of State, to Mr. Diller, Consul at Bremen (March 3, 1859)).

taxation, implying that the states alone controlled the question of immunity from state taxes.<sup>146</sup>

States have also controlled the development and application of customary international law governing immunity for non-consular sovereign property.<sup>147</sup> For instance, in 1923, the Supreme Court of Kentucky voided a tax assessment on tobacco owned by the French government.<sup>148</sup> The court held that imposing taxes would violate principles of sovereign immunity that presumed a foreign sovereign "does not intend to degrade its dignity by placing itself . . . within the jurisdiction of the other."<sup>149</sup> The court also rejected the local tax assessor's claim that such principles would violate the Kentucky Constitution's guarantee of a right to tax all property that was not "public property used for public purposes."<sup>150</sup>

Curiously, the Supreme Court of Kentucky's understanding of the scope of sovereign immunity for tax purposes was not supported by the State Department. In response to an inquiry from the Italian Ambassador about the propriety of the same Kentucky tax, the Secretary of State replied that "no principle of international law would be violated should such property . . . be subject to taxation."<sup>151</sup> The State Department took a similar position on a New Jersey local tax on locomotives owned by the Russian Government.<sup>152</sup> In this case a state court extended an even broader immunity under customary international law than what the federal government recognized.

In cases where the State Department did believe taxation would be improper under customary international law or treaty law, the prevailing practice was merely to inform the governor of the relevant state of the Department's views and request that he act accordingly.<sup>153</sup>

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146. 5 MOORE, *supra* note 117, at 87 ("The general principle is that a foreign consular officer is subject to no charge in the country of residence, by reason of his official capacity or acts . . . . I know of no [United States] internal-revenue tax which could affect the official character, functions or emoluments of a foreign consul." (quoting Letter from Mr. Frelinghuysen, U.S. Sec. of State, to Mr. de Struve, Russian Minister (April 21, 1884))).

147. See William W. Bishop, Jr., *Immunity from Taxation of Foreign State-Owned Property*, 46 AM. J. INT'L L. 239, 250 (1952).

148. *French Republic v. Bd. of Supervisors of Jefferson County*, 252 S.W. 124, 125 (Ct. App. Ky. 1923).

149. *Id.*

150. *Id.*

151. 2 GREEN HAYWARD HACKWORTH, DIGEST OF INTERNATIONAL LAW § 174 (1942).

152. *Id.*

153. *Id.* § 172 (describing request to Governor of Missouri); *id.* at 414 (describing California's adherence (sort of) to Secretary of State's request to exempt British vessel from sales tax); *id.* (describing Secretary's request to City of New York to exempt Ecuadorian vessel from sales tax). Sometimes the federal government also requests that

Even these views on the scope of the exemption under customary international law, however, did not appear to be binding on the states. For instance, when the Secretary of State requested that California grant exemptions to French consular officers during World War II, the Attorney General of California opined that “[c]onsular officers are appointed primarily for the purpose of protecting and advancing, in a foreign State, the business and commercial interests of the appointing state and its citizens.”<sup>154</sup> For this reason, California was “unable to agree with the contention of the State Department’s legal adviser that the property in question is entitled to tax exemption solely because it is owned by a foreign government.”<sup>155</sup>

Occasionally, the State Department exchanged notes with other governments on the subject. In 1941, the United Kingdom declared that all property of a foreign government was entitled to tax immunity under international law and the State Department responded by limiting the scope of the immunity to personal property “devoted to the public service.”<sup>156</sup> The State Department also refused to take a position on immunity for real property, saying only that real property in the District of Columbia would be held exempt.<sup>157</sup>

This exchange of notes was sufficient to convince Connecticut to reverse its initial refusal to grant an exemption to real and personal property owned by the United Kingdom.<sup>158</sup> The Connecticut Attorney General explained that the exchange of notes signified that the United States and the United Kingdom both accepted a rule of international law exempting personal property.<sup>159</sup> Therefore, “[s]ince international law exempts the personal property of a foreign state from taxation, we are bound to follow it, as it is also the law of the

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states exempt foreign consuls from their laws. See 5 MOORE, *supra* note 117, § 715 (citing Letter from Mr. Day, U.S. Assistant Secretary of State, to Governor of New Jersey (Jan. 31, 1898) (requesting tax exemption for Portuguese vice-consul residing in New Jersey))).

154. Bishop, *supra* note 147, at 249 (quoting 6 Cal. Att’y Gen. Op. 287 (Dec. 5, 1945)).

155. *Id.*

156. *Id.* at 244 (citing 22 CONN. ATT’Y GEN. BIENNIAL REP. 236, 414–17 (1942) (reprinting Letter from Conn. Att’y Gen. Francis A. Pallotti to Conn. Governor Robert A. Hurley (Aug. 5, 1942))).

157. See Bishop, *supra* note 147, at 244 (citing 22 CONN. ATT’Y GEN. BIENNIAL REP. 236, 414–17 (1942) (reprinting Letter from Conn. Att’y Gen. Francis A. Pallotti to Conn. Governor Robert A. Hurley (Aug. 5, 1942))).

158. *Id.* (citing 22 CONN. ATT’Y GEN. BIENNIAL REP. 236, 414–17 (1942) (reprinting Letter from Conn. Att’y Gen. Francis A. Pallotti to Conn. Governor Robert A. Hurley (Aug. 5, 1942))) (refusing to grant exemption); *id.* at 245 (citing 22 CONN. ATT’Y GEN. BIENNIAL REP. 236, 414) (granting exemption to personal property only, based on State Department declaration, but refusing to extend exemption to real property)).

159. *Id.* at 245 (citing 22 CONN. ATT’Y GEN. BIENNIAL REP. 236, 414).



State.”<sup>160</sup> It is also worth noting what the Connecticut Attorney General did not say. Specifically, he failed to mention that because the President had entered into an international agreement, that agreement held the status of federal law which Connecticut was obligated to follow under the Supremacy Clause.

In some cases, states determined the scope of immunities under customary international law without any input or guidance from the State Department at all. Moreover, the key decisionmakers in this context were the state executive authorities rather than courts. Thus, a number of state attorneys general opined that customary international law required tax exemptions for personal property of foreign states, despite the fact that most states specifically limited such immunity to personal property and required a showing that it was used for a public purpose.<sup>161</sup>

However, the practice of the states was not uniform. Maine, for instance, refused to exempt the property of the Canadian government from excise taxes,<sup>162</sup> and while California continued to take a restrictive view of immunity for consuls, Texas extended such tax immunity to both real and personal property.<sup>163</sup> Thus, the Texas Attorney General opined:

We take it that regardless of the various ways a rule of international law may arise, one of the most satisfactory methods would be by the mutual recognition of its existence between the governments concerned. Since the Republic of Mexico has accorded freedom from taxation to the property of our government used for its embassies and consular officers in Mexico City, this alone would in our opinion afford the most laudable reason for the exemption from taxation by our State . . . of the property of the Mexican Government located in our State used for offices and housing of its . . . representatives. We should recognize this as a binding obligation upon us under

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160. *Id.*

161. *See, e.g., id.* at 242 (describing how the Massachusetts Attorney General opined in 1920 that tangible personal property owned by U.K. and France cannot be taxed by state); *id.* at 245, 248–49 (describing how the California Attorney General issued a 1941 opinion that found personal property of the United Kingdom to be taxable, but then reversed his position in a 1942 opinion because of an express agreement of the U.S. and the U.K. that such property was *not* taxable); *id.* at 249 (quoting 6 Cal. Att’y Gen. Op. 289, 290 (Dec. 4, 1945) (refusing to grant exemption to personal property of the Netherlands unless state assessor finds property used “for public purposes”).

162. *Id.* at 246 (citing Maine Att’y Gen. Rep. (1947–1948), at 110 (reprinting Letter from Ralph W. Farris, Maine Att’y Gen., to Maine Governor Hildreth (May 14, 1945)) (refusing to refund excise taxes collected from Canadian government)).

163. *Id.* at 250 (quoting Tex. Att’y Gen. 0-5031 (Apr. 2, 1943)).

international usage and international law.<sup>164</sup>

This statement is revealing of a state's role in applying international law. The State of Texas requested neither an opinion from the State Department nor instructions from any agency of the federal government as to the proper interpretation of international law. Significantly, the obligation that bound Texas was based on "international usage and international law."<sup>165</sup> The opinion did not appear to mention federal law.

The independence of state authorities, at least on questions of customary international law, is confirmed by the treatment of a letter from the Legal Advisor of the State Department to the Comptroller of the City of New York. In this letter, the legal advisor opined that "under recognized principles of international law and comity the several states of the United States, as well as their political subdivisions, should not assess taxes against foreign government-owned property used for public noncommercial purposes."<sup>166</sup> This letter reveals the State Department's typical practice with respect to the implementation of customary international law and treaty obligations by the states. Prior to this letter, the State Department had issued a general letter to all state governors advising on the customary international law and treaty requirements for exemptions of consuls.<sup>167</sup> Thus, the letter is merely informative, because it did not purport to declare certain state tax laws "nullified," even though these laws should be unenforceable under the nationalist conception.<sup>168</sup>

The non-binding nature of the State Department's letter is further illustrated by the City of New York's decision to challenge the State Department's statement of customary international law as applied to the Argentine consulate. The Court of Appeals of New York agreed that it was "*not bound* to accept the [State Department's] submission but must make its own determination as to the status of Argentina's property under international law" and did not purport to rely on Argentina's claim that customary international

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164. *Id.*

165. *Id.*

166. LEE, *supra* note 105, at 546 (quoting Letter from Richard D. Kearney, Acting Legal Adviser, Department of State, to Comptroller, City of New York (Dec. 24, 1965)).

167. See Office of the Legal Adviser, Dep't of State, *Treaty Provisions in Force between the United States of America and Other Countries Relating to the Exemption of Government-Owned Property from Real Property Taxes*, 59 AM. J. INT'L L 103, 123-24 (1965).

168. See *id.*

law was a matter of “federal common law.”<sup>169</sup> Surveying the various authorities, including scholarly commentary and state practice, the Court of Appeals concluded that principles of sovereign immunity in customary international law extended to the protection of consular property.<sup>170</sup> Again, it is worth emphasizing that at no time did the court appear to suggest that the Supremacy Clause forced it to follow precedent set by State Department or federal court determinations on similar questions.

In addition to determinations made by state courts and executives, state legislatures have also incorporated or implemented international obligations in this area. For instance, a number of states have enacted legislation specifically exempting consuls and consular property from a variety of local taxes including alcohol and gasoline taxes.<sup>171</sup> The federal government was not completely passive in this area, although it is again worth noting that it did not pass legislation to implement or carry out its international obligations to provide such exemptions. Instead, in the case of the motor fuels tax, the State Department lobbied individual state legislatures to enact legislation exempting diplomatic and consular officials. Despite some resistance, many state legislatures responded to the State Department’s requests, thus permitting the United States to claim the right to reciprocal treatment for its officials overseas.<sup>172</sup>

Although this pattern of federal government deference and cooperation with the states has been dominant, on at least two

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169. *Republic of Argentina v. City of New York*, 250 N.E.2d 698, 699–700 (Ct. App. N.Y. 1968) (emphasis added).

170. *Id.* at 703–04.

171. *See, e.g.*, ALA. CODE § 40-12-243 (1993) (exempting consuls from license plate tax and fee); CAL. REV. & TAX CODE § 5331 (West 1954) (exempting aircraft owned by consuls from personal property tax); COLO. REV. STAT. ANN. § 42-3-134(3)(b) (West 2002) (exempting consuls from payment of annual vehicle registration fee); HAW. REV. STAT. ANN. § 237-24.3 (11) (Michie 2003) (exempting consuls and diplomats from excise taxes if they hold “cards issued or authorized by” the U.S. State Department); MD. CODE ANN., TAX-GEN., § 9-303.1 (2001) (motor vehicle fuel tax does not apply to retail purchase of motor vehicle fuel by diplomatic personnel); MINN. STAT. ANN., § 168.012 (West 2001) (exempting consuls from license plate tax and fees); N.H. REV. STAT. § 260:52 (1955) (exempting consuls from road tolls); N.Y. TAX LAW § 424 (McKinney 1999) (consuls and vice-consuls’ liquor purchases are exempt so long as American consuls are given reciprocal benefits in the foreign consul’s country); WASH. REV. TAX CODE ANN. § 82.36.245 (West 2000) (qualified foreign and diplomatic consular agents are exempt from tax on sales of motor vehicle fuel if equivalent exemption granted to similar personnel of U.S.). *But see* NEV. REV. STAT. ANN. § 482.3675 (Michie 2002) (making special provision for diplomatic license tags but charging an extra fee for them).

172. *See* LEE, *supra* note 105, at 549 (discussing State Department lobbying for state legislation on gasoline exemptions for consuls); John Lancaster, *Md. Senate Takes Diplomatic Turn*, WASH. POST, Feb. 22, 1989, at B4.

occasions, the federal government has sued to enforce a treaty or executive agreement to provide such exemptions.<sup>173</sup> These suits support the nationalist view's allocation of the authority to enforce treaties to the President. But if this power to enforce treaties by lawsuits is really so well-established, the rarity of such suits is more striking than their existence.<sup>174</sup>

### 3. Treatment of Aliens

#### a. Alien Rights with Respect to Real Property

Like consular rights and immunities, the protection of alien rights to succeed to real property was the subject of some of the earliest U.S. treaties. The regulation of alien rights to hold real property, however, has largely remained in the hands of the states.<sup>175</sup> States, for instance, clearly hold the authority to permit or prohibit aliens from succeeding to real property.<sup>176</sup> Aside from rules regulating public lands, the federal government has never legislated rules governing alien rights to real property.<sup>177</sup> While its treaties have

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173. See *United States v. County of Arlington*, 669 F.2d 925, 934-35 (4th Cir. 1982) (enforcing 1979 agreement affording the German Democratic Republic immunity from tax liens on property); *United States v. City of Glen Cove*, 322 F. Supp. 149, 153-54 (E.D.N.Y. 1971) (enforcing consular convention exemption for property of Russian ambassador to U.N.).

174. The only other context for such suits occurs in litigation to enforce American Indian treaties. In those cases, the courts appeared to recognize the U.S. interest as "guardians" of Indian tribe interests. *E.g.*, *United States v. Minnesota*, 270 U.S. 181, 192 (1926) (permitting the United States as "guardians" to sue for return to Indian tribes title certain lands held by Minnesota); *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975) (enforcing compliance of the State of Washington with Indian treaties where U.S. right to sue is not challenged); see also *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925) (stating in dicta that U.S. has standing to enforce treaty obligations).

