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## The Promise and Limits of Local Human Rights Internationalism

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# THE PROMISE AND LIMITS OF LOCAL HUMAN RIGHTS INTERNATIONALISM

*Lesley Wexler\**

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## INTRODUCTION: FROM THE INTERNATIONAL TO THE LOCAL

For many people across the globe, human rights remain aspirational. American politicians and diplomats often speak of the need to improve human rights abroad in places such as China, Sudan, and North Korea.<sup>1</sup>

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1. See, e.g., U.S. DEP'T OF STATE, SUPPORTING HUMAN RIGHTS AND DEMOCRACY: THE U.S. RECORD 2006 (2006), *available at* <http://www.state.gov/documents/organization/80699.pdf>; Hillary Rodham Clinton, U.S. Sec'y of State, Remarks on the Sudan Strategy (Oct. 19, 2009), *available at* [www.state.gov/secretary/rm/2009a/10/130686.htm](http://www.state.gov/secretary/rm/2009a/10/130686.htm).

Popular political discourse recognizes much less often the need to turn inward and improve our own government's human rights behavior, be it federal, state, or local. Despite the lack of mainstream support, for the last several years, NGOs and academics have increasingly criticized the failure of domestic actors to successfully bring human rights home. These critiques have given way to a second stage in the human rights struggle—the articulation of justifications, structures, and specific policies for implementing domestic human rights.

This piece is the fourth of a multi-part series of papers that takes a supportive but also critical approach to the project of bringing international law home. The first piece, *Take the Long Way Home: Sub-Federal Integration of Unratified and Non-Self-Executing Treaty Law*,<sup>2</sup> documented the existence of apathetic and intransigent federal actors and identified the role of sub-federal actors such as states and cities in implementing unratified and non-self-executing treaty law. In so doing, that paper acknowledged the significant federal limits on such behavior and discussed the limited role of sub-federal actors in promoting federal ratification. It also hypothesized that existing local and regional efforts on the Kyoto Protocol and the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) would serve as models for expanded sub-federal behavior.

The second piece, *The Non-Legal Role of International Human Rights Law in Addressing Immigration*,<sup>3</sup> contended that even unratified international human rights law influences non-binding regional processes, contributes to the development and dissemination of best practices, and helps produce and codify a human rights discourse. I looked outside of formal international law structures to identify ways in which human rights can move from international law into the state. This Article investigated regional consultative processes and Italy's immigration reforms as examples of state actors undertaking voluntary compliance with human rights norms outside of traditional pathways.

Most recently, *Human Rights Impact Statements: An Immigration Case Study*<sup>4</sup> proposed that domestic government actors, including states and localities, undertake human rights review of pending legislative and agency actions. I used the highly successful and much copied model of environ-

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

3. Lesley Wexler, *The Non-Legal Role of International Human Rights Law in Addressing Immigration*, 2007 U. CHI. LEGAL F. 359.

4. Lesley Wexler, *Human Rights Impact Statements: An Immigration Case Study*, 22 GEO. IMMIGR. L.J. 285 (2008).

mental impact statements as a starting point, but looked also at instances where government actors used such reviews to conduct more qualitative analyses. This Article addressed some design issues raised by such a proposal including: (1) which policies should be subject to assessment; (2) which governmental entities should conduct them; and (3) what consequences ought to flow from a human rights assessment or impact statement. Though I reached no conclusive recommendations, I noted the possibility and benefits of state and local experimentation in working through some of these design questions.

As a part of this larger project, this Article once again focuses on cities as a vital pathway for the movement from the international to the local. Like the prior works, this Article mixes theories, hypotheses, and case studies to illuminate the potential for bringing international law home. While the nation-state remains an extremely important player in the formation and enforcement of international law, international law also influences behavior by moving through sub-federal actors and regional sites. Sometimes this change occurs at the national government's behest, but oftentimes it also occurs when other government actors bypass those nation-states resistant to its pull. This Article seeks to explain why and how cities in particular can play an important role in bringing human rights home.

In the fifth and likely final paper, I anticipate concluding this discussion by looking closely at various methods to move human rights into the administrative state. That piece will compare a variety of human rights institutions that can be integrated at the federal, state, and local levels. I wish to look more deeply at the possibility for human rights impact statements, as well as determining the role for human rights commissions and ombudsmen. I plan on returning to some of the case studies introduced in earlier works, but this time for a sense of their administrative structure and design choices.

In so doing, this final work seeks to complete the cycle with the philosophical justifications for administering the human rights state. The works in this project share the assumption that while we may all inherently possess human rights, the contours of those rights are also something articulated in and constituted by both international and domestic law. Thus, this Article will also return to the recurring theme of creating a human rights discourse. I intend to argue that advocates sometimes overlook the boundaries of those inherent human rights and elide the justifications needed for creating enforceable protection of them. I will suggest that administering a human rights state can create the sort of reasoned articulation necessary to forge a consensus in favor of strong human rights protection. I wish to show how these various human rights institutions themselves can serve as

justifying bodies for the content of human rights by serving as vital sites of specification.

Before moving into this final component, however, this current paper needs to first explain the role of cities in the overall project. In recent years, international law scholarship has moved beyond a statist conception in which only national governments create and then implement international law.<sup>5</sup> Rather, bodies at all levels ranging from the transnational, such as regional consultative process and more formal international institutions, to state legislatures and state courts, and to local units such as cities, have all become active participants in the project of enshrining human rights in law. While previous works mostly took as a given federal inactivity in regards to human rights treaties, Part I reviews the numerous historical, political, and structural reasons for the limited federal efforts to integrate human rights treaties at home. These include the institutional objections of International Federalists, the substantive objections of Positive Rights Rejecters, and the political discretion concerns of the Flexible Foreign Policy Advocates. Although a domestic constituency supportive of human rights exists, until recently, it has focused mainly on human rights promotion rather than internal integration, and, thus, not created a strong counterbalance to the various political opponents.

I then link these political objections to the various structural hurdles through which treaties must pass. Such obstacles include the limited power of the executive's signature, the composition of the Senate, and various Senate procedures for treaty ratification. Though such obstacles are not insurmountable, I explain why they are particularly likely to pose challenges for human rights treaties.