175. See WILLIAM MARION GIBSON, *ALIENS AND THE LAW* 37 (1940) ("Any investigation of the treaty provisions [concerning real property] makes it quite evident that the United States government has not entered into any treaties which *completely* deprive the states of their power to decide who shall acquire and continue in possession of real property."); *Virginia v. Meekison*, *Treaty Provisions for the Inheritance of Personal Property, Considered with Reference to Clark v. Allen*, 44 AM. J. INT'L L. 313, 319 (1950) ("Treaty provisions regarding real property were . . . carefully phrased to preserve the traditional right of a State to determine for itself who could and could not acquire and hold land in its jurisdiction . . .").

176. See *Clark v. Allen*, 331 U.S. 503, 517 (1947); *Blythe v. Hinckley*, 180 U.S. 333, 338 (1901).

177. See Willard L. Boyd, *Treaties Governing the Succession to Real Property by Aliens*, 51 MICH. L. REV. 1001, 1005 (1953). The only area of serious federal regulation of alien property occurs in the context of war and the definition of "enemy aliens." See Comm. on Int'l Prop., Estate, & Trust Law, *Rights and Restrictions on Interests of Aliens in United States Estates: Federal and State Laws Affecting Administration and Distribution of United*

had some effect on these rights by guaranteeing non-discrimination, the federal government has never required that the states permit aliens to inherit real property.<sup>178</sup>

One reason for the lack of a federal policy may be the federal government's doubts about the scope of its treaty-making powers in this area. For instance, between 1819 and 1850, treaty-makers appeared to believe that the treaty power could not interfere with state regulation of real property.<sup>179</sup> Indeed, the federal government has since entered into a number of treaties that specifically conditioned alien property rights on the laws of the individual states.<sup>180</sup> For instance, an 1853 treaty with France granted property rights to French subjects "in all States of the Union, whose existing laws permit it."<sup>181</sup> The treaty went on, "[a]s to the States of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right."<sup>182</sup> This practice suggests the presence of federal doubts about the government's ability to regulate property rights through treaties.

Three years later, however, Attorney General Cushing issued an unequivocal opinion upholding the right of treaty-makers to regulate alien real property rights.<sup>183</sup> But doubts lingered. At approximately

*States Estates in Which Aliens Hold Interests*, in CURRENT LEGAL ASPECTS OF INTERNATIONAL ESTATE PLANNING 157, 163 (Robert A. Hendrickson & William K. Stevens, eds., 1981) [hereinafter *Rights & Restrictions*] (describing federal restrictions on enemy aliens holding real property).

178. See GIBSON, *supra* note 175, at 35.

179. See Boyd, *supra* note 177 at 1006; G.W. Duwalt, *The Treaties of the United States and Alien Land Laws of Illinois and Other States of the Union*, 43 CENT. L. J. 211, 215 (1896); Samuel Maclintock, *Aliens Under the Federal Laws of the United States*, 4 ILL. L. REV. 95, 107-08 (1909); Kurt Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 U. PA. L. REV. 323, 325-26 (1954).

180. See Treaty of Commerce, Friendship, Establishments, and Surrender of Criminals, Nov. 25, 1850, U.S.-Switz., art. 5, 11 Stat. 587, 590-91; Convention, Aug. 21, 1854, U.S.-Brunswick and Luneberg, art. 2, 11 Stat. 601, 602; Consular Convention, Feb. 23, 1853, U.S.-Fr., art. 7, 10 Stat. 992, 996 [hereinafter Treaty with France]; see also *Prevost v. Greneaux*, 60 U.S. (19 How.) 1, 14 (1857) (holding that "the obligation of [a treaty with France] and its operation in the State, after it was made, depend upon the laws of Louisiana"); *Lehman v. Miller*, 88 N.E. 365, 367 (Ind. App. 1909) (pointing out that the federal government negotiated a treaty with Switzerland based in part on the realization that some states might not allow aliens to hold real estate); *Jost v. Jost*, 1 Mackey 487, 495 (D.C. 1882) (observing that it is "doubtful whether the Federal Government has authority, in virtue of the treaty making power, and, therefore, whether it could have intended to interfere with the laws of descent in relation to real property in the several States").

181. Treaty with France, *supra* note 180, art. 7, 10 Stat. at 996.

182. *Id.*

183. 1857 OP. U.S. ATT'Y GEN. 411.

the same time that Cushing issued his opinion, Secretary of State Marcy was informing foreign diplomats that "it is not competent for the Government of the United States to interfere with the legislation of the respective States in relation to the property of foreigners dying *ab intestato* or in regard to inheritances of any kind."<sup>184</sup>

Professor Golove has suggested that these and other statements by the federal government disclaiming the power to regulate state affairs through treaties were disingenuous and that the real motivation was to avoid entering into the treaty in the first place.<sup>185</sup> But, as he notes, the federal government continued to make what appears to be contradictory statements about its power to regulate real property through treaties.<sup>186</sup> Rather than reflecting a pattern of disingenuous subversion of treaties, as Professor Golove suggests, the erratic and sometimes contradictory performance of the federal government could also reflect a serious good faith disagreement about the scope of the treaty power to regulate real property.

In any event, even after concluding that the federal government had the power to enter into treaties that affected real property, the State Department continued to refer all inquiries seeking implementation or enforcement of those treaties to the states. Thus, Secretary of State Evarts informed the Russian ambassador in 1877:

The local authorities of the State of New York are vested with *exclusive control over property of decedents in that State*, and no functionary of the Government of the United States can properly interfere in any such matter. By article X of the treaty between the United States and Russia of 1832, Russian subjects may inherit the personal estate of decedents in the United States, and may take possession thereof, by themselves or by others; and, if the heirs are absent, the property is to be taken care of till it is claimed by them. *The function of taking care of it is not vested in the Department of State, but judging by the course generally pursued by the United States in such matters, the most proper and effective course with regard to property in New York claimed by Russian heirs would seem to be for the Russian government to instruct its consul general at New York in regard to the matter.*<sup>187</sup>

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184. See 4 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 37 (1906).

185. Golove, *supra* note 11, at 1241–42 nn.550–52.

186. See *id.* at 1242 n.552 (noting self-contradictory views of Secretaries of State Hamilton, Fish, and Bayard).

187. Letter from Mr. Evarts, U.S. Secretary of State, to Mr. Boker, Minister to Russia (Nov. 9, 1877), *reprinted in* 4 MOORE, *supra* note 184, § 535 (emphasis added); see also

In short, enforcement of real property rights under a particular treaty must be directed toward the state government even though the treaty was constitutional and, under the Supremacy Clause, held the status of federal law. In fact, unlike the French treaty, the language of the Russian treaty appeared to explicitly grant the rights that the Russians sought to enforce.<sup>188</sup> To wit, the treaty guaranteed that a Russian could inherit and dispose of real property without unfair taxation or other treatment.<sup>189</sup> Despite this unequivocal language, the State Department seemed to believe that the *enforcement* of the treaty right could only be made through the vehicle of the state governments.

To be sure, state attempts to regulate property inheritances by aliens through statutes requiring reciprocity from the alien's home country were famously invalidated by the United States Supreme Court in *Zschernig v. Miller*.<sup>190</sup> The *Zschernig* Court invalidated the reciprocity statute on the grounds of a general federal foreign affairs power rather than with respect to an existing bilateral treaty.<sup>191</sup> Even in this instance, however, it is worth noting the relative passivity of the political branches of the federal government, which had informed the Court that no effect on foreign relations would flow from the application of the reciprocity statute in the *Zschernig* case.<sup>192</sup>

*Zschernig* has also been the subject of a substantial amount of commentary, much of it critical,<sup>193</sup> and lower courts applying

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Letter from Mr. Bayard, U.S. Secretary of State, to Mr. Jackson, (July 17, 1885), *reprinted in* 6 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 993 (1906) (explaining that diplomatic complaints are only a last resort after all local judicial remedies have been exhausted).

188. See, e.g., Treaty of Navigation and Commerce, May 11, 1833, U.S.-Russ., art. 10, 8 Stat. 444, 448 [hereinafter, Treaty with Russia].

189. *Id.* at art., 8 Stat. at 450. The treaty stated:

And where, on the death of any person holding real estate, within the territories of one of the High Contracting Parties, such real estate would, by the laws of the land, descend on a citizen or subject of the other party, who by reason of alienage may be incapable of holding it, he shall be allowed the time fixed by the laws of the country, and in case the laws of the country actually in force, may not have fixed any such time, he shall then be allowed a reasonable time to sell such real estate and to withdraw and export the proceeds without molestation, and without paying to the profit of the respective governments any other dues than those to which the inhabitants of the country wherein said real estate is situated, shall be subject to pay, in like cases.

*Id.*

190. 389 U.S. 429 (1968).

191. *Id.* at 667.

192. *Id.*

193. See, e.g., Goldsmith, *supra* note 65, at 1649, 1664-80 (describing *Zschernig* as constitutional innovation but criticizing functional necessity); see also Bradley &

*Zschernig* have continued to uphold state laws restricting inheritance by aliens, provided that the examination of foreign statutes is limited to facial analysis.<sup>194</sup> Thus, despite the broad potential sweep of *Zschernig*, states still retain primacy in the regulation of alien succession rights to real property with little or no federal intervention through either treaty or statute.<sup>195</sup> Even though the Supreme Court has endorsed both the use of the treaty power and the federal government's broad foreign affairs powers over the states,<sup>196</sup> the states have maintained a central role in the administration of the property of aliens.<sup>197</sup> Furthermore, with the narrow exception of *Zschernig*, the federal government has suggested it would rely on the states to implement and carry out any treaty obligations involving alien property.<sup>198</sup>

#### b. Remedies for Injuries to Aliens

Both under customary international law and pursuant to treaties,

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Goldsmith, *supra* note 5, at 865 (describing *Zschernig* as "dormant" and saying it retains "little, if any, validity").

194. For instance, a federal court in Montana upheld a similar reciprocity statute on the grounds that it did not require treating foreign law as an issue of fact. See *Gorun v. Fall*, 287 F. Supp. 725, 728 (D. Mont. 1968) (per curiam), *aff'd*, 393 U.S. 398 (1969) (per curiam). This reading was affirmed by the Supreme Court in the same year that *Zschernig* was decided, and included a concurring opinion by *Zschernig* author Justice Douglas. See *Gorun v. Fall*, 393 U.S. 398, 398 (1969) (Douglas, J., concurring). The case then went back to a Montana probate court, which ruled that the federal courts had found that reciprocity existed and awarded damages to the plaintiffs. See *In re Estate of Giurgiu*, 466 P.2d 83, 84 (Mont. 1970). This ruling was reversed by the Montana Supreme Court, *id.*, but the U.S. Supreme Court refused to hear the appeal for lack of a substantial federal question. *Gorun v. Montana*, 399 U.S. 901 (1970); see also *Mora v. Battin*, 303 F. Supp. 660 (N.D. Ohio 1969) (per curiam) (overturning a state court's ruling that denied inheritance rights to citizens of Czechoslovakia); *In re Estate of Leikind*, 239 N.E.2d 550 (N.Y. 1968) (holding that because there was no showing of conduct by the court as described in *Zschernig*, the statute was not unconstitutional). In other contexts, courts have refused to apply *Zschernig* unless there is a showing that a state statute has more than an "incidental or indirect effect in foreign countries." *Int'l Ass'n of Indep. Tanker Owners v. Locke*, 148 F.3d 1053, 1069 (9th Cir. 1998), *rev'd on other grounds sub nom.*, 529 U.S. 89 (2000); see also *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 751–53 (9th Cir. 2001) (holding that because the statute in question does not raise diplomatic concerns and does not single out any one country, it does not violate the rule from *Zschernig*).

195. See *Rights & Restrictions*, *supra* note 177, at 170–81 (giving overview of states' roles). Of course, these cases could be called into question given the Supreme Court's recent endorsement of *Zschernig* in *Garamendi*. See *Am. Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2388 (2003).

196. See, e.g., *Zschernig*, 389 U.S. at 440 (citing general foreign affairs power as basis for preempting state law); *Missouri v. Holland*, 252 U.S. 416, 432–33 (1920) (rejecting Tenth Amendment challenge to application of treaty power).

197. See *Rights & Restrictions*, *supra* note 177, at 170–81.

198. See 6 MOORE, *supra* note 187, § 993.



the federal government is obliged to take actions to punish private individuals who injure aliens in the United States. Failure to do so may make the federal government responsible for the alien's pecuniary losses.<sup>199</sup> In imposing this duty, treaties often require the United States to extend "the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law."<sup>200</sup> Accordingly, Secretary of State Fish declared in 1873 that

[t]he rule of the law of nations is that the Government which refuses to repair the damage committed by its citizens or subject, to punish the guilty parties or to give them up for that purpose, may be regarded as virtually a sharer in the injury and as responsible therefore.<sup>201</sup>

The United States, however, has had difficulty fulfilling its obligations under this rule because, for much of its history, only the state governments had the jurisdiction to punish outbreaks of violence against aliens.<sup>202</sup> In such circumstances, upon receiving protests from foreign ministers about mob violence against their nationals, the United States would plead constitutional helplessness. For example, when the Chinese minister demanded action by the federal government after mobs ransacked and pillaged a Chinese settlement in Colorado, the Secretary of State replied:

As to the arrest and punishment of the guilty persons who composed the mob at Denver, I need only remind you that the powers of direct intervention on the part of this Government are limited by the Constitution of the United States. Under the limitations of that instrument, the Government of the Federal Union cannot interfere in regard to the administration or execution of the municipal laws of a State of the Union, except under circumstances expressly provided for in the Constitution.<sup>203</sup>

Thus, even though Article II grants the President the "Executive Power" and charges him with the duty to "Take Care" that laws be

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199. See 2 HYDE, *supra* note 105, § 289A (discussing damages (or lack thereof) arising from failure to prosecute).

200. Treaty with Germany, *supra* note 136, art I, 44 Stat. at 2134; see also MITCHELL, *supra* note 140, at 78–80 (discussing this treaty).

201. 2 HYDE, *supra* note 105, § 289A n.10.

202. See MITCHELL, *supra* note 140, at 80.

203. 6 MOORE, *supra* note 187, § 1025.

executed,<sup>204</sup> the President appears to lack, according to the Secretary, the power to enforce international law obligations against the states.

Indeed, the federal government even denied its liability under international law for the failures of the states to punish wrongdoers, declaring that any payments of restitution it made were out of comity rather than obligation.<sup>205</sup> This view was eventually abandoned by President Harrison in 1891, who declared that in response to protests from Italy over the lynching of a number of Italians in New Orleans:

The officers of the State charged with police and judicial powers in such cases must, in the consideration of international questions growing out of such incidents, be regarded in such cases as Federal agents as to make this Government answerable for their acts in cases where it would be answerable if the United States had used its constitutional power to define and punish crimes against treaty rights.<sup>206</sup>

Having conceded liability to make reparations, however, the federal government continued to disclaim the ability to force state governments to act in absence of federal legislation authorizing federal prosecutions.<sup>207</sup> A series of Presidents continued to make requests to Congress for such legislative authority but to no avail.<sup>208</sup> Hence, the federal role has remained limited to making apologies and appropriating compensation.<sup>209</sup>

Under the nationalist view, however, it is not obvious why the President could not have acted alone to enforce the nation's international law obligations to provide minimum protection to alien residents. President Harrison, in theory, could have sued the state and local governments of New Orleans for injunctive relief or for damages pursuant to the enforcement of its treaty with Italy, which guaranteed Italian nationals "the most constant protection and security for their persons and property, and [that they] shall enjoy in

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204. U.S. CONST, art. II, §§ 2, 3.

205. See 2 HYDE, *supra* note 105, § 290 nn.5 & 8.

206. 6 MOORE, *supra* note 187, § 1026.

207. 2 HYDE, *supra* note 105, § 290.

208. See Spiro, *supra* note 68, at 1236-37; Charles H. Watson, *Need of Federal Legislation in Respect to Mob Violence in Cases of Lynching of Aliens*, 25 YALE L.J. 561, 577-79 (1916) (discussing failed efforts of various presidents from Harrison to Taft to get a federal law passed that would punish crimes against aliens committed in violation of treaty obligations).

209. See Ronan Doherty, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 VA. L. REV. 1281, 1335-37 (1996) (pointing out that the federal government has no legislative authority to remedy injuries to aliens in violation of international law or treaties).

this respect the same rights and privileges as are or shall be granted to the natives."<sup>210</sup>

In alien protection cases, it was again left to the states to handle the nation's international obligations. In some instances, states have discharged this duty through normal processes of investigation and prosecution.<sup>211</sup> On other occasions, the state, after prodding from the State Department, itself paid compensation for violations of treaty obligations.<sup>212</sup> More interestingly, state legislatures also provided civil redress to victims of mob violence by enacting legislation permitting recovery of damages against the local jurisdiction where a lynching occurred.<sup>213</sup> Such legislation was not limited to alien victims, but it was used successfully by alien victims to obtain judgments and compensation.<sup>214</sup>

### C. Summary

The preceding discussion suggests that states have played an important role in carrying out international law obligations on behalf of the United States. Not only have state courts developed and applied principles of customary international law largely free of federal court supervision, but state executives have independently determined the scope of their duties under customary international law. State legislatures have acted to implement treaty obligations by adopting legislation such as guaranteeing notice in probate proceedings or exempting foreign state property from certain local taxes. In many of these areas of law, the federal government has played a largely passive role by requesting, rather than commanding, state compliance with international obligations.

While the states did not feel obligated to obey international law as "federal law," there are indications that states did feel obligated to obey international law as "international law." In so doing, the states seemed to take seriously their independent duty to comply with international law. For this reason, compliance with consular and sovereign immunity from taxation was relatively strong despite the

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210. Treaty of Commerce and Navigation, Feb. 26, 1871, U.S.-Italy, art. III, 17 Stat. 845, 846.

211. See, e.g., 2 HYDE, *supra* note 105, § 290 n.6. (discussing Colorado prosecutions of mob leaders).

212. Letter from Mr. Olney, U.S. Secretary of State, to Governor of Georgia (Feb. 9, 1897), reprinted in 6 MOORE, *supra* note 187, § 998 (instructing Georgia to pay damages to Sweden for proceedings against a Swedish vessel by a local justice of the peace).

213. 2 HYDE, *supra* note 105, § 292.

214. *Id.*

lack of direct federal supervision.<sup>215</sup> In other words, states appear to have been free to decide whether and how to comply with international law obligations, and for the most part, they did.

### III. CONTEMPORARY EXAMPLES OF STATE CONTROL OVER INTERNATIONAL LAW

The system described in Part II, in which states implement certain international agreements and obligations, independent of federal supervision, is not merely historical. In the modern era, states have continued to control compliance with international law in a variety of areas, including probate law, commercial law, and consular relations. In a modern twist, however, state control in some of these areas of private law has become intertwined with the “uniform laws” system promulgated by the National Conference of Commissioners on Uniform State Laws. Additionally, states have begun to play an important role in carrying out U.S. commitments to international institutions and obligations under international human rights treaties. Overall, the continued existence of this system of state control further undercuts the nationalist conception of international law.

#### A. *Private International Law and the Uniform Laws System*

In recent years, the movement to harmonize and unify private areas of law internationally has gained momentum. A variety of international institutions, the most prominent of which include the Hague Conference on Private International Law, the United Nations Commission on International Trade Law (“UNCITRAL”), and the International Institute for Unification of Private International Law (“UNIDROIT”), have facilitated the discussion, negotiation and adoption of a dizzying array of treaties aimed at unifying or harmonizing areas as diverse as probate law, trusts, family law, and commercial law.<sup>216</sup>

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215. See *supra* notes 144–74 and accompanying text.

216. See, e.g., United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, Dec. 11, 1995, U.N. Doc. A/RES/50/48 (1995), 35 I.L.M. 735 (1996) (providing guidelines for credit arrangements); Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. TREATY DOC. NO. 105-51 (1998), *reprinted in* 32 I.L.M. 1134 (1994) (establishing guidelines intended to safeguard the best interests and fundamental rights of internationally adopted children); United Nations Convention on International Bills of Exchange and Promissory Notes, Dec. 9, 1988, U.N. Doc. A/43/820 (1988), 28 I.L.M. 170 (1989) (establishing a new type of negotiable instrument for international transactions); Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons, Oct. 20, 1988, 28 I.L.M. 146 (1989) [hereinafter Hague Convention on

The United States has traditionally stayed aloof from such efforts to unify private international law, due in large part to concerns that the United States could not enter into such treaties without violating state autonomy.<sup>217</sup> However, U.S. reluctance eventually faded and it began actively participating in the negotiation of a number of important private international law conventions.<sup>218</sup> Because concerns about federalism continued to linger, however, the State Department found new and creative ways to involve the states in the process. Most importantly, the State Department began consulting directly with the National Conference of Commissioners for Uniform State Laws seeking to harness this lawmaking mechanism to encourage states to implement U.S. treaty obligations.<sup>219</sup>

As a result, three models for contemporary state implementation of treaties on private international law have emerged. First, states may, as in case of the Convention for a Uniform Law on the Form of an International Will, implement a non-self-executing treaty through the adoption of a uniform law expressly designed to implement the convention. Second, states may adopt a uniform law implementing

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Succession] (governing inheritance practices); Hague Convention on the Law Applicable to Trusts and on Their Recognition, Oct. 20, 1984, 23 I.L.M. 1388 (1984) [hereinafter Hague Convention on Trusts] (providing a uniform system for trusts); Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, S. TREATY DOC. NO. 99-11 (1985), 1343 U.N.T.S. 98, *reprinted in* 19 I.L.M. 1501 (1980) (presenting rules to secure the prompt return of children kidnapped and taken away from their home countries); United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 98-9 (1998), *reprinted in* 19 I.L.M. 668 (1980) (adopting uniform rules to govern sales contracts); Convention Providing a Uniform Law on the Form of An International Will, Oct. 26, 1973, S. TREATY DOC. NO. 99-29 (1986), *reprinted in* 12 I.L.M. 1298 (1973) (adopting uniform rules for interpreting wills).

217. *See, e.g.*, Nadelmann, *supra* note 179, at 357-62 (arguing that the federal government is cautious to enter international treaties regarding private law because of a seeming lack of authority to command state governments to follow them).

218. For instance, the United States did not join the Hague Conference, which is one of the premier organizations for negotiating private international law conventions, until 1964, eleven years after the Conference was fully established. *See* Statute of the Hague Conference on Private International Law, July 15, 1955, 15 U.S.T. 2228. Similarly, the United States did not join the International Institute for the Unification of Private Law until 1964, twenty-four years after the Institute's charter was established. *See* Charter of the International Institute for the Unification of Private International Law, March 15, 1940, 15 U.S.T. 2494 (1964). Since then, the United States has signed but not ratified a number of private international law treaties under the auspices of both organizations. *See* Hague Convention on Succession, *supra* note 216; UNIDROIT Convention on International Financial Leasing, May 28, 1988, 27 I.L.M. 922 (1988); Hague Convention on Trusts, *supra* note 216; Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, Oct. 5, 1961, 33 U.S.T. 883.

219. *See* Richard D. Kearney, *The International Wills Convention*, 18 INT'L LAW. 613, 619 (1984):

treaties that have not yet been ratified by the Senate (and for which ratification is not assured). Finally, in some cases states have implemented treaties through legislation in tandem with federal implementing legislation or a self-executing treaty. All of these modern mechanisms for state implementation are consistent with past practice with respect to consular rights in probate proceedings, tax immunities, and real property. The only modern innovation is the reliance on the Uniform Laws system.<sup>220</sup>

1. State Implementation of Non-Self-Executing Treaties:  
Convention on the Uniform Law for the Form of an International  
Will

In 1973, the United States hosted negotiations for the Convention on the Form of an International Will under the auspices of UNIDROIT in Washington, D.C. The purpose of the Washington Convention was “to provide testators with a way of making wills that will be valid as to form in all countries joining the Convention.”<sup>221</sup> The Convention relied on two key mechanisms for ensuring recognition of wills across borders: (1) all states would adopt a uniform law that recognizes an “international will” that is created in the form agreed upon by the Convention,<sup>222</sup> and (2) the uniform law would define and specify “authorized persons” to verify and validate an international will.<sup>223</sup>

President Reagan submitted the Washington Convention to the Senate in 1986<sup>224</sup> and the Senate ratified it in August 1991.<sup>225</sup>

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220. In an important article on treaty interpretation, Professor Van Alstine uses these commercial international law conventions as an example of the need for courts to draw on formalist “dynamic” interpretive methods. See Michael Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 694–701, 775–85 (1998). Professor Van Alstine overlooks, however, the role that state legislatures and the uniform laws system play in the implementation of private international law at the state rather than federal level. See *id.* at 690 (stating that the ratification of private international law conventions places at issue “nothing less than federal arrogation of traditional state competence in the law governing private, and in particular commercial, relations”).

221. UNIF. PROBATE CODE art. II, pt. 10 prefatory note (2001).

222. Convention Providing a Uniform Law on the Form of an International Will, Oct. 26, 1973, art. I., 12 I.L.M. 1302, 1302 (Nov. 1973) *reprinted in* UNIF. PROBATE CODE art. II, pt. 10 prefatory note (2001) [hereinafter Washington Convention].

223. Washington Convention, *supra* note 222, art. II, 12 I.L.M. at 1302.

224. President’s Message to Congress Transmitting the Convention Providing a Uniform Law on the Form of an International Will, 1986 PUB. PAPERS 905–06 (July 2, 1986), *available at* 1973 U.S.T. LEXIS 321 [hereinafter Submittal Letter].

225. See Convention Providing a Uniform Law on the Form of an International Will, 102d Cong., 137 CONG. REC. S12131 (daily ed. Aug. 2, 1991) (Sup. Docs. No. X/A.102/1:137/121).

However, to date the treaty is still not officially in force. Like other self-executing treaties, the Convention requires implementing legislation; but what is unusual about the Washington Convention is that the implementation contemplated by the executive branch is on the state rather than the federal level. Specifically, the treaty will not enter into force without *state* implementation via adoption of a revised Uniform Probate Code or an International Wills Act.

From the outset, the subject matter of the Washington Convention raised concerns about federal encroachment on areas of state control. Indeed, one commentator accused the Convention's draftsmen of seeking "not merely the resolution of international probate problems but knowingly undert[aking] the subversion of the traditional role of the American states in enforcing their own rules for testing the validity of testamentary instruments."<sup>226</sup>

Although the Washington Convention specifically allowed federal states to limit their obligation to particular sub-units, the United States failed to make such a declaration.<sup>227</sup> On the other hand, despite one influential commentator's recommendation,<sup>228</sup> the federal government also refused to implement the treaty by relying exclusively on federal legislation:

It would be undesirable, however, to rely exclusively on federal legislation to bring both aspects of the Convention—the execution of international wills as well as their recognition—into force. Our testators and their attorneys are not accustomed to consulting federal statutes for guidance on the formalities for making wills; they should continue to be able to place primary reliance on the laws of their States, rather than on federal law, for this purpose. What is therefore to be recommended to the Congress and the several State legislatures, is that the making of international wills within the United States be governed by State legislation, with *each State free to decide whether it wishes to make it possible for testators to execute wills in its jurisdiction in this new form.*<sup>229</sup>

Not only did the federal government announce that it would rely on the states in this way, but it chose to use the uniform laws system

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226. Jerome J. Curtis, Jr., *The Convention on International Wills*, 23 AM. J. COMP. L. 119, 120 (1975).

227. See Submittal Letter, *supra* note 224, at 905–06.

228. See Kurt Nadelmann, *The Formal Validity of Wills and the Washington Convention Providing the Form of an International Will*, 22 AM. J. COMP. L. 365, 375 (1974) (arguing for federal statutory implementation).

229. Submittal Letter, *supra* note 224, at 905–06 (emphasis added).

to implement its treaty obligations under the Washington Convention.<sup>230</sup> Thus, the National Conference of Commissioners for Uniform State Laws was enlisted to adopt model legislation implementing the treaty.<sup>231</sup> Although the Convention obliges the federal government to pass implementing legislation to require uniform recognition of international wills by “authorized persons,” the amendments to the Uniform Probate Code effectively guarantee the same result.<sup>232</sup> In theory, the promoters of the Washington Convention expected federal legislation to impose on all states the requirement of recognizing foreign wills executed in accordance with the Convention.<sup>233</sup> No such federal legislation was actually introduced, however, resulting in what one commentator called a “bizarre patchwork of states which do and do not have state implementing legislation.”<sup>234</sup>

Not only does this “bizarre patchwork” exist today, but nine states enacted amendments to the Uniform Probate Code specifically designed to implement the Washington Convention prior to the Senate’s advice and consent in 1991.<sup>235</sup> Even today, although no federal legislation has been passed, a total of sixteen states have essentially decided to enter into the Washington Convention

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230. See Kearney, *supra* note 219, at 628.

231. See UNIF. PROBATE CODE, art. II, pt. 10 prefatory note (2001).

232. See, e.g., Washington Convention, *supra* note 222, Annex, art. 1, 12 I.L.M. at 1307. The treaty provides:

A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Articles 2 to 5 hereinafter.