Part II begins with a typology of various local human rights initiatives. Such categorization can help identify when constitutional, political, and

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5. See, e.g., Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, in NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 110 (Janne Nijman & André Nollkaemper eds., 2007); Sarah Cleveland & Catherine Powell, *Foreword to Human Rights in the United States: A Special Issue Celebrating the 10th Anniversary of the Human Rights Institute at Columbia Law School*, 40 COLUM. HUM. RTS. L. REV. 1 (2008); Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393 (2007); Hari M. Osofsky, *Is Climate Change "International"?* *Litigation's Diagonal Regulatory Role*, 49 VA. J. INT'L L. 585 (2009); Catherine Powell, *Foreword to Symposium, International Law and the Constitution: Terms of Engagement*, 77 FORDHAM L. REV. 399 (2008); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001); Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007); Melissa A. Waters, *Normativity in the "New" Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts*, 32 YALE J. INT'L L. 455 (2007).

economic limitations are most likely to be present. I then articulate some reasons why some cities might be more likely—and more effective—first movers. These include possible political homogeneity, avoidance of certain federal level objections, enhanced capacity to generate visible benefits for their constituents, and structural advantages in passing ordinances. In undertaking those efforts to integrate human rights, cities might create some local benefits that exist above and beyond mere substitution for federal action. I also wish to identify some of the city-specific gains that may arise from local implementation. Cities can capture good governance gains independent of whether the federal government decides to act. As they often provide basic social services and possess a large bureaucracy, subjecting city bureaucracies to human rights creates gains for its residents, regardless of what actions states and the federal government decide to undertake. So even in those instances in which the federal government acts to bring human rights home, cities can supplement and reinforce those efforts by acting as laboratories and providing an additional layer of protection by promoting good government.

This section, however, concludes by identifying some structural limitations on cities that do not exist at the federal level and by cautioning those who believe cities to be a likely motivator of federal behavior.<sup>6</sup> Many of the same factors that allow cities space to act also serve as impediments to effective state and federal spillovers. While cities can perform much significant work bringing human rights home, we must simultaneously acknowledge that they also labor under significant structural and political constraints in order to have a realistic sense of cities' true potential in bringing human rights home.

### **I. U.S. FEDERAL GOVERNMENT AS A RELUCTANT AND INCOMPLETE FIRST MOVER**

Given the federal government's exclusive authority to conduct treaties with foreign powers<sup>7</sup> and the limitation on sub-federal actors' abilities to conduct agreements and compacts with those same actors, the federal government seems at first blush to be the first best actor in bringing human rights home. Regardless of this statement's accuracy, it does not necessarily follow that the U.S. federal government will or must be the first mover in this arena. This section details the various reasons why the U.S. federal government is often, and perhaps systemically, reluctant to prioritize the

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6. I have discussed in other works why cities cannot capture all of the benefits of treaty ratification, so I will not return to that subject here. *See, e.g.*, Wexler, *supra* note 2, at 32-35.

7. U.S. CONST. art. 1, § 10.

ratification and domestic enforcement of international human rights as embodied in treaty law.

Before describing the reasons for the government's reluctance, I want to draw attention to two rather large, related assumptions of my project. First, this Article presumes that many benefits flow from framing substantive policies in the human rights framework. While this Article looks at many human rights treaties and ordinances that might be reimagined instead as part of a civil rights agenda, or public health program, or good governance initiative, I more fully explore the reasons to prefer a human rights framework in some of the other papers in this series. In short, I have argued elsewhere human rights may provide a better mechanism to mobilize domestic and international support, build domestic and international networks, and capture domestic and international media attention. Of course, such a contention is an empirical question that needs to be empirically tested.<sup>8</sup> Yet this paper addresses a different part of the puzzle by explaining why some cities may be particularly likely to pass human rights ordinances, what those projects look like, and what legal and political constraints may prevent the spillover of such efforts.

Second, I presume that the human rights framework should be tied to international law. Once again, the underlying justifications for these assumptions are developed in prior works. I only briefly revisit those articulations here. I contend that international law

produc[es] a fully articulated framework by which to understand the problem underlying the [law]; reduc[es] drafting costs for welfare-maximizing legislation; provid[es] focal points that cities and states can use to measure compliance; offer[s] evidence of an international consensus on the existence of, and approach to, a problem; and present[s] an instrument to express and signal a cosmopolitan self identity.<sup>9</sup>

Of course, for those who resist the call of cosmopolitanism, many of these benefits seem to be costs instead, particularly when preexisting domestic law can serve some of the other functions I identify.

#### **A. Objecting to the Federal Integration of Domestic Human Rights**

Since the passage of the Universal Declaration of Human Rights ("UDHR"), the United States has developed an uneasy relationship with the international human rights project. Neither Democratic nor Republican

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8. See Clifford Bob, *Bringing Rights Home? The Promises and Pitfalls of Rights Strategies in Social Justice Advocacy* (May 7, 2007) (unpublished manuscript, available at <http://ssrn.com/abstract=989048> (follow "One-Click Download" hyperlink)).

9. Wexler, *supra* note 2, at 13.

presidents have embraced the full panoply of strategies to recognize and implement human rights domestically. The U.S. government has long resisted signing and ratifying many major human rights treaties such as the CEDAW and the Convention on the Rights of the Child (“CRC”).<sup>10</sup> Even ratification of major human rights treaties leads to few federal legislative changes or initiatives.<sup>11</sup> Unlike its European counterparts,<sup>12</sup> the U.S. federal government has created no national human rights institution, utilizes no human rights ombudspersons, lacks a human rights commission, and fails to conduct human rights impact statements on proposed initiatives. Yet, at various times over the last sixty years, the United States proudly carried the mantle of a human rights leader. American diplomats aggressively drafted and promoted various human rights treaties including the UDHR,<sup>13</sup> the CRC,<sup>14</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>15</sup> American presidents on both sides of the aisle have cited human rights as justifications for supporting particular foreign leaders, limiting military and economic aid for various regimes, and even using military force.<sup>16</sup> Although America’s relationship with international human rights law is a long and complicated one, this section identifies several political positions that help explain why, despite varying and often high levels of national support for human rights, the federal government is generally unlikely to be a first mover on domestic integration of international human rights.<sup>17</sup>

The first set of arguments I identify as belonging to “International Federalists,” who vigorously oppose human rights treaties as (1) imposing on domestic sovereignty by subordinating the federal government to interna-

10. *US: Treaty Signing Signals Policy Shift*, HUMAN RIGHTS WATCH, July 24, 2009, <http://www.hrw.org/en/news/2009/07/24/us-treaty-signing-signals-policy-shift> (noting that “The United States has signed six of the nine core international human rights treaties, but ratified only three.”).

11. Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT’L L. 347 (2000).

12. See generally Gauthier de Beco, *National Human Rights Institutions in Europe*, 7 HUM. RTS. L. REV. 331 (2007).

13. See NATALIE HEVENER KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION* 73-78 (1990).

14. See SHARON DETRICK, *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD* 650-56 (1999) (describing the drafting of the CRC).

15. See NATAN LERNER, *THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* 29-82 (1970) (identifying U.S. involvement in the drafting of the Convention).

16. See, e.g., Shirin Ebadi, *Keynote Address: Islam, Human Rights, and Iran* (Oct. 17, 2008), in 23 EMORY INT’L L. REV. 13, 16-21 (2009).