*Id.*

233. Kearney, *supra* note 219, at 630–31.

234. Tim Covell, *Legislation Should Prompt States to Enact International Wills Laws*, TR. AND EST., May 1994, at 42–43.

235. See Act of May 1, 1990, ch. 79, 1990 Cal. Legis. Serv. 79 (West) (codified as amended at CAL. PROB. CODE §§ 6380–6390 (1991)); Act effective Apr. 17, 1989, 1989 Colo. Legis. Serv. 180 (West) (codified as amended at COLO. REV. STAT. §§ 15-11-1001 to -1011 (2002)); Act of June 19, 1987, 1987 Conn. Legis. Serv. 369 (West) (codified as amended at CONN. GEN. STAT. ANN. §§ 50a-1 to -9 (West 1994)); Act effective Jan. 1, 1991, 1990 Legis. Serv. P.A. 86-1291 (West) (codified as amended at 755 ILL. COMP. STAT. ANN. 10/0.01–10/10 (West 1992)); Act effective Mar. 24, 1978, ch. 525, 1978 Minn. Laws 153 (codified as amended at 19 MINN. STAT. ANN. §§ 524.2-1001 to -1010 (West 2002)); Act of Feb. 27, 1991, ch. 62, 1991 Mont. Laws 170 (codified as amended at MONT. CODE ANN. §§ 72-2-901 to -910 (2001)); Act effective July 1, 1993, ch. 66, 1992 N.M. Laws 748 (codified as amended at N.M. STAT. ANN. §§ 45-2-1001 to -1010 (Michie 1995)); Act of Mar. 15, 1979, ch. 376, 1979 N.D. Laws 915 (codified as amended at N.D. CENT. CODE §§ 30.1-08.2-01 to -09 (1996)); Act of July 28, 1981, ch. 481, 1981 Or. Laws 519 (codified as amended at OR. REV. STAT. § 112.232 (1997)). Cf. *infra* note 236 (listing states who enacted the provisions of the Washington Convention after the Senate approved it).



themselves through their enactment of laws implementing that convention.<sup>236</sup> Testators in those states can execute wills under the Convention, and foreign international wills are recognized in those states.

The Washington Convention thus illustrates the modern incarnation of the system of state control over international law described in Part II. Facing the choice between federalizing an area of traditional state regulation or permitting states to control compliance, the federal government has essentially left implementation to the states, as it did in the past with respect to consular rights to notice in estate proceedings. Thus, although the United States has not formally declared that its treaty obligation would extend only to certain states of the Union as Canada did with respect to its provinces,<sup>237</sup> as a practical matter, compliance with the International Wills Convention essentially rests with the willingness of state legislatures to adopt implementing legislation found in the Uniform Probate Code. Furthermore, there is no reason to believe that the federal government considers such state implementation to interfere unduly with its need to maintain a single voice with respect to adoption of international law.

## 2. State Implementation Prior to Senate Ratification

The model of state implementation through the uniform laws system has also apparently been adopted with respect to other signed, but not ratified conventions. The Uniform Probate Code ("UPC") contains provisions "in harmony with" the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.<sup>238</sup> While seemingly unremarkable, it demonstrates that the UPC, which has been adopted by a majority of American states, has incorporated treaty provisions that have not even been submitted to the Senate for ratification.

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236. See Act effective Jan. 1, 1997, ch. 75, 1996 Alaska Sess. Laws 308, 308 (codified as amended at ALASKA STAT. §§ 13.12.912 to 13.12.921 (Michie 2002)); Act effective June 25, 1997, ch. 81, 71 Del. Laws 177, 177 (1997) (codified as amended at DEL. CODE ANN. tit. 12 §§ 251-59 (2001)); Act effective Apr. 1, 2000, No. 386, 1998 Mich. Pub. Acts 1738, 1738 (codified as amended at MICH. COMP. LAWS ANN. §§ 700-2951 to 700-2959 (West 2002)); Act approved Mar. 20, 1995, 1995 Va. Acts ch. 443, 637, 637 (codified as amended at VA. CODE ANN. §§ 64.1-96.2 to 64.1-96.11 (Michie 2002)). Cf. *supra* note 235 (listing states who enacted the provisions of the Washington Convention before the Senate approved it).

237. See Submittal Letter, *supra* note 224, at 905-06 (pointing out that four Canadian provinces had adopted the Act).

238. UNIF. PROBATE CODE § 2-1002 cmt. (2001). See Eugene Scoles, *The Hague Convention on Succession*, 42 AM. J. COMP. L. 85, 103 (1994).

Similarly, one Uniform Trust Code section allowing a settlor to designate the governing law and, in absence of such designation, providing choice of law rules, is “consistent with and was partially patterned on the Hague Convention on the Law Applicable to Trusts and on their Recognition.”<sup>239</sup> While broadly phrased, the Uniform Law reporter’s open acknowledgement that the wording follows the Hague Convention is a further example of the states adopting a rule established in a treaty never submitted for ratification.

Additionally, the Uniform Child Custody Jurisdiction and Enforcement Act provides that a custody determination can be registered without any request for enforcement.<sup>240</sup> As the official comment to this section notes, this provision is required by the Hague Convention on Jurisdiction, Applicable Law, Recognition and Cooperation in Respect of Parental Responsibility and Measures of the Protection of Children, a treaty that has not yet even been signed by the United States.<sup>241</sup>

### 3. Joint Federal-State Implementation

In some instances, the federal government and the states act in conjunction to implement treaty obligations. For instance, the Uniform Child Custody and Enforcement Act enables adopting states to “enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction”<sup>242</sup> even though that convention was also implemented by the federal International Child Abduction Remedies Act (“ICARA”).<sup>243</sup>

Similarly, the Convention Abolishing the Requirement of Legalization for Foreign Public Documents<sup>244</sup> appears to supersede various state practices related to notary recognition.<sup>245</sup> Nonetheless, most states enacted legislation to ensure implementation anyway

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239. UNIF. TRUST CODE § 107 cmt. (2000).

240. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 305(a) (2000).

241. See Hague Convention of October 19, 1996, on Jurisdiction, Applicable Law, Recognition, Enforcement, and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Status Sheet, at <http://www.hcch.net/e/status/proshite.html> (last visited Dec. 2, 2003) (on file with the North Carolina Law Review).

242. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 302.

243. 42 U.S.C. §§ 11601–11610 (2000).

244. Convention Abolishing the Requirement of Legalization for Foreign Public Documents (Oct. 5, 1961), 20 I.L.M 1405 (1981).

245. See, e.g., State of California Attorney General’s Opinion on the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, 21 I.L.M 357, 357 (1982) (concluding that Notary Convention overrides California law).

either through adoption of the Uniform Law on Notarial Acts<sup>246</sup> or separate legislation.<sup>247</sup>

### B. Consular Notification and Consultation Rights

Although the role of states in compliance with international law is perhaps most central in the area of private international law, states also play important roles in the fulfillment of other international law obligations. For instance, upon the arrest of a foreign national, a state is responsible under the Vienna Convention on Consular Relations for notifying such nationals of his or her right to communicate with consular officials.<sup>248</sup> Prior to entering into the Vienna Convention in 1964, however, the United States had long recognized a right for an arrested alien to contact consular officials.<sup>249</sup> The obligation of the receiving state to inform the arrested national of the right to contact consular officials appears to have been an innovation of the Vienna Convention.<sup>250</sup>

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246. UNIF. LAW ON NOTARIAL ACTS § 6 (1982).

247. See Act of Apr. 9, 1996, ch. 127, sec. 11, 1996 Ariz. Sess. Laws 642, 645 (codified as amended at ARIZ. REV. STAT. § 41-325 (2003)); Act of June 30, 1981, ch. 61, sec. 4, 63 Del. Laws 87 (1981), Act of June 19, 1984, ch. 275, sec. 4325, 64 Del. Laws 630, 631 (1983) (codified as amended at DEL. CODE ANN. tit. 29, § 4326 (2003)); Act of Apr. 27, 1990, ch. 1205, sec. 6, 1990 Iowa Acts 303, 304 (codified as amended at IOWA CODE § 9E.13 (2003)); Act effective July 1, 1984, ch. 201, sec. 6, 1984 Kan. Sess. Laws 806, 809 (codified as amended at KAN. STAT. ANN. § 53-507 (2003)); Act effective Aug. 1, 1985, ch. 268, sec. 8, 1985 Minn. Laws 1199, 1203 (codified as amended at MINN. STAT. § 358.46 (2003)); Act of Mar. 25, 1993, ch. 192, sec. 8, 1993 Mont. Laws 488, 491 (codified as amended at MONT. CODE ANN. § 1-5-608 (2003)); Act of Aug. 25, 1969, ch. 523, sec. 2., 1969 Neb. Laws 2139, 2140 (codified as amended at NEB. REV. STAT. § 64-202 (1943)); Act of May 11, 1993, ch. 115, sec. 12, 1993 Nev. Stat. 200, 201 (codified as amended at NEV. REV. STAT. § 240.165 (2003)); Act of Apr. 7, 1993, ch. 281, sec. 6, 1993 N.M. Laws 2861, 2866 (codified as amended at N.M. STAT. ANN. § 14-14-6 (Michie 1978)); Act effective Nov. 1, 1985, ch. 131, sec. 7, 1985 Okla. Sess. Laws 361, 364 (codified as amended at OKLA. STAT. tit. 49, § 117 (2003)); Act effective Jan. 1, 1986, ch. 156, sec. 15, 1985 Wash. Laws 591, 599 (WASH. REV. CODE § 42.44.150 (2003)).

248. Vienna Convention on Consular Relations and Optional Protocols, Apr. 24, 1963, art. 36 (1)(b), 21 U.S.T. 77, 101, 596 U.N.T.S. 261, 292 [hereinafter VCCR].

249. 4 GREEN HAYWARD HACKWORTH, DIGEST OF INTERNATIONAL LAW § 441 (1942) (citing 1936 State Department letter responding to Italian foreign minister's query on this subject); LEE, *supra* note 105 at 136; see Arthur K. Kuhn, *Protection of Nationals Charged with Crime Abroad—Case of Lawrence Simpson*, 31 AM. J. INT'L L. 94, 94-97 (1937) (describing how an American national arrested by the Nazi government was allowed to communicate with the American Consulate during his detention in a concentration camp).

250. Compare 2 HYDE, *supra* note 105, § 469 n.12 (citing a 1936 letter to an Italian ambassador refusing to recognize consul's automatic notification right, but permitting consul to visit upon prisoner's request), with LUKE T. LEE, VIENNA CONVENTION ON CONSULAR RELATIONS 137 (1996) (discussing commentary on the effects of the Vienna Convention on diplomatic relations including the right to contact consular officials).

In any event, the historical practice of the United States in this regard has also relied on state implementation. Thus, when the Mexican government protested California's unwillingness to permit a Mexican consular official to visit a detained Mexican national,<sup>251</sup> the Secretary of State wrote a letter to the Governor of California informing him that Mexico granted the United States such visitation rights.<sup>252</sup> Hence, the Secretary "earnestly requested prompt action" to allow the visitation to take place.<sup>253</sup> California apparently granted this request.

The Vienna Convention on Consular Relations ("VCCR"), which the United States joined in 1969, took the consular assistance obligation one step further, requiring that state authorities notify the detainee of his or her consular assistance rights.<sup>254</sup> Nonetheless, the implementation of the treaty obligations with respect to consular assistance for detained foreign nationals has remained largely with the states.

The State Department's explanation of how the United States complies with its VCCR notification requirements illustrates the continued existence of a decentralized approach to treaty implementation. It explains:

[T]he obligations of consular notification and access are binding on states and local governments as well as the federal government, primarily by virtue of the Supremacy Clause in Article VI of the United States Constitution . . . . [I]t is also open to government entities to adopt laws or regulations for the purpose of implementing these obligations.<sup>255</sup>

This decentralized view of international law implementation resonates with this Article's positive account of state-led implementation. The federal government has adopted no implementing legislation because "executive, law enforcement and judicial authorities can implement these obligations through their existing powers."<sup>256</sup> This sentence is not limited in scope to federal

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251. 4 HACKWORTH, *supra* note 249, § 441.

252. *Id.*

253. *Id.*

254. VCCR, *supra* note 248, art. 36(1)(b), 21 U.S.T. at 101, 596 U.N.T.S. at 292.

255. STATE DEP'T, CONSULAR NOTIFICATION AND ACCESS: INSTRUCTIONS FOR FEDERAL, STATE, AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM, PART FIVE: LEGAL MATERIAL, BASIS FOR IMPLEMENTATION, at <http://www.travel.state.gov/notification5.html#basis> (last visited Nov. 4, 2003) (on file with the North Carolina Law Review).

256. *Id.*

entities. The statement emphasizes that entities at all levels of government are obligated to enforce obligations under customary international law and treaty law and that even a self-executing treaty can be implemented by states adopting new rules and legislation.<sup>257</sup>

In fact, state implementation may be the sole mechanism for ensuring U.S. compliance with the Vienna Convention, because the federal courts have foreclosed most judicial remedies for foreign nationals arrested in violation of their Vienna Convention obligations. For instance, federal courts have uniformly held that evidence seized in an arrest in violation of the Vienna Convention, although self-executing, does not give defendants the remedy of suppressing such evidence from trial.<sup>258</sup> Additionally, federal courts have uniformly held that the doctrine of procedural default, which stems from more recent congressional enactments limiting challenges under federal and constitutional law in habeas corpus petitions, prevents any foreign national from attempting to use a Vienna Convention violation to attack either his sentence or conviction in post-trial proceedings.<sup>259</sup>

Although the Vienna Convention is a self-executing treaty with federal law status, the federal government itself has limited implementation at the federal level through post-arrest or post-conviction judicial remedies. Thus, just as states were called upon to adopt legislation to implement consular notice obligations in probate and workman's compensation proceedings, states have begun to adopt implementing legislation for the VCCR. Florida and California have both adopted legislation relating to VCCR obligations to provide consular notification rights to detained foreign nationals.<sup>260</sup> California's statute provides:

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257. *Id.*

258. *See, e.g.,* *United States v. Duarte-Acero*, 296 F.3d 1277, 1281 (11th Cir. 2002) (concluding the VCCR did not create any individual rights); *United States v. Bustos de la Pava*, 268 F.3d 157, 165 (2d Cir. 2001) (finding VCCR does not support ineffective assistance of counsel claim); *United States v. Jimenez-Nava*, 243 F.3d 192, 197 (5th Cir. 2001) (holding that VCCR does not provide a suppression of evidence remedy); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1195 (11th Cir. 2000) (same); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 887 (9th Cir. 2000) (explaining that VCCR does not provide a judicially available remedy of suppression of evidence and no other country has allowed that type of remedy under the treaty either); *United States v. Li*, 206 F.3d 56, 61 (1st Cir. 2000) (stating that even if VCCR created individual rights, remedies of suppression of evidence or dismissal of charges cannot be inferred without specific language in the treaty).

259. *See, e.g.,* *Republic of Paraguay v. Allen*, 134 F.3d 622, 625 (4th Cir. 1998) (denying defendant's habeas corpus petition on grounds of procedural default because he failed to raise the VCCR defense at his trial).

260. CAL. PENAL CODE § 834c(a)(1) (2003); FLA. STAT. ch. 901.26 (West 2003).

In accordance with federal law and the provisions of this section, every peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country . . . .<sup>261</sup>

Such a statute appears to be, at the very least, redundant given that the Vienna Convention is self-executing, but state participation in the implementation of binding treaty obligations, such as what this Article has described in the context of consular estate rights and diplomatic tax immunities,<sup>262</sup> is hardly unusual. Given the general failure of local and state authorities to implement the Vienna Convention obligations—and the federal government’s decision not to permit any judicial remedies for arrests made in violation of the treaty—the state statute serves as a necessary mechanism for improving U.S. compliance with its treaty obligations. For instance, the California statute instructs local officers to follow State Department guidelines and provides that training manuals setting forth treaty requirements would be distributed by December 31, 2000.<sup>263</sup>

Of course, the motivation behind implementing the VCCR may be less about international law compliance and more about trying to prevent further challenges by arrestees who have failed to receive their VCCR notification.<sup>264</sup> Even so, it is unclear why the state legislators believed they could close a loophole that appears to have been required by a treaty of the United States.

Florida also adopted legislation implementing the VCCR. Rather than emphasizing implementation, however, Florida’s statute specifically states that “[f]ailure to provide consular notification under the Vienna Convention on Consular Relations or other bilateral consular conventions shall not be a defense in any criminal proceeding against any foreign national and shall not be cause for the foreign national’s discharge from custody.”<sup>265</sup>

The purpose of this legislation is somewhat mysterious. On the

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261. CAL. PENAL CODE § 834c(a)(1).

262. See *supra* notes 105–26, 144–74 and accompanying text.

263. CAL. PENAL CODE § 834c(a)(2), (c).

264. See Calif. Sen. Comm. on Public Safety, *Arrest of Foreign Nationals*, Comm. Rep. on SB 287 (March 16, 1999), at [http://info.sen.ca.gov/pub/99-00/bill/sen/sb\\_0251-0300/sb\\_287\\_cfa\\_19990316\\_125225\\_sen\\_comm.html](http://info.sen.ca.gov/pub/99-00/bill/sen/sb_0251-0300/sb_287_cfa_19990316_125225_sen_comm.html) (on file with the North Carolina Law Review) (stating that one purpose of bill is to “attempt to close the ‘loophole’ on Consular Relations Appeals for death row inmates”).

265. FLA. STAT. ch. 901.26.

face of it, Florida is attempting to limit the effect of the VCCR, which is a treaty and equivalent to federal law, in state criminal proceedings. Florida cannot claim that it holds the final power to interpret the VCCR, but it might argue that because the VCCR is unclear on how to address violations of its terms under domestic law, it is simply "implementing" the VCCR the way it sees fit for the purposes of Florida criminal proceedings. In theory, Florida's legislature could have adopted a different statute that specifically granted such judicial remedies under the VCCR, despite the federal courts' previous denial of such remedies.

Whatever the rationale, the intervention of Florida and California in VCCR legislation, especially their attempts to limit the treaty's effect, makes little sense from the nationalist perspective. In light of the system of state control over international law discussed above,<sup>266</sup> however, this legislative activity is hardly surprising. Where the federal government has decided against further implementation of a treaty obligation at the federal level, states have the discretion to legislate with respect to implementing, or even limiting, such obligations.<sup>267</sup>

### C. *International Institutions: The ICJ Proceedings*

While states have some role in the implementation of VCCR obligations, the federal government's acknowledgement of states' role in complying with international law has been rare in recent years. For instance, in the submittal of the Washington Convention, the President expressly disclaimed any federalism concerns.<sup>268</sup> However, a recent interchange between the United States and the International Court of Justice has resulted in the federal government's strongest contemporary endorsement of an independent state role in the implementation of international law obligations.<sup>269</sup>

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266. See *supra* notes 98–104 and accompanying text.

267. Although legislation has been introduced in Texas to implement the VCCR and to regulate relations with the many Mexican consulates in the state, such legislation has apparently died in the Texas Senate. See Anthony Spangler, *Mexican Officials Criticize Consul Rights Bill Failure*, FORT WORTH STAR TELEGRAM, June 7, 2003, at 12.

268. Submittal Letter, *supra* note 224, at 905–06.

269. Through its ratification of the U.N. Charter, the United States is party to the ICJ Statute. See U.N. CHARTER art. 93 ("All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice."); *id.* art. 94 ("Each Member of the United Nations undertakes to comply with a decision of the International Court of Justice in any case to which it is a party."). Although the United States withdrew from the compulsory jurisdiction of the ICJ in 1985, it is still party to a number of treaties, including the VCCR, that commit it to litigation of certain disputes in the ICJ. See Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory

In 1998, the government of Paraguay sought remedies against the United States for the failure to fulfill the VCCR obligations with respect to a Paraguayan citizen scheduled for execution in Virginia.<sup>270</sup> Paraguay sought remedies from both the United States Supreme Court, by filing a suit against Virginia for its violation of the VCCR obligations, and the International Court of Justice.<sup>271</sup> Two years later, Germany sought similar remedies to stop Arizona from executing two of its nationals who had also failed to receive such notification rights.<sup>272</sup> More recently, Mexico filed an almost identical application on behalf of all Mexican nationals who have been convicted and sentenced to death in the United States, although it is not yet clear whether Mexico will seek intervention from the United States Supreme Court.<sup>273</sup>

All three countries obtained a “provisional measures” order from the ICJ,<sup>274</sup> stating that the United States “should take all measures at its disposal to ensure that” the condemned foreign nationals were not “executed pending the final decision in these proceedings.”<sup>275</sup>

In the first two instances, however, the Supreme Court refused to enforce the ICJ order due to its procedural posture in a habeas proceeding and due to the Eleventh Amendment’s prohibition of

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Settlement of Disputes, April 24, 1963, art. 1, 21 U.S.T. 325, 326, 596 U.N.T.S. 487, 488 (“Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.”); BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 326 (3d ed. 1999) (discussing withdrawal from ICJ’s compulsory jurisdiction).

270. See *Breard* Provisional Measures Order, *supra* note 17, 1998 I.C.J. at 249–50.

271. See *id.*, 1998 I.C.J. at 249–50.

272. LaGrand Case (F.R.G. v. U.S.) (I.C.J. Provisional Measures Order of Mar. 3, 1999), 1999 I.C.J. 9 (Mar. 3) [hereinafter LaGrand Provisional Measures Order], available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (on file with the North Carolina Law Review).

273. *Avena* Provisional Measures Order, *supra* note 17, at para. 15.

274. The ICJ has the power “to indicate . . . any provisional measures which ought to be taken to preserve the respective rights of either party.” Statute of the International Court of Justice, June 26, 1945, art. 41(1), 59 Stat. 1055, 1061. According to the ICJ, such provisional measures orders are “legally binding” on member states to the same extent all its decisions are binding. LaGrand Judgment, *supra* note 17, para. 109. Under Article 94 of the United Nations Charter, the refusal of one party to comply with a decision of the ICJ provides grounds for the other party to seek remedies from the United Nations Security Council. U.N. CHARTER, art. 94(2).

275. See LaGrand Provisional Measures Order, *supra* note 272, 1999 I.C.J. at 16; *Breard* Provisional Measures Order, *supra* note 17, 1998 I.C.J. at 258.



lawsuits against the states.<sup>276</sup> In other words, the federal government appeared to foreclose any judicial remedy, either by the foreign state or by the foreign national, to enforce U.S. obligations under the VCCR.

Although the ICJ's communication was styled an "order," the United States responded to these communications in a manner similar to its response to other demands from foreign governments that it fulfill international obligations for injuries to aliens, for the protection of land rights, or for the exemption from local taxes.<sup>277</sup> It forwarded the ICJ's decision to the relevant government authorities, here the governors of Virginia, Arizona, Texas, and Oklahoma. In one of these cases, *Breard v. Greene*, Secretary of State Albright "requested" the governor of Virginia to stay the pending execution in consideration of the ICJ's decision.<sup>278</sup> The federal government did not take any other action, and, in fact, filed amicus briefs in the United States Supreme Court opposing the foreign governments' legal actions against the individual states.<sup>279</sup>

Despite the State Department's requests, neither of the governors in the first two cases stayed the executions.<sup>280</sup> In the *Breard*

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276. See *Federal Republic of Germany v. United States*, 526 U.S. 111, 111 (1999) (per curiam); *Breard v. Greene*, 523 U.S. 371, 378 (1998).

277. See *supra* notes 105–214 and accompanying text.

278. *Breard* Amicus Curiae Brief, *supra* note 19, at app. F (excerpting letter from U.S. Secretary of State Madeline K. Albright to Virginia Governor James Gilmore); see Memorial of the Federal Republic of Germany, (F.R.G. v. U.S.), paras. 2.14, 4.169–4.171 & annex 16 (Sept. 16, 1999) [hereinafter *LaGrand* F.R.G. Memorial] (describing how Secretary of State Albright took no action in the *LaGrand* case other than forwarding the ICJ order to Arizona Governor Jane Hull).

279. *Breard* Amicus Curiae Brief, *supra* note 19, at 51.

280. At the time of this writing, the response of the U.S. and Oklahoma governments to the ICJ's Mexico order was yet to be determined. See Toby Sterling, *World Court Orders U.S. to Stay Executions of Three Mexicans*, CHI. TRIB., Feb. 6, 2003, at 3 ("Clifford Sobel, U.S. ambassador to the Netherlands, said the Justice Department was 'studying the decision.' It would be 'premature' to say whether the U.S. will abide by the decision, Sobel said."); Kevin Sullivan, *World Court Orders U.S. to Stay Executions of Three Mexicans*, WASH. POST, February 6, 2003, at A32 (noting that Charles Barclay, a State Department spokesman, stated that the U.S. was still studying the ICJ order and the ICJ had not yet ruled on the merits of Mexico's case). Jennifer Miller, the chief of criminal appeals for the Oklahoma Attorney General's office, said that Oklahoma was reviewing the ICJ order. See Sullivan, *supra*. The U.S. State Department is also reviewing the order and has not said whether Washington will order Texas and Oklahoma to stay the executions. The U.S. argued the order would interfere with its sovereign right to administer its criminal justice system." *Id.* Texas, however, has already decided to refuse to comply, although it is unclear what it would do if the federal government made a request. *Texas to Ignore Court Order to Stay Executions*, L.A. TIMES, Feb. 7, 2003, at A33 [hereinafter *Texas to Ignore Court Order*] (reporting that Texas will ignore the February 6, 2003 ICJ order and go ahead with the executions, whereas Oklahoma and the United

case, the State Department expressed its regrets to the ICJ but explained that the United States, by requesting the Governor to stay the execution, had fulfilled its obligations under the ICJ Charter to “take all measures at its disposal.” The Solicitor General stated in his brief to the Supreme Court that the “federal system imposes limits on the federal government’s ability to interfere with the criminal justice systems of the States.” Indeed, the “measures at the United States’ disposal under our Constitution may in some cases include only persuasion . . . and not legal compulsion through the judicial system. That is the situation here.”<sup>281</sup>

In proceedings before the ICJ, the United States made similar declarations about the collision between the ICJ’s order and the federal government’s limited power over the states.<sup>282</sup> In the *LaGrand* case, for example, the United States’ Counter-Memorial declared, in language reminiscent of previous State Department notes to foreign powers with respect to alien land rights or tax immunities:

[T]he separate states of the United States retain their independence and authority except in areas where the Federal Government has been allocated power by the Constitution of the United States. The separate states are not subsidiary bodies subordinate to the power of the Federal Government and subject to its direction. Rather, they remain sovereign and the masters of their affairs within the areas of responsibility reserved to them by the United States Constitution.<sup>283</sup>

Such statements, though consistent with U.S. actions, make little sense under the nationalist conception. Not surprisingly, these statements and actions have been subject to a torrent of criticism abroad<sup>284</sup> and from academics at home.<sup>285</sup> If the federal government

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States are in the process of reviewing the order). Gene Acuna, a spokesman for Texas Governor Rick Perry, stated, “‘According to our reading of the law and treaty, there is no authority for the federal government or this World Court to prohibit Texas from exercising the laws passed by our legislature.’” *Id.* The Governor believes that the U.S. courts provide adequate safeguards and are the appropriate forum to hear cases regarding consular notification on a case-by-case basis; therefore, orders from the state and federal courts are the only ones that Texas will follow. *See id.*

281. *Breard* Amicus Curiae Brief, *supra* note 19, at 51.

282. Verbatim Record of Public Sitting, Tues. Jan. 21, 2003, 11:30 a.m., at 31, paras. 3.43-3.44 (Statement of U.S. Department of State Principal Deputy Legal Advisor James H. Thessin), Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), at [http://www.icj-cij.org/icjwww/idocket/imus/imuscr/imus\\_icr2003-02\\_20030121.pdf](http://www.icj-cij.org/icjwww/idocket/imus/imuscr/imus_icr2003-02_20030121.pdf) [hereinafter Avena Thessin Statement] (last visited Jan. 7, 2004) (on file with the North Carolina Law Review).

283. *See LaGrand* U.S. Counter-Memorial, *supra* note 18, para. 121.

284. *See, e.g.,* M. Wesley Clark, *Providing Consular Rights Warnings to Foreign*

*Nationals*, FBI L. ENFORCEMENT BULL., March 1, 2002, at 28 (“ ‘Violations of Article 36 followed by death sentences and executions cannot be remedied by apologies or the distribution of leaflets.’ ” (quoting Germany’s response to an apology by the United States and their endeavors to educate law enforcement about Article 36)); Peter Finn, *Foreign Leaders Laud on Death Penalty in Illinois*, WASH. POST, Jan. 18, 2003, at A19 (“ ‘The death penalty is un-American because it postulates the infallibility of a government institution,’ wrote Die Welt, the conservative German daily. ‘America’s democracy is based on the mistrust of government, on the ability to revise all decisions.’ ”); Peter Finn, *UN Wades into Death Penalty Fray; Court: U.S. Broke Pact by Executing German in 1999*, CHI. TRIB., June 28, 2001, at 4 (“ ‘I hope [the decision] sets a precedent in terms of the United States’ application of international obligations,’ said Claudia Roth, leader of Germany’s Greens Party, ‘and that all cases on non-Americans on Death Row will be reviewed.’ ”); Cragg Hines, *Consular Rights, Station House Wrongs*, HOUST. CHRON., Feb. 23, 2003, at C2 (stating that Mexico is very serious about U.S. enforcement of the Vienna Convention and noting that last year Mexico’s President, Vincente Fox, canceled a meeting with President Bush to protest the execution of a Mexican in Texas); Andrew Osborn, *US Broke Law in Double Execution*, THE GUARDIAN, June 28, 2001, at 17 (noting that Germany was quick to welcome the ICJ decision because it signifies an increase in the rights of Germans when arrested abroad); Carol J. Williams, *U.S. Ignored Law in German Case, U.N. Rules; Court: Reprimand Over Brothers’ Consular Rights and Their Executions Is Seen as a Boost to the Foes of the Death Penalty*, L.A. TIMES, June 28, 2001, at A3 (noting that German officials hailed the ruling as a victory for human rights and that German Foreign Minister Joschka Fischer welcomed the ruling as a vindication of Berlin’s position).