17. For a more detailed explanation of why the U.S. is unlikely to join treaties, see Wexler, *supra* note 2, at 38-41.



tional decision-makers and/or (2) infringing on states' rights by allowing the federal government to use treaties as an end run around states' authority.<sup>18</sup> While various groups oppose the specific content of particular human rights agreements, many of these opponents care, or at least claim to care, more about the distribution of power and authority than the content of the human rights rules themselves. In fact, many of these opponents often couple their federal and state sovereignty arguments with the observation that the United States is already largely voluntarily compliant with international human rights and consequently has no need for additional protections or oversight.<sup>19</sup>

The International Federalists' high water mark culminated in the proposed 1952 Bricker Amendment. This amendment sought to limit the reach of international treaties by dictating that "[a] treaty shall become effective as internal law . . . only through legislation by Congress which it could enact under its delegated powers in the absence of such a treaty."<sup>20</sup> While this proposed constitutional amendment failed, International Federalists forced President Eisenhower to commit to not adhere to future human rights treaties to pacify amendment supporters.<sup>21</sup> Although senatorial support for this viewpoint has waxed and waned over time, adherents of this view have thus far succeeded in blocking ratification of the CEDAW and CRC.<sup>22</sup>

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18. John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2237-39 (1999). President Carter urged the adoption of a reservation recognizing state sovereignty. Transmittal Letter, 14 WEEKLY COMP. PRES. DOC. 395 (Feb. 23, 1978) (referring to Letter of Submittal, Dep't of State, Dec. 17, 1977); Letter from Warren Christopher, Deputy Sec'y of State, to President James Carter (Dec. 17, 1977), reprinted in U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS? 88, 96 (Richard B. Lillich ed., 1981). The International Covenant on Civil and Political Rights has in fact been ratified subject to an understanding of the same import. Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23, at 9 (1992), reprinted in 31 I.L.M. 645, 652; see also Aya Gruber, *Who's Afraid of Geneva Law?*, 39 ARIZ. ST. L.J. 1017, 1075-84 (2007) (debating the federalist argument that international treaties should "be presumptively non-self-executing in order to preserve state rights"); Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy"*, 44 HASTINGS L.J. 79, 82, 91 (1992) (noting that the International Covenant on Economic, Social and Cultural Rights has not been ratified because of concerns of its impact on state sovereignty).

19. See Jack Goldsmith, *International Human Rights Law & the United States Double Standard*, 1 GREEN BAG 365, 371-72 (1998).

20. KAUFMAN, *supra* note 13, at 30-31.

21. Louis B. Sohn, *United States Attitudes Toward Ratification of Human Rights Instruments*, 20 GA. J. INT'L & COMP. L. 255, 260 (1990).

22. See SRINI SITARAMAN, STATE PARTICIPATION IN INTERNATIONAL TREATY REGIMES 197-204 (2009); John Fonte, *'The World is My Constituency': Are Liberals Rejecting the Liberal-Internationalist Tradition?*, NAT'L REV., Nov. 17, 2008, at 44.

One might suggest the International Federalists are in fact merely using structural arguments as a cover to mask their more substantive objections.<sup>23</sup> For instance, many of those who most strongly favored the Bricker Amendment feared that other countries would force the United States to change segregationist behavior which they believed to be legitimate as a matter of principle. They would likely have resisted domestic change enacted through structurally legitimate channels as strongly as they did calls from international actors.<sup>24</sup> Regardless of the ultimate source of their opposition, it is worth identifying this as a distinct influence on the political behavior of federal actors. Even if some of the time these arguments are mere smoke screens, they can still constrain executive and legislative behavior.

The second camp which I term “Positive Rights Rejecters,”—sometimes, though not always, aligned with the first—resists much of the content of international human rights law. While often presented as a monolithic structure, foundational international law documents contain at least five basic categories of human rights. These include: (1) rights of the person such as life, liberty, and security of the person; (2) rights associated with the rule of law; (3) political rights such as freedom of expression, assembly, and association; (4) economic and social rights which refer to an adequate standard of living; and (5) rights of communities.<sup>25</sup> Many countries find the wide variety of such rights uncontroversial and enshrine them in their constitutions.<sup>26</sup> The U.S. Constitution, however, creates very few, if any, obligations on the government to provide social services or community rights.<sup>27</sup> Similarly, the U.S. Legislature has not seen fit to recognize

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23. Thanks to Steve Gey for this observation. See also Catherine Powell, *CEDAW, Federalism, and Democracy in U.S. International Lawmaking*, OPINIO JURIS, Mar. 21, 2008, <http://opiniojuris.org/2008/03/21/cedaw-federalism-and-democracy-in-us-international-lawmaking/> (suggesting opponents use federalism arguments in lieu of their actual substantive objections).

24. See David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DEPAUL L. REV. 579, 585 (2002) (observing that those lodging anti-treaty federalism arguments “principally had racial segregation in mind”); Judith Resnick, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1578 (2006) (“[A] specific premise of the American constitutional agreement to ‘split the atom of power’ was that it enabled slavery to survive, if not flourish. States claimed a sovereign prerogative to determine which persons were recognized as legally entitled to the sanctity of their own bodies and the fruits of their own labors.”).

25. Charles R. Beitz, *Human Rights as a Common Concern*, 95 AM. POL. SCI. REV. 269, 271 (2001).

26. Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 90, 91 (Michael Ignatieff ed., 2005).

27. *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982).

many of these categories of rights, as it sees them as unjustified extensions of the government's role, unduly costly, or as correlative with socialist forces.<sup>28</sup>

Positive Rights Rejecters argue for substantive minimalism, suggesting that human rights concerns should be limited to forcible intrusions on bodily security<sup>29</sup> or, slightly more broadly, other limitations on the government's relationship with the individual.<sup>30</sup> They shy away from the creation of positive obligations for the federal government. Such individuals might raise the philosophical objection that governments only exist to protect negative liberty.<sup>31</sup> Similarly, they contend social and economic rights do not actually exist because they believe rights, properly defined, must correspond to obligations.<sup>32</sup> Since they find international law lacks meaningful definitions of the content of governments' obligations associated with such rights, they view economic and social claims as mere aspirations or preferences.

Positive Rights Rejecters also voice more pragmatic objections. Even if the state might be permitted to undertake an expansive role in enforcing a maximalist view of human rights, it ought not do so because, in practice, implementing a broader set of rights usurps the limited resources available to monitor and enforce the more narrow set of "negative" human rights.<sup>33</sup> They contend that in a time of limited fiscal resources, international human rights treaties fail to respect the delicate resource balancing that must occur. Similarly, assuming that the state may properly engage in positive rights enforcing, using international law to broadly define human rights may use legal language to mask mere political judgments at the expense of meaningful political deliberation.<sup>34</sup>

Such a view need not lead to a universal rejection of international human rights law. For instance, Positive Rights Rejecters may embrace those treaties that restrict the state's power, such as the Convention Against Torture

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28. Sunstein, *supra* note 26, at 92 (identifying various explanations).

29. Joshua Cohen, *Minimalism About Human Rights: The Most We Can Hope For?*, 12 J. POL. PHIL. 190, 192 (2004). Cohen rejects this view. *Id.* at 191.

30. Such a view is consistent with the Supreme Court's reluctance to recognize welfare rights such as financial assistance, *Dandridge v. Williams*, 397 U.S. 471, 487 (1970); housing, *Lindsey v. Normet*, 405 U.S. 56, 74 (1972); education, *Plyler v. Doe*, 457 U.S. 202, 221 (1982); and health care, see Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care* 3-21 (Aug. 12, 2009) (unpublished manuscript, available at <http://ssrn.com/abstract=1421504> (follow "One-Click Download" hyperlink)).

31. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 198, 210-213 (1980); Maurice Cranston, *Are There Any Human Rights?*, 112 *DAEDALUS* 1 (2003).

32. See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1919).

33. Cohen, *supra* note 29, at 193.

34. *Id.*

and the International Covenant on Civil and Political Rights (“ICCPR”). Yet, the United States has long resisted those human rights treaties that promise social and economic rights such as the International Convention on Economic, Social and Cultural Rights and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.<sup>35</sup> Even when the United States signs and ratifies international human rights law, Positive Rights Rejecters have been wary of the creation of any specific judicially enforceable rights stemming from those treaties.<sup>36</sup>

A third group, “Flexible Foreign Policy Advocates” object not to the domestic effects of human rights treaties or the role of the government in securing those rights, but rather to the possible limitations that supporting international human rights places on our ability to conduct foreign policy. While adherents to this group might like, or at least be neutral on, the inherent benefits of human rights at home, they suggest that the United States’ support for particular human rights treaties might complicate diplomacy, requiring delicate political maneuvering.<sup>37</sup> Such concerns might motivate people on either side of the political aisle; the decision of whether to engage or contain human rights violators is not a purely partisan one.

Despite the combined forces of such arguments and political supporters, countervailing positions also influence the political process. For instance, the group of individuals I identify as “Foreign Human Rights Promoters” strongly supports the United States’ adherence to multilateral efforts to strengthen human rights. Foreign Human Rights Promoters can count as their success such actions as the United States’ membership in, and active support for, the UDHR as a mechanism to export constitutional values abroad.<sup>38</sup> In addition, the United States belongs to four of the major U.N. human rights treaties, including the ICCPR, the Convention Against All

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35. Benjamin Mason Meier & Larisa M. Mori, *The Highest Attainable Standard: Advancing a Collective Human Right to Public Health*, 37 COLUM. HUM. RTS. L. REV. 101, 128 n.112 (2005); Amnesty International, Economic, Social and Cultural Rights: Questions and Answers, [http://www.amnestyusa.org/escr/files/escr\\_qa.pdf](http://www.amnestyusa.org/escr/files/escr_qa.pdf) (last visited Mar. 15, 2010).

36. See generally Lori Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI.-KENT. L. REV. 515 (1991).

37. See Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT’L L. 678 (1994) (discussing similar concerns in the context of an international humanitarian law treaty).

38. See PHILIPPE SANDS, LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR’S ATLANTIC CHARTER TO GEORGE W. BUSH’S LAWLESS WAR (2005).

Forms of Racial Discrimination, the Convention Against Torture,<sup>39</sup> and the Genocide Convention.<sup>40</sup> The U.S. also strongly supported the United Nations World Conference on Human Rights in Vienna in 1993.<sup>41</sup> More recently, President Obama signed the International Disability Treaty and is asking for Senate ratification.<sup>42</sup> He also identified the CEDAW as one of the top three U.N. treaties he would like to see ratified during his term and has created an ambassador for women's rights in the State Department.<sup>43</sup>

Yet even the Foreign Human Rights Promoters have often viewed international human rights law as a way to extol the exceptionalism of America. They seem to believe that we already know and understand how governments should treat their citizens and we need only find effective mechanisms for transporting those approaches.<sup>44</sup> Foreign Human Rights Promoters have little interest in changing domestic law to conform to international law or in creating judicially enforceable rights that would stem from these treaties.

Given these various constituencies, it should be no surprise that internal critique and change of domestic human rights progress has been less than forthcoming. Domestic support for human rights has generally been directed as a way to improve external, rather than internal, conditions.<sup>45</sup> As discussed in more detail below, both the U.S. government and domestic NGOs produced extensive information on global compliance with human rights treaties.<sup>46</sup> Such information may have spurred externally-oriented human rights legislation, such as the government's practice of linking eco-

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39. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20, at 20, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

40. Other important memberships include the Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967); International Labour Organization, Abolition of Forced Labour Convention, adopted June 25, 1957, ILO No. 105, 320 U.N.T.S. 291; Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253.

41. ROBERT F. DRINAN, *THE MOBILIZATION OF SHAME: A WORLD VIEW OF HUMAN RIGHTS* 16 (2001).

42. Nancy Langer, *UN Disabilities Treaty Deserves Support*, BALT. SUN, Aug. 2, 2009, at 23A.

43. Megan Carpentier, *A New State of Mind*, MS., Spring 2009, at 42.

44. Golove, *supra* note 24, at 579; *see also* Book Note, *Are American Human Rights Groups Exceptional in Their Silence?*, 119 HARV. L. REV. 631, 636 & n.20 (2005).

45. RICHARD A. FALK, *HUMAN RIGHTS HORIZONS: THE PURSUIT OF JUSTICE IN A GLOBALIZING WORLD* 38-39 (2000).

46. Kenneth Cmiel, *The Emergence of Human Rights Politics in the United States*, 86 J. AM. HIST. 1231, 1241 (1999) (quoting the *Washington Post's* observation that human rights legislation "would probably not have passed except for 'the large volume of detailed information that has become available to American lawmakers about just how badly many of Washington's client states are abusing their own citizens.'").

conomic assistance on other countries' human rights performances.<sup>47</sup> The emphasis on political and civil rights, as opposed to economic rights, both kept with domestic commitments and allowed criticism of cold war adversaries.<sup>48</sup>

Recently, a fifth camp, "Domestic Human Rights Integrators," who emphasize the need for human rights at home as well as abroad, have become a meaningful part of the political landscape. Supporters of this view can lay claim to some small federal-level victories. For instance, the federal government has undertaken some review of its own practices in the past twenty years, demonstrating an increased commitment to its obligations under human rights treaties. This includes the 1994 State Department efforts to draft the Shattuck report to satisfy the ICCPR,<sup>49</sup> and the submission of its first report to the Committee on the Elimination of Racial Discrimination in 2001.<sup>50</sup> Similarly, in 2002, the United States began to allow outside observers to report on its domestic human rights practices to the U.N. Human Rights Council.<sup>51</sup> This openness has also included a 2007 visit from the Special Rapporteur on Human Rights.<sup>52</sup> Yet, outside of treaty compliance reports, the federal and state governments have done little to directly demonstrate their support for the domestic internalization of international human rights treaties.<sup>53</sup>

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47. *Id.* at 1241-42.

48. FALK, *supra* note 45, at 58.

49. CCPR, INITIAL REPORTS OF STATES PARTIES DUE IN 1993: UNITED STATES OF AMERICA, Addendum (Aug. 24, 1994), available at <http://www.state.gov/documents/organization/133836.pdf>. Both NGOs and the U.N. Commission on Human Rights used this report to strongly criticize domestic policies such as the mistreatment of immigrants. DRINAN, *supra* note 41, at 28-30; Daniel Wessner, *From Judge to Participant: The United States as Champion of Human Rights*, in DEBATING HUMAN RIGHTS: CRITICAL ESSAYS FROM THE UNITED STATES AND ASIA 255, 269 (Peter Van Ness ed., 1999).