285. See, e.g., Sanja Djajic, *The Effect of International Court of Justice Decisions on Municipal Courts in the United States: Breard v. Greene*, 23 HASTINGS INT’L & COMP. L. REV. 27, 108 (1999) (discussing the possible political implications of the United States’ disrespect for the ICJ in the *Breard* case, including the deterioration of the United States’ international reputation and diplomatic relations with Paraguay, the denial of access to consular services for U.S. citizens arrested abroad, and the weakening of the U.S. position in seeking remedies before the ICJ in future cases); Joan Fitzpatrick, *The Unreality of International Law in the United States and the LaGrand Case*, 27 YALE J. INT’L LAW 427, 427 (2002) (stating that the *LaGrand* case has not “resulted in a discernable improvement in the United States compliance with the Vienna Convention” and that “[t]he gross deficiencies of U.S. practice regarding consular access under Article 36 of the Convention are a sad but telling reflection of the unreality of international law in the United States today”); Erik G. Luna & Douglas J. Sylvester, *Beyond Breard*, 17 BERKELEY J. INT’L L. 147, 149 (1999) (“Individual American citizens are placed in harm’s way when the government fails to adequately protect the rights of foreign citizens in the United States.”); Howard S. Schiffman, *The LaGrand Decision: The Evolving Legal Landscape of the Vienna Convention on Consular Relations in U.S. Death Penalty Cases*, 42 SANTA CLARA L. REV. 1099, 1133–34 (2002) (stating that the cases of *Breard* and *LaGrand* illustrate the need for a “more sensitive approach to the effects of a treaty breach” because these cases strain international relations, contribute to the “United States’s isolation over the issue of the death penalty,” and emphasize “an inability or unwillingness to follow through on important obligations of international law”); Cara Drinan, Note, *Article 36 of the Vienna Convention on Consular Relations: Private Enforcement in American Courts After LaGrand*, 54 STAN. L. REV. 1303, 1303 (2002) (stating that American courts have failed to correctly interpret and announce the *LaGrand* decision); Karen A. Glasgow, Note, *What We Need to Know About Article 36 of the Consular Convention*, 6 NEW ENG. INT’L & COMP. L. ANN. 117, 131 (2000) (“There does not appear to be sufficient action by the State Department with regards to its responsibility of upholding the Consular Convention.”); Chad Thornberry, Comment, *Federalism vs.*

controls the incorporation and implementation of international law obligations, especially international treaty obligations, how could the federal government aver that it had taken “all measures at its disposal” by simply requesting state compliance?

These claims, however, make more sense when viewed in the context of this Article’s account of state control over international law. A foreign entity, in this case an international court, demanded that the United States comply with a treaty obligation. In this case, the obligation required the United States to “take all measures at its disposal” to ensure the executions did not happen. However, given the nature of the federal system, the obligation required implementation by state governments rather than by the federal government. In these circumstances, the state government, on behalf of the United States, is the only body authorized to fulfill the international obligations embodied in the order.<sup>286</sup>

As we have seen, the state governments usually, but not always, comply with such international requests. In these instances of noncompliance, the state governors may have believed that their actions did not in fact violate international obligations, because a substantial body of authority supported the view that an ICJ order was not “binding” as a matter of international law.<sup>287</sup> Or the state

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*Foreign Affairs: How the United States Can Administer Article 36 of the Vienna Convention on Consular Relations Within the States*, 31 MCGEORGE L. REV. 107, 108–10 (1999) (noting that the cases of *Breard* and *LaGrand* have notified the world that the United States frequently violates its consular notification and have caused the international world to question the United States’ intentions regarding treaty obligations in general); Jennifer Lynne Weinman, Comment, *The Clash Between U.S. Criminal Procedure and the Vienna Convention on Consular Relations: An Analysis of the International Court of Justice Decision in the LaGrand Case*, 17 AM. U. INT’L REV. 857, 861–62 (2002) (noting that “many legal commentators and international scholars have criticized the United States” for relying on the Vienna Convention when U.S. citizens are overseas, while lacking a firm commitment to ensure the same rights for foreign nationals on U.S. soil).

286. Indeed, the federal government has come close to declaring that it simply lacks any power at all to enforce state compliance with an ICJ Order. In opposing Mexico’s application for a provisional measures order, the State Department argued that Mexico’s proposed order requiring the United States to “take all measures necessary to ensure” the executions did not occur “could well test the limit of federal authority, if not go well beyond it.” Avena Thessin Statement, *supra* note 282, at 32, para. 3.44 (internal quotations omitted).

287. *LaGrand* F.R.G. Memorial, *supra* note 278, para. 216 & annex 33 (Statement of Arizona Governor Jane Dee Hull); *id.* para. 4.163 & annex 59 (Statement of Virginia Governor James Gilmore); see RESTATEMENT (THIRD), *supra* note 4, § 903, reporters’ note 6 (1987) (discussing disagreement among scholars as to whether a provisional order is “binding” on state-parties to the ICJ Statute). The ICJ resolved this question in its Final Judgment in *LaGrand* and clarified that provisional orders are “binding.” *LaGrand* Judgment, *supra* note 17, paras. 98–110.

governments may simply have made the determination to refuse to comply with the ICJ order. This view may be suggested by Texas' announcement that neither the World Court nor the federal government had the power to interfere with their execution of a Mexican national convicted and sentenced under Texas law.<sup>288</sup>

Although the underlying dispute is about the "self-executing" VCCR, the question of enforcing state compliance with ICJ provisional measures orders arises under the U.N. Charter and the ICJ statute. Both treaty obligations have been previously found to be non-self-executing.<sup>289</sup> The U.S. obligation to obey the ICJ's orders is found in Article 94(1) of the U.N. Charter, which requires that "each member . . . undertakes to comply with the decision of the [ICJ] in any case to which it is a party."<sup>290</sup>

Such broad language is unlikely to be deemed self-executing given Article 94(2)'s statement that "[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the [ICJ], the other party may have recourse to the Security Council."<sup>291</sup> By indicating an alternative remedy for non-compliance, it is unlikely that a court would find the ICJ provision of the Charter to be self-executing because the Charter itself contemplates that the resolution of ICJ disputes have been committed to the Security Council.<sup>292</sup>

The fact that the Supreme Court would not enforce an ICJ order in a suit brought by an individual or a foreign state, however, does not mean that the federal government itself could not have acted to stop the executions at issue. While the President could not have exercised his pardon powers in a state conviction,<sup>293</sup> scholars have suggested

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288. See *Texas to Ignore Court Order*, *supra* note 280.

289. See, e.g., *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985) (explaining that Articles 55 and 56 of U.N. Charter are non-self-executing); *Hitai v. INS*, 343 F.2d 466 (2d Cir. 1965) (same); *Sei Fujii v. State*, 242 P.2d 617, 621 (Cal. 1952) (same); see also *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) (finding ICJ Statute does not confer a private right to enforce ICJ orders and that Statute is non-self-executing).

290. See *Reagan*, 859 F.2d at 935 (citing U.N. CHARTER art. 94).

291. U.N. CHARTER art. 94, para. 2; *Reagan*, 859 F.2d at 938.

292. U.N. CHARTER art. 94, para. 2.

293. U.S. CONST. art. II, § 2, cl. 1 ("The President . . . shall have power to grant reprieves and pardons for offenses *against the United States*, except in cases of impeachment.") (emphasis added); see also *United States v. Grossman*, 1 F.2d 941 (N.D. Ill. 1924) (holding that President's pardon power does not extend to contempt crimes). Even the German government seemed to recognize this legal fact when it acknowledged in a letter to President Clinton that, "you have no means at law to influence the decision . . . of Ms. Jane Dee Hull, the Governor of Arizona." Letter from Roman Herzog, President, F.R.G., to William J. Clinton, President, U.S., *quoted in* LaGrand U.S.

that the federal government has the power to sue the state in order to enforce the United States' treaty obligations<sup>294</sup> or to simply issue an executive order staying any state executions.<sup>295</sup> For this reason, scholars have argued that the United States failed to fulfill its international legal obligations to take "all measures at its disposal."<sup>296</sup> Although the ICJ itself stated that the "choice of means must be left to the United States" for giving effect to the treaty obligations,<sup>297</sup> it also found that merely transmitting the letter to the Governor of Arizona was insufficient.<sup>298</sup> Still, a claim that the President holds a unilateral implementation power is not entirely convincing from either a historical or functional perspective.<sup>299</sup>

Although Presidents have, on a few occasions, sued in federal court to enforce a treaty obligation,<sup>300</sup> all of these suits appear to have been brought to enforce treaties that were already self-executing.<sup>301</sup>

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Counter-Memorial, *supra* note 18, para. 123.

294. See Henkin, *supra* note 20, at 681; see also Halberstam, *supra* note 20, at 1 (discussing the federal government's constitutional authority to require states to comply with treaties that affect state criminal law proceedings).

295. Vazquez, *supra* note 20, at 690 (arguing that U.N. Charter and ICJ Statute delegate to President authority to order compliance with provisional measures orders via an executive order.).

296. Henkin, *supra* note 20, at 681; Vazquez, *supra* note 20, at 690.

297. LaGrand Judgment, *supra* note 17, 2001 I.C.J. at para. 125.

298. *Id.* paras. 111–12.

299. Nor has the federal government endorsed these mechanisms. In fact, in proceedings before the ICJ they have consistently denied that these powers exist. See, e.g., LaGrand U.S. Counter-Memorial, *supra* note 18, para. 125 (calling "an Executive order to a state governor to stay an execution . . . unprecedented and fraught with legal uncertainty.").

300. See, e.g., *United States v. Arlington*, 669 F.2d 925, 935–36 (4th Cir. 1982) (permitting U.S. to bring suit to enforce tax immunity treaty obligation); *United States v. City of Glen Cove*, 322 F. Supp. 149, 152–53 (E.D.N.Y. 1971) (same); see also *Sanitary Dist. of Chicago*, 266 U.S. 405, 425 (1925) (stating in dicta that U.S. has standing to enforce treaty obligations). The only other context for such suits appears to occur in the context of suits to enforce American Indian treaties. See, e.g., *United States v. Minnesota*, 270 U.S. 181, 191–92 (1926) (returning to Indian tribes title to certain lands held by Minnesota); *United States v. Washington*, 520 F.2d 676, 684–85 (1975) (enforcing compliance of State of Washington with Indian treaties).

301. In many cases where the President has been permitted to sue to enforce a treaty obligation, courts have regarded the treaty in question as self-executing. See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 193–95 (1999) (enforcing Treaty with the Chippewa, July 29, 1837, U.S.-Chippewa, 7 Stat. 537); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 674–685 (1979) (enforcing various Indian treaties, including the Treaty of Medicine Creek, Dec. 26, 1854, U.S.-Nisqually, 10 Stat. 1132); *Mille Lacs*, 270 U.S. at 203, 215 (enforcing Treaty with the Chippewa, July 29, 1837, U.S.-Chippewa, 7 Stat. 537, the same treaty litigated in *Mille Lacs*); *Sanitary Dist.*, 266 U.S. at 426–27 (enforcing Boundary Waters Treaty, Jan. 11, 1909, U.S.-Can., 36 Stat. 2248); *Arlington*, 669 F.2d at 935–36 (enforcing Agreed Minute on Negotiations Concerning the Establishment of Diplomatic Relations,

Extending this power to non-self-executing treaties like the ICJ Statute would be troublesome and somewhat unprecedented. If the U.N. Charter (and therefore the ICJ Statute) is "non-self-executing," it could either be because its obligations are improper for judicial resolution or because the treaty-makers sought to limit the domestic effects of the treaty, especially against the states.<sup>302</sup> Both of these motivations are plausible inferences. The U.N. Charter expressly excludes its effect on "matters which are essentially within the domestic jurisdiction of any state,"<sup>303</sup> and the United States conditioned its acceptance of compulsory jurisdiction of the ICJ on the exclusion of domestic matters.<sup>304</sup> Furthermore, Congress implemented the U.N. Charter via the United Nations Participation Act without including any provisions permitting judicial enforcement of ICJ orders.<sup>305</sup> All of these actions could plausibly support an intent of the treaty-makers to ensure no domestic effect of a treaty obligation without implementing legislation. In fact, in the context of congressional-executive agreements, Congress has specified by statute the conditions upon which the President can bring a suit to enforce an international obligation.<sup>306</sup>

Such analysis applies with equal force to the claim that the President had the authority to issue an executive order to enforce the

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Sept. 4, 1974, U.S.-G.D.R., 25 U.S.T. 2597); *Minnesota v. Block*, 660 F.2d 1240, 1257, 1259 (8th Cir. 1981) (enforcing Boundary Waters Treaty, Jan. 11, 1909, U.S.-Can., 36 Stat. 2248, the same treaty litigated in *Sanitary District*); *Washington*, 520 F.2d at 693 (enforcing various Indian treaties, including the Treaty of Medicine Creek, Dec. 26, 1854, U.S.-Nisqually, 10 Stat. 1132, the same treaty litigated in *Fishing Vessel Ass'n*); *In re Estate of Charkowsky*, 392 N.Y.S.2d 368, 370 (N.Y. Surr. Ct. 1977) (allowing consular officer to represent interests of Soviet nationals in New York estate proceeding by invoking the Consular Convention and Protocol, June 1, 1964, U.S.-U.S.S.R., 19 U.S.T. 5018, 5025).

302. See, e.g., RESTATEMENT (THIRD), *supra* note 4, § 111(4)(a) (noting that a treaty is non-self-executing if agreement "manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation"); *id.* § 111(4)(b) (treaty is non-self-executing "if the Senate in giving consent to a treaty . . . requires implementing legislation.").

303. U.N. CHARTER, art. 2, para. 7.

304. REMARKS OF HON. TOM CONNALLY RELATIVE TO THE CHARTER OF THE UNITED NATIONS FOR THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY ("CONNALLY RESERVATION"), S. DOC. NO. 79-58, at 7, 79 Cong. 1st Sess. (1945) (Serial Set# 10951).

305. United Nations Participation Act, 22 U.S.C. § 287 (2000).

306. See Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, § 102(b)(2), (c)(1)-(2), 108 Stat. 4809, 4817-18 (codified at 19 U.S.C. § 3512(2) (2000)) (barring anyone other than the United States from challenging U.S. or state action or inaction based on its consistency with the Uruguay Round Agreements); Uruguay Round Agreements Act: Statement of Administrative Action, H.R. Doc. No. 103-316, at 656, 675-77, (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4327 (Sup. Doc. No. Y1.1/7: 103-316).

ICJ orders.<sup>307</sup> While it is true that the Supreme Court has previously upheld an executive order overriding state law in *Dames & Moore*, none of the special factors cited by the Court in that case, including a long history of congressional acquiescence by statute in executive claims settlements, were relevant here.<sup>308</sup> The Court relied on an inference of congressional assent to presidential action.<sup>309</sup> This assent is harder to find in the case of the U.N. Charter (and the ICJ Statute), given that the treaty is non-self-executing and that Congress has *already* acted to implement the treaty through the United Nations Participation Act.

If the President could issue an executive order or sue to enforce any non-self-executing treaty without congressional authorization, this would result in the transfer of power to implement every “non-self-executing” treaty to the discretion of the President, even if Congress or the Senate had expressly intended to hold that power of implementation to themselves.<sup>310</sup> Elsewhere I have argued that such a transfer would raise separation of powers concerns about excessive delegation.<sup>311</sup> Here, the separation of powers limitation works in tandem to protect federalism as well, because, as many nationalist scholars have argued, Congress (or the Senate alone) has political incentives to protect state autonomy.<sup>312</sup> A strict application of the non-self-execution doctrine, however, would avoid the excessive delegation and federalism concerns by essentially leaving the power to implement ICJ orders to the states.<sup>313</sup>

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307. Vazquez, *supra* note 20, at 690.

308. *Dames & Moore v. Regan*, 453 U.S. 654, 681 (1981) (holding that the statutory grant of Presidential authority to settle claims indicates “congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case”).

309. *Id.*

310. President Clinton took some limited steps to implement non-self-executing treaties under his own constitutional authority. See Implementation of Human Rights Treaties, Exec. Order No. 13,107, 63 Fed. Reg. 68991, 68991 (Dec. 10, 1998) (instructing “[a]ll executive departments and agencies . . . [to] maintain a current awareness of United States international human rights obligations that are relevant to their functions and [to] perform such functions so as to respect and implement those obligations fully.”). Even this very narrow assertion of presidential power over the non-self-executing human rights treaties sparked criticism in Congress. See, e.g., 145 CONG. REC. E139–40 (daily ed. Feb. 4, 1999) (Extension of Remarks of Rep. Schaffer) (characterizing the executive order as an attempt to circumvent the Senate in the implementation of “controversial U.N. treaties”).

311. See Ku, *supra* note 47, at 100–04 (arguing that ICJ provisional measures orders could be subject to non-delegation doctrine attack).

312. See, e.g., Golove, *supra* note 11, at 1294–99; HENKIN, *supra* note 5, at 167–69.

313. Here, I borrow Professor Bradley’s idea that the non-self-execution doctrine can be understood as a mechanism for limiting delegations while not actually wielding the long moribund non-delegation doctrine. Curtis A. Bradley, *International Delegations, the*



Of course, this does not resolve the policy dilemma caused by leaving the states in control of what appear to be classic foreign policy matters. Yet, as Part IV discusses, this policy dilemma is not so stark as it first may appear. While it is true that states appear to hold discretion over certain foreign policy questions in such circumstances, the reason the states hold that power is because the foreign policy question directly implicates a matter of state control. Consistent with the federal government's practice with respect to tax immunities or even VCCR violations, such state intervention in foreign policy issues is tolerated because the interest in maintaining state authority over such domestic matters outweighs the need for imposing a national and international system.

The view that the President could either sue or simply order state compliance with the ICJ orders is emblematic of the nationalist conception of international law. Both of these theories of federal power assume that states cannot (and should not) hold the last word when it comes to an international obligation, especially an international treaty obligation. In fact, Professor Vazquez charges that the federal government's claims of powerlessness over the states are "ill-founded and insincere," and declares unequivocally that "our Constitution does not leave the decision whether to comply with ICJ orders . . . to state Governors."<sup>314</sup>

Yet, as this Article has already shown in the context of tax immunity and alien inheritance rights, where Congress has declared a treaty non-self-executing or otherwise limited its domestic effects, states *do* control the decision of whether and how to comply with the international obligation embodied in the ICJ orders, if only because the federal government has allocated this role to them. Because the ICJ Statute is non-self-executing, the decision to comply with ICJ order *does* rest with state governors, as odd as that may seem. But in a system where states commonly are responsible for carrying out

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*Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1557-60 (2003). While I agree that most concerns about delegation concerns can be limited by such measures, I continue to believe the non-delegation doctrine can provide a useful analytical framework for assessing the transfer of power to international institutions because the non-self execution doctrine depends to some great degree on the political branches' willingness to utilize it. The non-delegation doctrine is the type of judicial safeguard that can ensure compliance with constitutional structure as well as harness the legitimating force of the courts to endorse and confirm our relationships with international institutions. See Ku, *supra* note 47, at 135-44.

314. Vazquez, *supra* note 20, at 690-91; see also Halberstam, *supra* note 20, at 14-15 (arguing that the Constitution grants the federal government authority to require compliance with ICJ judgments).

international obligations on behalf of the United States, it would have been extraordinary for the federal government to have acted differently than it did. At the very least, federal officials' reluctance to act against the states can hardly be denigrated as insincere.

*D. International Human Rights Treaties*

The last Section suggested that, according to the President, the power to implement ICJ orders touching on matters within state jurisdiction rests with the states. This Section argues that, according to the Senate, states also independently control the implementation of U.S. obligations under major international human rights treaties. For instance, the Senate ratification of the International Covenant on Civil and Political Rights ("ICCPR") was accompanied by a declaration that:

The United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.<sup>315</sup>

Similar understandings were attached to the ratification of two other international human rights treaties<sup>316</sup> to which the United States is a party and have been proposed for two others still being considered.<sup>317</sup> In addition to these understandings, the Senate has

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315. U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 102nd Cong., 138 CONG. REC. S4781, S4784 (daily ed. Apr. 2, 1992) [hereinafter ICCPR Ratification].

316. U.S. Senate Resolution of Advice and Consent to Ratification of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 101st Cong., 136 Cong. Rec. S17486, S17904 (Oct. 27, 1990) (Pell & Helms Executive Amendments); U.S. Senate Resolution of Advice and Consent to the Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination, 103rd Cong., 145 Cong. Rec. S7634, S7634 (June 24, 1994) [hereinafter Racial Discrimination Ratification].

317. Senate Comm. on Foreign Relations, REPORT RECOMMENDING RATIFICATION OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, S. EXEC. REP. NO. 107-9 at 9, 12 (2002) (Sup. Doc. No. Y1.1/6: 107-9) [hereinafter CEDAW Recommendation]; Message from the President of the United States Transmitting Four Treaties Pertaining to Human Rights, S. EXEC. REP. NO. 95-2, C-F (Feb. 23, 1978) [hereinafter Carter Message] (recommending ratification of four

attached “non-self-execution” declarations to each of these treaties precluding judicial enforcement of these treaties.<sup>318</sup>

Read from the nationalist perspective, the federalism understanding seems at best redundant because implementing the ICCPR or other human rights treaties “to the extent of the federal government’s legislative and judicial jurisdiction” should not leave any role for the states.<sup>319</sup> As Professor Henkin states, the understandings “serve no legal purpose” because the federal government already exercises jurisdiction over all matters implicated by the treaty, if for no other reason than because of the existence of the treaty.<sup>320</sup>

To be sure, the legal purpose of the “understandings” is hardly self-evident. Because they are not “reservations,” they do not appear to limit the United States’ obligations under international law.<sup>321</sup> Thus, they do not specifically limit the treaty obligations to asking for state implementation in the same way as the so-called “federal-state” clauses to treaties do.<sup>322</sup> On the other hand, the understandings are clearly conditions upon which ratification takes place and the federal government has, at various times, suggested that it intends the understandings to limit U.S. obligations under international law.

For instance, when submitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”), the State Department attached what it called a “federal-state reservation” that would limit the scope of U.S.

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treaties with federalism understandings, including International Covenant on Economic, Social and Cultural Rights.).

318. See CEDAW Recommendation, *supra* note 317, at 10–11; Carter Message, *supra* note 317, at xv. These non-self executing declarations are controversial among scholars. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 401 n.4 (2000) (citing to scholarly criticism of non-self executing declarations). Nonetheless, these declarations have thus far been enforced by courts. See, e.g., *Domingues v. State*, 961 P.2d 1279, 1280 (Nev. 1998) (giving effect to ICCPR’s non-self executing declarations).

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

320. *Id.* at 346; see also Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 G.W. J. INT’L L. & ECON. 49, 59 (1997) (stating a federalism reservation is unnecessary).

321. See Henkin, *supra* note 319, at 346.

322. See, e.g., Convention for the Protection of World Cultural and Natural Heritage, Nov. 23, 1972, art. 34(b), 27 U.S.T. 37, 49 (limiting obligations of federal states to recommending that states implement legislation to comply with treaty obligations); Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. VI, 19 U.S.T. 6223, 6227–28 (same); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. XI(b), 21 U.S.T. 2517, 2521 (same); Constitution of the International Labor Organization, Oct. 9, 1946, art. 19(9), 62 Stat. 3485, 3526 (same).

obligations to implement the Convention.<sup>323</sup> It further explained that the United States would implement obligations to provide training of persons involved in treatment of detained persons “with respect to law enforcement forces acting under its authority or control.”<sup>324</sup> However, with respect to state and local law enforcement forces, “the Federal Government would take appropriate measures to the end that the competent authorities of the states may take appropriate measures for the fulfillment of [the Convention Articles].”<sup>325</sup>

One reading of this far from pellucid language is that the federal government’s implementation, with respect to state and local law enforcement, would be to the same “end” or extent as whatever “appropriate measures” the states take to fulfill the Convention. This implies that the federal government was asserting its right to take the same “appropriate measures” that the states could take.

Such a reading is unlikely, however, given the stated purpose of attaching this statement. This language originated in President Carter’s original submission of four treaties to the Senate.<sup>326</sup> In that submission, the State Department described the understanding as a “reservation designed to deal with . . . provisions . . . which impose obligations whose fulfillment is dependent on the legal power of the state and local governments as well as the federal government.”<sup>327</sup>

In light of this history, the better reading is that the United States’ implementation at the state and local level would consist of those implementation actions taken by the states. This second reading is strengthened by Senator Helms’s amendment to the language, which modified the first clause to read that the “Federal Government shall take measures appropriate to the Federal system.” This amendment (and perhaps the well-known views of its sponsor as well)<sup>328</sup> strengthens the proposition that the federal government’s

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323. Report of the Senate Committee on Foreign Relations on the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. EXEC. REP. NO. 101-30, 13, 36 (Aug. 30, 1990) (Sup. Doc. No. Y1.1/6: 101-30).

324. *Id.* at 23.

325. *Id.*

326. See Carter Message, *supra* note 317, at vii.

327. *Id.* at viii.

328. Senator Jesse Helms of North Carolina served as Chairman of the Senate Foreign Relations Committee from 1994 to 2001 before retiring from the Senate. His skepticism of international institutions and defense of what he called “American sovereignty” made him the bete-noire of many internationalists and international law advocates. Prior to becoming the chairman of the Committee on Foreign Relations, Senator Helms was an outspoken member of that same committee, at one point attaching a separate statement to the committee report recommending ratification of the Genocide Convention filled with criticisms of international institutions and their encroachment on American sovereignty.

“appropriate measures” are limited by the “Federal System” to whatever “appropriate measures” are taken by the states. The modified “federalism understanding” language was also adopted with respect to ratifications of the ICCPR and the Racial Discrimination Convention.<sup>329</sup>

More recently, the Senate Foreign Relations Committee report recommending ratification of the Convention for the Elimination of Discrimination Against Women (“CEDAW”) described the purpose of a modified proposed federalism understanding in this way:

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, the administration is proposing an understanding to make it 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.<sup>330</sup>

The Report goes on to explain that federalization is not necessary to implement certain parts of CEDAW affecting public education and “[i]n some areas, it would be inappropriate to do so” where federal control is “expressly limited by statute.”<sup>331</sup>

Although the various statements from the Senate and the President with regard to these understandings do not explicitly claim that federal implementation would in some cases be unconstitutional, they do state that the federal role is “limited” and that federalization would be “inappropriate.”<sup>332</sup> Even though the Clinton Administration’s proposed federalism understanding removed Senator Helms’s “federal system” language,<sup>333</sup> there is no reason to

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*See generally* SEPARATE STATEMENT OF SENATOR JESSE HELMS, REPORT ON THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, S. EXEC. REP. NO. 98-50 (1984) (Sup. Doc. No. Y1.1/6: 98-50).

329. *See* ICCPR Ratification, *supra* note 315, at S4783; Racial Discrimination Ratification, *supra* note 316, at S7364.

330. REPORT OF THE SENATE COMMITTEE ON FOREIGN RELATIONS RECOMMENDING RATIFICATION OF THE CONVENTION FOR THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, S. EXEC. REP. NO. 103-38 at 7 (1994) (Sup. Doc. No. Y1.1/6:103-38) [hereinafter CEDAW Report].

331. *Id.* at 22.

332. *Id.*

333. In its last submission, the Clinton Administration modified the language of the last sentence to read: “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.” *Id.* at 223 (describing federalism understanding proposed by Clinton administration).

believe (especially in light of its response to the *Breard* ICJ orders) that that administration did not believe the states are responsible for implementing at least some parts of CEDAW.

Because the non-self-execution declarations preclude judicial enforcement, this practice of conditioning ratification of treaties on the attachment of federalism understandings leaves the states in control of the implementation of international human rights obligations. Indeed, it is likely that the states retain some independent jurisdiction with which the federal government cannot interfere.

As mentioned previously, this idea of state implementation of treaty obligations has been sharply criticized by scholars defending the nationalist view.<sup>334</sup> But as a practical matter, the “monstrous” system Professor Golove so feared has already come to life. Whether or not the federal government is constitutionally prohibited from passing implementing legislation for international human rights treaties against the states, the fact remains that no such implementing legislation has been enacted or even proposed. Moreover, in many cases, the treaty-makers specifically contemplated that implementation would be carried out by the states. This decision has thus left control of compliance with international human rights obligations to the state governments.

This understanding sheds new light on Professor Vazquez’s aforementioned argument that federalism understandings violate the ban on commandeering state officials announced in *Printz v. United States*.<sup>335</sup> A treaty would normally bind state officials under the Supremacy Clause but for the treaty’s non-self-execution reservation. In these circumstances, the states have the independent authority to implement *international law as international law* (but not international law as federal law), a power which they have already exercised in the implementation of tax immunities for consuls, the protection of aliens, and consular rights.