50. U.N. Comm. on the Elimination of Racial Discrimination, 59th Sess., 1475th mtg., U.N. Doc. CERD/C/SR.1475 (2001).

51. These external observations include a report on migrants' human rights. Gabriela Rodríguez Pizarro, *Human Rights of Migrants: Mission to the Border between Mexico and the United States of America*, (Oct. 31, 2002), available at [http://www.unhcr.ch/huridocda/huridoca.nsf/2848af408d01ec0ac1256b09004e770b/5b6e3e148f22c3fbc1256c8e00335f80/\\$FILE/g0215399.doc](http://www.unhcr.ch/huridocda/huridoca.nsf/2848af408d01ec0ac1256b09004e770b/5b6e3e148f22c3fbc1256c8e00335f80/$FILE/g0215399.doc). For a more recent report, see, e.g., Arjun Sengupta, *Extreme Poverty and Human Rights—A Mission Report on the United States* 30-31 (Jan. 6, 2007) (unpublished manuscript, available at <http://ssrn.com/abstract=961230> (follow "One-Click Download" hyperlink)).

52. Press Release, United Nations, Special Rapporteur on Human Rights of Migrants Ends Visit to the United States (May 17, 2007), available at <http://www.unhcr.ch/hurricane/hurricane.nsf/0/BA409950651325ECC12572E2002845A5?opendocument>.

53. LAWYERS COMM. FOR HUMAN RIGHTS, IN THE NATIONAL INTEREST 2001: HUMAN RIGHTS POLICIES FOR THE NEW ADMINISTRATION 106 (2001).

Domestic Human Rights Integrators are just beginning to coalesce efforts to bring human rights home. These efforts include the U.S. Human Rights Network, founded in 2002,<sup>54</sup> which seeks to increase the capacity and visibility of the U.S. human rights movement as well as strengthen links between and among domestic and international human rights issues and groups.<sup>55</sup> Most notably, the Human Rights Network's activities includes a Katrina initiative "dedicated to ensuring that all levels of the U.S. government comply with its domestic and international legal obligations and norms concerning the rights and protections accorded to persons displaced by natural disaster."<sup>56</sup> On other fronts, schools including the University of Chicago and Columbia University have expanded their joint action and academic programs to include an exploration of domestic human rights at home.<sup>57</sup> Similarly, with the ushering in of a new administration, the American Constitution Society crafted a policy blueprint for human rights. This proposal promotes federal-level changes such as an executive order to "reconstitute and revitalize an Interagency Working Group on Human Rights which will serve as a coordinating body among federal agencies and departments for the promotion and respect of human rights and the implementation of human rights obligations in U.S. domestic policy," act on specific treaty obligations, create a national human rights commission, ratify outstanding human rights treaties, and undertake reviews of harmful reservations, understandings, and declarations in already-ratified human rights treaties.<sup>58</sup> Legal scholars are increasingly focusing on this issue with several symposia devoted to the idea of bringing international law home.<sup>59</sup>

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54. US Human Rights Network, About Us—History, <http://www.ushrnetwork.org/about-us-history> (last visited Feb. 22, 2010).

55. US Human Rights Network, Core Principles & Goals, <http://www.ushrnetwork.org/about-us-core-principles-goals> (last visited Feb. 22, 2010). It also conducts training sessions and is launching a human rights mapping and database project to gain a comprehensive picture of the work of its members. US Human Rights Network, USHRN Launching Human Rights Mapping and Documentation Project, [http://www.ushrnetwork.org/mapping\\_db](http://www.ushrnetwork.org/mapping_db) (last visited Feb. 22, 2010).

56. US Human Rights Network, Hold the US Accountable: The US Human Rights Network's Internally Displaced Persons (IDP) Human Rights Campaign, <http://www.ushrnetwork.org/projects-katrina> (last visited Feb. 22, 2010).

57. See Center for the Study of Human Rights, <http://www.hrcolumbia.org/> (last visited Feb. 22, 2010); The University of Chicago Human Rights Program, Projects, <http://humanrights.uchicago.edu/projects.shtml> (last visited Feb. 22, 2010).

58. CATHERINE POWELL, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, HUMAN RIGHTS AT HOME: A DOMESTIC POLICY BLUEPRINT FOR THE NEW ADMINISTRATION 3-5 (2008).

59. In addition to this volume, see also *Human Rights in the United States: A Special Issue Celebrating the 10th Anniversary of the Human Rights Institute at Columbia Law*

Yet the Domestic Human Rights Integrators have not focused exclusively on forcing federal ratification or passing national legislation. CEDAW and other human rights treaties are not high priority agenda items for the President or the Legislature. Rather, many of those concerned with human rights choose to focus on local action instead. This next subsection seeks to explain why this is an important choice.

### B. Linking the Political to the Structural and Procedural

These competing political approaches alone are insufficient to explain the significant difficulty entailed in federal human rights action. Treaties also face a host of structural barriers that hamper ratification.<sup>60</sup> Though popular and bipartisan treaties often easily surmount these obstacles, they can make the passage of treaties that raise the ire of the political factions mentioned above quite difficult. First, the President has a de facto absolute veto over treaties. Unless he decides to sign a treaty, it cannot move forward, even if the Senate strongly supports it.<sup>61</sup> Unlike the legislative veto, which Congress can override by a two-thirds vote in both branches, the President's implicit treaty veto is final. Exercising this de facto veto is also less costly because the refusal to sign is in many instances a political non-event requiring substantially less political capital than the active decision to veto legislation that has already passed through Congress.<sup>62</sup>

Second, while the refusal to sign can block a treaty, the President cannot create any commitment to ratify through signing.<sup>63</sup> At best, mere signature creates an obligation "to refrain from acts that would defeat the object and purpose of the treaty";<sup>64</sup> at worst, it only asks a state to avoid undertaking an action which would hamper full compliance once the treaty has entered into domestic force.<sup>65</sup> So the various presidents who have signed several core human rights treaties such as the International Covenant on Economic,

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*School*, 40 COLUM. HUM. RTS. L. REV. (2008); Catherine Powell, *International Law and the Constitution: Terms of Engagement*, 77 FORDHAM L. REV. 399 (2008).

60. A possible end run is to reconstrue treaties as executive agreements, but I do not address this possibility as the major human rights documents have already been presented as treaties rather than executive agreements.

61. U.S. CONST. art II, § 2, cl. 2.

62. This observation may not always hold true, particularly in the case of the pocket veto.

63. Harvard Research in International Law, *Law of Treaties*, 29 AM. J. INT'L L. 653, 769 (noting that a signature creates no state obligation to ratify a treaty).

64. Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 307 (2007). This obligation is reflected in Article 18 of the Vienna Convention on the Law of Treaties, which the U.S. has not rejected and which might be viewed as customary international law. *Id.* at 307-08.

65. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 94 (2000).



Social and Cultural Rights (1977), the American Convention on Human Rights (1977), CEDAW (1980), and the CRC (1995), have watched them languish for decades.<sup>66</sup>

Moreover, the newly emerging presidential power to unsign a treaty<sup>67</sup> creates another related, if mostly theoretical,<sup>68</sup> barrier to treaty ratification. Though this power has only been exercised once,<sup>69</sup> some have urged the unsigning of human rights treaties such as the CRC and the International Labour Organization Convention on Race Discrimination in Employment.<sup>70</sup> If presidents decide to use this power more frequently, it means one president cannot preserve a future president's political capital or bypass a future president's de facto veto. In other words, the questionable exercise of one president's power to unsign a treaty might force a future president to resign the treaty if he wants it to move through the Senate. This means that a sitting president that faces a hostile senate cannot guarantee his signing leaves a treaty in the Senate's hands in case political fortunes realign with a hostile president and friendly senate. Nor can a president even lock in a commitment to act consistently with the purposes of the treaty, as unsigning is a complete exit that frees all domestic actors from any possible treaty-based restraints.<sup>71</sup>

Finally, the constitutional decision to vest treaty passage in the Senate also weighs against the passage of progressive human rights treaties. Unlike the House of Representatives, the Senate is designed to be "less responsive to emerging political trends" through six-year terms and a cycling of elections that places only one-third of the seats up in each election.<sup>72</sup>

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66. See Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 (signed by the U.S. on Feb. 16, 1995); Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (signed by the U.S. on July 17, 1980); American Convention on Human Rights, *adopted* Nov. 22, 1969, 1144 U.N.T.S. 123 (signed by the U.S. on Jan. 6, 1977); International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (signed by the U.S. on Oct. 5, 1977).

67. See Curtis Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, AM. SOC'Y INT'L L., May 2002, <http://www.asil.org/insights/insigh87.htm>.

68. Only time will tell if future presidents will choose to exercise this power.

69. See Letter from John R. Bolton, Under Sec'y of State for Arms Control and Int'l Sec., to Kofi Annan, UN Sec'y Gen., (May 6, 2002), *available at* <http://archives.cnn.com/2002/US/05/06/court.letter.text/index.html> (announcing the President's decision to unsign the Rome Statute which creates the International Criminal Court's jurisdiction).

70. See Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2064 (2003).

71. *Id.* at 2082-83.

72. Tara Grove, *The Structural Safeguards of Federal Jurisdiction*, 123 HARV. L. REV. (forthcoming 2010); see GERALD LEONARD, *THE INVENTION OF PARTY POLITICS: FEDERAL-*

This status quo bias does not block all, or even nearly all, treaties, but it makes those treaties that step ahead of social or political consensus difficult to pass. Other Senate-specific structural barriers include Rule 22, which permits a single member to filibuster a treaty unless sixty percent of the Senate supports a cloture vote.<sup>73</sup> In addition to the general filibuster problem, the Senate Foreign Relations Committee possesses absolute control over whether and when a treaty comes to the floor for debate. Even if the Chair supports the treaty, other members can prevent a treaty from reaching the floor because the Committee cannot meet without a quorum.<sup>74</sup>

I conclude this section by noting that while treaties are the most aggressive mechanism for human rights to pass into the federal domestic arena, other national mechanisms exist.<sup>75</sup> These include the legislative creation of national human rights institutions or passage of other human-rights-oriented legislation. Other legislative activity faces similar political hurdles, though not necessarily identical structural hurdles. I focus here though on treaties because Congress has never passed the equivalent of domestic-implementing legislation for treaties that have failed to make it through the political process. Though the Legislature might pass something that is substantively similar to the treaties' domestic requirements, such human rights legislation has not been offered as an alternative or a supplement.<sup>76</sup> In the section below, I offer some reasons why cities might be better situated to take such action.

## II. THE PROMISE AND PERIL OF CITIES

When the federal government is a reluctant first mover, many have suggested moving to the sub-federal as a second-best option. This section ex-

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ISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS 27 (2002).

73. United States Senate Committee on Rules and Administration, Rules of the Senate, Rule XXII Precedence of Motions, <http://rules.senate.gov/public/index.cfm?p=RuleXXII> (last visited Feb. 22, 2010).

74. See Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85 (1987).

75. Executive efforts, such as President Clinton's efforts to conduct human rights reviews, also present another national strategy. These reviews, however, were parasitic on the underlying human rights treaties. I have discussed elsewhere why the president may be constitutionally limited in efforts to use purely executive efforts to make an end run around a Senate unwilling to ratify a treaty. See Wexler, *supra* note 2, at 17 (discussing such mechanisms in the context of the Kyoto Protocol).

76. Even the Obama administration has not framed key agenda items as human rights issues, regardless of their consistency with human rights treaties. For instance, the administration has never suggested that health care is a human right as contained by the International Convention on Economic, Cultural, and Social Rights.

plores the reasons why some types of cities may be well positioned for the domestic integration of human rights norms. Integration is often more politically feasible at the local level than that at the federal or even state level. Reasons for this include, but are not limited to, political homogeneity, the avoidance of federalism and foreign policy concerns, and a more favorable structural environment that can facilitate passage of progressive proposals. Not all cities, however, are equally likely to adopt human rights ordinances and, thus, I try to explain what types of cities are most likely to act given the political feasibility features mentioned above.

This enthusiasm for local action, however, must be tempered with a serious discussion of the structural constraints on local behavior. This section addresses both the federal and state governments' authority and propensity to limit the behavior of cities. It also tempers the enthusiasm of my earlier work in this area by highlighting the limitations on state, federal, and international spillover. Just as not all cities are likely to adopt human rights ordinances, even if cities have successful, flourishing human rights infrastructures, states and the federal government may be unlikely to follow suit.

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Table 1. Typology of Human Rights Ordinances

Type of Ordinance	Federal Constitutional Objections	State or Federal Preemption	Political Objections	Risk of Capital Flight	Benefits/Spillover
Purely Expressive	Likely no	Likely no	<ul style="list-style-type: none"> <li>◆ Substance</li> <li>◆ Flexible Foreign Policy Advocates</li> </ul>	Unlikely	<ul style="list-style-type: none"> <li>◆ Expressive</li> </ul>
Good Governance	Likely no	Likely no	<ul style="list-style-type: none"> <li>◆ Substance</li> </ul>	Unlikely	<ul style="list-style-type: none"> <li>◆ Expressive</li> <li>◆ Individual benefits to those affected by government behavior</li> </ul>
Positive or Other Rights Promoting	Likely no	Maybe	<ul style="list-style-type: none"> <li>◆ Substance</li> <li>◆ Positive Rights Rejecters</li> </ul>	Possible	<ul style="list-style-type: none"> <li>◆ Expressive</li> <li>◆ Limited possible individual benefits</li> </ul>
Positive Rights Enforcing	Likely no	Maybe	<ul style="list-style-type: none"> <li>◆ Substance</li> <li>◆ Positive Rights Rejecters</li> </ul>	Possible targeted industries most likely	<ul style="list-style-type: none"> <li>◆ Expressive</li> <li>◆ Potentially significant individual benefits</li> </ul>
Treaty Participation	Treaties clause	Maybe	<ul style="list-style-type: none"> <li>◆ Substance</li> <li>◆ International Federalists</li> <li>◆ Positive Rights Rejecters</li> <li>◆ Flexible Foreign Policy Advocates</li> </ul>	Unlikely	<ul style="list-style-type: none"> <li>◆ International spillover/synergy benefits</li> </ul>