Although Professor Vazquez believes that this view of the understandings “is in deep tension with our constitutional scheme,”<sup>336</sup> because the federal government would not be able to prevent treaty violations by the states,<sup>337</sup> this Article has demonstrated that states often hold broad discretion to incorporate and implement

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334. See *supra* notes 79–93 and accompanying text (describing views of Professors Golove and Vazquez).

335. 521 U.S. 898, 935 (1997).

336. Vazquez, *supra* note 88, at 1358.

337. See *id.* at 1357–58.

international obligations. The fact that similar understandings continue to be attached to proposed treaties<sup>338</sup> suggests that the states will maintain this central role in the future.

### *E. Summary*

In the modern era, states often implement U.S. obligations under treaties state-by-state through the Uniform Laws system, through independent adoption of legislation, or through independent action by state executives. Such implementation has even preceded Senate ratification resulting in some states “complying” with obligations that the United States has not even undertaken.<sup>339</sup> In other cases, the states have essentially replaced Congress in the process of implementing treaties. At the very least, states appear to supplement gaps in self-executing treaties and implementing legislation.<sup>340</sup> In the context of international human rights, it is likely that the federal government has specifically allocated this role to the states. In all of these areas, the states, and not the federal government, have become the key institutions for carrying out U.S. obligations under international treaties.

These examples of state implementation of international obligations, even those obligations required by self-executing treaties that already held the status of supreme federal law, suggest that the nationalist conception has seriously underestimated the importance of states in the incorporation and implementation of international law. States do not merely carry out international obligations as the federal government commands. Instead they are independently employing the power that has been allocated to them (or left to them), which requires that they decide whether and how to comply with international law obligations.

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338. See CEDAW Report, *supra* note 330, at 9, 12.

339. See *supra* note 235 (listing states that adopted the Uniform International Wills Act prior to Senate advice and consent).

340. Additionally, some states have adopted model legislation that itself was developed by international institutions to harmonize and unify private law. For instance, five states have adopted the UNCITRAL Model Law on International Commercial Arbitration (California, Connecticut, Illinois, Oregon, and Texas). United Nations Commission on International Trade Law, Status of Conventions and Model Laws, pt. II, para. 10, at <http://www.uncitral.org/en-index.htm> (last visited Nov.10, 2003) (on file with the North Carolina Law Review). Similarly, forty-four states plus the District of Columbia enacted the Uniform Electronic Commerce Act, which in some cases explicitly adopts the UNCITRAL Model Law on Electronic Commerce. *Id.* at pt. II, para. 13. While such actions do not create “international law”, they do represent a new phenomenon: the states enacting legislation promulgated by international institutions without any federal oversight or involvement.

#### IV. THE IMPLICATIONS OF STATE CONTROL OVER INTERNATIONAL LAW

This Article's primary goal has been to establish, as a descriptive matter, the existence of a system of state control over international law compliance. This Part, however, considers the implications of such a system for the scholarly debate over the role of states in foreign affairs and, more generally, for the development of international law in the United States.

##### A. *More Than "One Voice"*

As many scholars have pointed out, the Supreme Court has stated on a number of occasions that it is necessary for the United States to speak with one voice on matters involving foreign policy.<sup>341</sup> Moreover, there is ample evidence that the founding generation sought to prevent states from violating treaties and thereby inviting foreign policy consequences for the nation as a whole.<sup>342</sup>

The longstanding existence of a system in which states control compliance with various types of international law, however, suggests that the U.S. system tolerates more voices, at least with respect to international law, than either the Court's or Founders' statements seem to indicate. Where international law intersects directly with areas of traditional state control, the states have more often than not been responsible for fulfilling those international obligations. The federal government has not only failed to enforce "one voice" with respect to many international law matters, but it has often explicitly disclaimed an ability to do so.

Professor Spiro has argued that the increasing diversity of state voices in foreign affairs indicates the rise of a new conception of states on the world stage as "demi-sovereigns."<sup>343</sup> In his view, a regime of federal exclusivity was contingent on the different social and political imperatives of the nineteenth and twentieth centuries.<sup>344</sup> The rise of globalization in the late twentieth and early twenty-first

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341. See *supra* notes 31–45 and accompanying text.

342. See, e.g., THE FEDERALIST NO. 3, at 15 (John Jay) (Jacob. E. Cooke ed., 1961) ("[U]nder the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner,—whereas adjudications on the same points and questions in thirteen states . . . will not always accord or be consistent . . ."); Jack N. Rakove, *Making Foreign Policy—The View from 1787*, in FOREIGN POLICY AND THE CONSTITUTION 1, 1–3 (Robert A. Goldwin & Robert A. Licht, eds., 1990) (describing importance of creating uniform foreign policy among Constitution's framers).

343. Spiro, *supra* note 26, at 161–74.

344. *Id.*; Spiro, *supra* note 68, at 1227–28.



century and the increased complexity of cross-border interactions, he has argued, has obviated the need for imposing "one voice" on foreign relations law.<sup>345</sup> Though the preceding description of state control of international law compliance dovetails nicely with his broader theory, this Article does not claim (as Spiro seems to suggest) that the state-control system is historically contingent. Rather, this account suggests that states have long played this role in compliance with international law, even during the period of "federal exclusivity" that Spiro believes existed in the nineteenth and twentieth centuries.

Nevertheless, it is probably true that the functional imperative for "one voice" has probably been overstated. Not all foreign policy questions are created equal. To be blunt, some matters of foreign policy are simply more important than others. Adhering with one voice to certain international obligations may simply not be as important as maintaining a commitment to constitutional norms such as federalism or separation of powers. The recognition that the United States may sometimes prefer violating international law over violating domestic law is embodied in doctrines such as the "last in time" rule that permits Congress to abrogate a treaty with a statute passed later in time<sup>346</sup> and the Supreme Court's refusal to exempt treaties from the Constitution.<sup>347</sup>

It is certainly not irrational for Congress and the President to prefer a method of implementation that, while probably not perfect, creates a balance between respecting state autonomy and fulfilling international law obligations. Depending on the relative importance of a particular international obligation, then, the federal government could (as it has done in most cases) choose to leave the incorporation and implementation of certain international obligations to the states and even tolerate non-uniformity. This is essentially how the federal government has chosen to implement most conventions in private international law. Such a system is hardly radical or absurd. In fact, it is essentially the same result as the system of treaty implementation adopted by Canada.<sup>348</sup>

Additionally, in some cases, state institutions may be the most effective mechanisms for achieving compliance with different types of international obligations. State legislation, for instance, may be a

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345. Spiro, *supra* note 26, at 161-74; Spiro, *supra* note 68, at 1225-28.

346. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

347. See *Reid v. Covert*, 354 U.S. 1, 18-19 (1957) (plurality opinion).

348. See JAMES MCLEOD HENDRY, *TREATIES AND FEDERAL CONSTITUTIONS* 122-27 (1975) (describing Privy Council's decision limiting power of central government to implement treaty against the provinces).

more practical and effective mechanism than new federal legislation for implementing obligations to guarantee statutory notice in probate proceedings or exempting consuls from property taxes.<sup>349</sup> Indeed, international treaty obligations are already being implemented by some states, even prior to ratification, through the uniform law system. There is no reason to believe that this “private lawmaking” system cannot be used to implement compliance with international obligations.<sup>350</sup> As the State Department’s foray into state-by-state lobbying to win exemptions in gasoline taxes suggests, such a process would not be unprecedented either.

### *B. Development of International Law*

Supporters of the nationalist conception have also suggested that leaving international law implementation to the states would complicate and even weaken adherence to international law.<sup>351</sup> As an empirical matter, it is an open question whether the existing regime actually prevents the United States from adhering to international law. In fact, the leading work in this vein has failed to reveal any meaningful difference between U.S. and European compliance with international human rights treaties.<sup>352</sup> As this Article’s account suggests, states have largely acted to implement international law obligations without the threat of federal intervention, and there is no evidence to suggest the United States is more of an international law scofflaw than other nations due to its federal system.<sup>353</sup> Indeed, the usage of the uniform laws system to implement treaty obligations will likely ensure that adherence to international law obligations will be no less remarkable than states’ adherence to the Uniform

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349. See *supra* notes 127–74 and accompanying text.

350. Or, as Professor Swaine has suggested, certain states could be authorized to enter into compacts with foreign nations, thus permitting federalism concerns to be respected while allowing those states wishing to enter into international agreements to do so. See Edward Swaine, *Can Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 447–49 (2003). While such a method is certainly a creative solution to the federalism dilemma, my understanding is that this process *could already occur* because states could adopt laws that entitle them to reciprocity from foreign jurisdictions even in the absence of a treaty or compact. See *supra* notes 221–37 and accompanying text (discussing the Washington Convention).

351. See *supra* notes 46–62 and accompanying text.

352. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1935, app. at 2034–39 (2002) (presenting data which suggests that U.S. compliance with certain human rights treaties is similar to other industrialized countries and significantly better than many other countries).

353. Indeed, as pointed out previously, Canada, often a leading proponent of international law compliance, has adhered to a system of province by province treaty implementation. See HENDRY, *supra* note 348, at 122–27.

Commercial Code.

A system of state control over the implementation of international law obligations strikes a balance between the development of international law and our constitutional commitment to federalism. At least in the treaty-making context, the Senate's commitment to preserve a role for the states in the implementation of treaties may be necessary for American adherence.<sup>354</sup> Given the substantial political influence of the countermajoritarian Senate in foreign affairs, maintaining a circumscribed federal role in the implementation of international law obligations may well increase the likelihood of the adoption of international law norms in at least some parts of the United States.<sup>355</sup>

Finally, as some scholars have suggested, a robust and active role for states in the international lawmaking sphere may actually foster more rather than less development of international law, especially customary international law.<sup>356</sup> On this view, states can contribute to the formation of customary international law norms by fulfilling international law obligations which the federal government has not yet endorsed. Such actions by the states can spread upward to the federal government or across borders to other states or nations, thus contributing to the "formation" of customary international law. In Professor Powell's conception, states can thus participate in a "dialogic federalism" process that she suggests will bolster and strengthen international law norms.<sup>357</sup>

### C. *Bolstering Legitimacy for the New International Law*

As scholars have noted elsewhere, much of the future conflict between federalism and international law will arise because of a "new" type of international law that regulates a nation-state's interactions with its own nationals.<sup>358</sup> This new international law, much of it embodied in modern international human rights conventions and private international law, is more likely to intersect with the autonomy of the several states than traditional international

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354. See, e.g., Bradley & Goldsmith, *supra* note 28, at 457–67 (arguing that RUDs may facilitate greater U.S. participation in human rights treaty regimes).

355. See, e.g., Bradley, *supra* note 29, at 289–90.

356. Powell, *supra* note 30, at 250–51.

357. *Id.*

358. See Ku, *supra* note 47, at 83–88; Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555, 1556 (describing a new international law regulating relations between nation states and their own citizens).

law, which dealt mostly with state-to-state relations.<sup>359</sup>

In fact, the increased likelihood that international law will conflict with domestic law actually increases the importance of adhering to constitutional constraints. International law that has the effect of overriding domestic law, which in the United States will often be state law, needs the most solid foundation of political legitimacy possible. Therefore, aggressive judicial review to enforce these constitutional constraints, which may implicate separation of powers, individual rights, and federalism concerns, is an important element of building that foundation of political legitimacy.<sup>360</sup> Unfortunately, the nationalist conception often deprives international law of that solid foundation by insisting that federal institutions exercise broad, constitutionally-suspect power over the states. In light of this Article's account of the historical practice of the federal government with respect to international obligations implicating state autonomy, it is not surprising that, even today, the federal government refuses to exercise what many nationalist scholars believe are basic and uncontroversial powers. As the United States declared before the International Court of Justice with respect to claims about the federal government's powers to stop a state execution:

In a government that operates under the rule of law, the chief executive is not asked to sign orders of any kind without careful preparation and research to ensure that the order is legally authorized and sound. An Executive order to a state governor to stay an execution would have been unprecedented and fraught with legal uncertainty.<sup>361</sup>

Indeed, this Article's account of the interaction between federal and state decisionmakers in the international law-making process suggests that federal policymakers have restrained themselves because of doubt about the constitutional legitimacy of the nationalist view of international law.<sup>362</sup> These concerns are even greater in the context of the "new" international law, which has the potential to reshape more state law than the "old" international law interventions on behalf of consuls and aliens could have ever imposed.

By leaving much of the incorporation, implementation, and

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359. See Bradley, *supra* note 8, at 396–98.

360. *Id.* at 394.

361. LaGrand U.S. Counter-Memorial, *supra* note 18, para. 125.

362. Avena Thessin Statement, *supra* note 282, at paras. 3.43–3.44 (arguing that the ICJ was seeking to force the federal government to "test the limits" of its authority over the states).

execution of international law to the states, the federal government can confer the greatest amount of political legitimacy on the new international law. Rather than international law imposed from above through questionable constitutional mechanisms, international law can be “made” in a manner free from constitutional doubt—by the states.

#### CONCLUSION

Although the Supreme Court has suggested states do not “exist” with respect to foreign affairs, this Article has suggested that, at least with respect to international law, the states remain alive and well. A review of the practice of the United States with respect to customary international law and treaty obligations reveals that the states have controlled the implementation of many important U.S. responsibilities under international law.

The continuing importance of the states is confirmed by the federal government’s recent interaction with the International Court of Justice in disputes over the provision of consular notification rights to arrested foreign nationals and the federal government’s use of the uniform laws system to implement private international law treaties. Whether or not the nationalist conception prevails as a matter of constitutional doctrine, the states will almost certainly maintain their important role in the system for carrying out U.S. obligations under international law.

This system limits fears of unchecked international lawmaking power by permitting the United States to participate in the development of international law while at the same time protecting state autonomy. In this system, customary international law obligations implicating state law that are not codified by treaty or statute are left to the states to fulfill. Additionally, compliance with relevant non-self-executing treaties or self-executing treaties whose effect has been limited by other federal law, is held by the states.

Recognition of this flexible federalism-friendly system for compliance with international law may actually encourage more, rather than less, U.S. participation in the development of international law because states can actually contribute to the formation of customary international law norms. At the very least, resort to this system of state control will confer greater political legitimacy on such law than the nationalist conception can provide.

Hence, for the foreseeable future, the State of New York (as well as the other forty-nine states) will continue to exist, and indeed

thrive, as part of the system for fulfilling international law obligations within the United States. The task for courts and commentators is first to recognize the importance of states in this process and then to move toward considerations of how best to accommodate the development of international law to this constitutional reality.