### A. Typology

A brief typology of human rights ordinances may prove to be helpful as human rights legislation and ordinances come in all shapes and sizes. I begin with what might be labeled as purely expressive human rights ordinances.<sup>77</sup> Such ordinances express the city's solidarity with some piece of international law. In so doing, they might also criticize the state or federal government's non-compliance with such international law. For instance, Berkeley's 2002 *Resolution to Oppose the Patriot Act, Justice Department Directives, and Executive Orders that Prevent the Protection of Civil Rights and Liberties* affirms U.N. Charter Article 55 but does not commit the city to any new course of action.<sup>78</sup> The resolution merely reiterates the city's support for existing constitutional policies and disavows federal activity.<sup>79</sup> Similarly, in February 2009, Berkeley passed an ordinance disavowing the U.S. practice of giving juveniles sentences of life without parole.<sup>80</sup> Berkeley based its opposition on, among other things, international human rights law.<sup>81</sup> Yet Berkeley neither has nor pretends to have any control over federal or state criminal sentencing practices.<sup>82</sup>

Second, cities might pass ordinances that are more than purely expressive, but do not themselves create any enforceable rights. Ordinances prohibiting state officials from voluntarily complying with federal immigration enforcement laws might serve as an example.<sup>83</sup> Individual immigrants would not have a private right of action for violations, but it may enable the

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77. These might also be deemed "political graffiti" in the words of Richard Briffault. Richard Briffault, Remarks at the Fordham Urban Law Journal Cooper-Walsh Colloquium on Empowered Cities: The Emergence of Cities as Autonomous Actors (Oct. 30, 2009).

78. Berkeley, Cal., Resolution to Oppose the Patriot Act, Justice Department Directives and Executive Orders that Prevent the Protection of Civil Rights and Liberties (July 23, 2002), available at <http://www.ci.berkeley.ca.us/citycouncil/2002citycouncil/packet/072302/2002-07-23%20Item%2031.pdf>; see also Santa Cruz, Cal., Resolution 26.032, Resolution to Oppose the Patriot Act, Justice Department Directives and Executive Orders that Prevent the Protection of Civil Rights and Liberties (Nov. 12, 2002).

79. Berkeley, Cal., Resolution, *supra* note 78.

80. See Letter from Jesse Arreguin, Councilmember, Berkeley, Cal., to Jennifer Granholm, Governor, Mich., (Feb. 10, 2009) available at [http://www.ci.berkeley.ca.us/uploaded/Files/Clerk/Level\\_3\\_-\\_City\\_Council/2009/02Feb/2009-02-10%20Item%2011%20Letter%20Supporting%20the%20Release%20of%20Efren%20Paredes,%20Jr.pdf](http://www.ci.berkeley.ca.us/uploaded/Files/Clerk/Level_3_-_City_Council/2009/02Feb/2009-02-10%20Item%2011%20Letter%20Supporting%20the%20Release%20of%20Efren%20Paredes,%20Jr.pdf).

81. *Id.*

82. In another example, Chapel Hill's endorsement of the UDHR explicitly states that the city is not joining or creating a treaty, but merely providing a declaration of principles. A Resolution Adopting the Universal Declaration of Human Rights as Guiding Principles (2009), available at [http://townhall.townofchapelhill.org/agendas/2009/11/23/5p/5p-2009-11-23\\_r11.pdf](http://townhall.townofchapelhill.org/agendas/2009/11/23/5p/5p-2009-11-23_r11.pdf).

83. See, e.g., Rose Cuison Villazor, "Sanctuary Cities" and Local Citizenship, 37 FORDHAM URB. L.J. 573 (2010) (examining San Francisco sanctuary law).

future acquisition of positive rights such as those that flow from citizenship.<sup>84</sup> Another example might be human rights impact statement reviews that create procedural but not substantive obligations.

Relatedly, cities might participate in treaty mechanisms either formally or informally. For instance, Berkeley's City Council recently voted to "report to the U.N. on the city's compliance with treaties on civil liberties, racial discrimination and torture."<sup>85</sup> While the city is not formally a member of these treaties, as a subcomponent of the United States, it is expressing its support for federal membership and any duties that might implicate city behavior as well as generating information to judge federal compliance. Yet, an individual would have no entitlement nor redress under these local procedures.

Third, cities might pass ordinances which use international human rights concepts and treaties to reform city behavior. The most frequently cited example, and one which I have discussed at length elsewhere, is San Francisco's local CEDAW ordinance, which implements the treaty's principles without actually participating in treaty organizations or governance.<sup>86</sup> So far, San Francisco has completed CEDAW-mandated gender analyses of six city departments. The gender analysis included a "framework to evaluate and address any differential impact of service delivery, employment practices, and budget allocation."<sup>87</sup> As a result of these analyses, the following changes were made: better allocation of resources to female offenders in juvenile probation; increased and improved collection of gender disaggregated data; changed placements of streetlights and sidewalk cuts; expansion of sexual harassment training; enhanced flexibility in meeting vendor requirements for women; and greater appointments of women to

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84. See, e.g., Jesse McKinley, *San Francisco Alters When Police Must Report Immigrants*, N.Y. TIMES, Oct. 21, 2009, at A19 (describing a bill passed by the San Francisco board of supervisors preventing deportation of juveniles arrested on felony charges until conviction).

85. Posting of Heather Ross to Daily Californian, <http://blog.dailyca.org/news/tag/berkeley-city-council> (Sept. 30, 2009, 11:38 PST).

86. Stacy Laira Lozner, *Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative*, 104 COLUM. L. REV. 768, 768, 776-84 (2004). It was later amended to reflect the principles of the Convention on the Elimination of All Forms of Religious Discrimination (a treaty that the U.S. ratified but has not implemented).

87. Emily M. Murase, Ph.D., Executive Director, San Francisco Dep't on the Status of Women, Testimony at N.Y. City Council's Governmental Operations Comm. Human Rights GOAL Hearing (Apr. 8, 2005), available at <http://www.nychri.org/documents/Murase.pdf>.

revenue-creating commissions.<sup>88</sup> Influenced by San Francisco, other cities and states are promoting similar initiatives.<sup>89</sup>

These human-rights-influenced actions might include the creation of human rights commissions or human rights ombudsmen. For instance, the city of Eugene, Oregon has taken a model from abroad, discussed in more detail below, and designated itself a “human rights city.”<sup>90</sup> So far, its human rights code includes a ban on a variety of discriminatory behaviors that far surpasses federal protections in housing, employment, and city contracting.<sup>91</sup> Eugene’s efforts include proactive efforts to prevent, rather than to merely remedy, discrimination, including unintentional or passive discrimination.

Fourth, cities can create positive rights through ordinances. As a practical matter, it is important to note that cities actually are increasingly adopting local measures “that regulate individual rights, social welfare, and other measures traditionally thought as within the purview of the states.”<sup>92</sup> For instance, Bloomington, Indiana might recognize the right to a living wage by mandating covered employers pay above the federal minimum wage to covered workers.<sup>93</sup> Similarly, Eugene’s human rights city program also hopes to speak to the full range of human rights, including political, cultural, social, and economic rights. Eugene aspires to make human rights “a central part of every City program” by “striv[ing] to systematically include human rights values in proposing or considering new legislation; in

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88. Krishanti Dharmaraj, WILD For Human Rights, Testimony at N.Y. City Council’s Governmental Operations Comm. Human Rights GOAL Hearing (Apr. 8, 2005), available at <http://www.nychri.org/documents/Dharmara.pdf>.

89. Both Los Angeles and Chicago have passed similar CEDAW ordinances. Efforts are also underway in Seattle, Palo Alto, Santa Cruz County, and Santa Clara. See Convention on the Elimination of All Forms of Discrimination Against Women, Adopted by the U.N. General Assembly on December 18, 1979, and Signed on Behalf of the United States of America on July 17, 1980: Hearing Before the Comm. on Foreign Relations, 107th Cong. 105 (2002) (statement submitted by the National Education Association), available at <http://ftp.resource.org/gpo.gov/hearings/107s/80461.pdf>.

90. See Eugene, Oregon, The Human Rights City Project, [www.humanrightscity.com](http://www.humanrightscity.com) (last visited Mar. 16, 2010).

91. See City of Eugene Human Rights Commission, [http://www.eugene-or.gov/portal/server.pt?open=335&qid=50709979&rank=1&parentname=SearchResult&parentid=5&mode=2&in\\_hi\\_userid=2&cached=true](http://www.eugene-or.gov/portal/server.pt?open=335&qid=50709979&rank=1&parentname=SearchResult&parentid=5&mode=2&in_hi_userid=2&cached=true) (last visited Mar. 25, 2010) (including family status, marital status, and sexual orientation).

92. Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2574 (2006).

93. City of Bloomington, Living Wage Ordinance, [http://bloomington.in.gov/sections/viewSection.php?section\\_id=79](http://bloomington.in.gov/sections/viewSection.php?section_id=79) (last visited Feb. 22, 2010). The city passed it through its human rights commission, and advocates that support it use human-rights-based arguments. See Milton Fisk: Human Rights and Living Wages, <http://www.miltonfisk.org/writings/human-rights-and-living-wages/> (last visited Mar. 25, 2010).

the design, implementation, and evaluation of policies and programs; in the course of making budgetary decisions; and in developing and diversifying its human resources.”<sup>94</sup> These human rights programs are likely the priciest programs and the most taxing on a city’s limited resources. In the next sections, I will use this typology both to explain which kinds of cities are likely to pass such policies, and to assess the spillover constraints of local human rights ordinances.

## B. Optimizing the Intersection of Political and Structural

### 1. Maximizing Political Homogeneity

One reason we should expect to see more treaty-influenced human rights behavior at the local level is because some, though certainly not all, cities contain politically homogenous populations. While the state of California contains so many varied interests that commentators have suggested splitting the state into two (or even three) entities, relatively speaking, those who reside in San Francisco or Berkeley tend to share much more aligned interests and preferences. Both small and large cities can possess enough political homogeneity to pass legislation that would encounter greater difficulty at the state or federal level. Though large cities often contain diverse populations, they tend to have more voter interest convergence than the state in which they are located or than the federal population as a whole. For instance, recent maps of electoral politics demonstrate that while states as a whole tend to look purple with their mixed political views, individual cities seem to be strongly blue or red.<sup>95</sup> If substantive objections are what really blocks the ratification of human rights treaties, then the strong political homogeneity of at least some cities should make the passage of such proposals more likely.

Relatedly, for those cities whose ideological preferences align with the treaty preferences, they can use human rights proposals to successfully compete for and retain citizens. Charles Tiebout has suggested that cities compete for residents on the basis of their provision of social services.<sup>96</sup> While citizens might desire the efficient delivery of services, they also pay

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94. Human Rights City, Frequently Asked Questions, [http://www.humanrightscity.com/Human\\_Rights\\_City\\_Project/FAQs.html](http://www.humanrightscity.com/Human_Rights_City_Project/FAQs.html) (last visited Mar. 30, 2010).

95. Robert J. Vanderbei, Election 2004 Results, <http://www.princeton.edu/~rvdb/JAVA/election2004/> (last visited Feb. 22, 2010) (see 3-D maps).

96. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418-20 (1956).



attention to the specific bundle of services provided.<sup>97</sup> Just as people might be concerned about school districts or the rate of local taxes, they might also care about the way in which cities frame and describe such services. The local integration of human rights treaties can encompass the provision of new services that the government has not offered before, new mechanisms of accountability for local government, as well as a new language for understanding the role of the city in the life of its citizens. Thus, cities that believe its constituents will prefer such policies have a strong reason to innovate or mimic them.

Of course, Tiebout's insight that individuals move to localities in order to satisfy their preferences for public policies is often overstated. Agglomeration theory suggests instead that many individuals, along with the businesses they work in, move to localities, particularly large cities, in order to capture the efficiency and information gains of having lots of neighbors.<sup>98</sup> Thus, while the package of city services may matter strongly to some individuals, others may care about them only after satisfying their preferences for efficiency and information gains. In some instances, those city services and structures may matter very little.<sup>99</sup> Yet for some cities, like New York and San Francisco, this combination of Tieboutian individuals and agglomerative individuals may actually cut in favor of the passage and retention of aggressive human rights policies. Those most likely to oppose expansive economic rights and other progressive policies often find they are unwilling or unable to successfully threaten exit because they gain more from their particular agglomeration of neighbors than they lose from local policy.<sup>100</sup> For instance, a business that dislikes a human rights living wage ordinance but has location-specific investments may find itself unable or unwilling to move.

On the other hand, if certain businesses are able, and do in fact, move from relatively friendly cities as these ordinances increase costs to cities abroad, violations may actually accelerate as the businesses will not be sub-

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97. See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1498-99 (1987) (book review of RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987), noting that families may move to a community to access its school system).

98. See EDWARD L. GLAESER, *CITIES, AGGLOMERATION AND SPATIAL EQUILIBRIUM* (2008).

99. Another reason one might want support on the local level is that it provides an alternative to the burgeoning rhetoric of competition. Many cities are downplaying their public features and instead emphasizing a business model of the city with individuals as clients and administrators as managers. Schragger, *supra* note 92, at 2552-53.

100. David Schleicher, *The City as a Law and Economic Subject*, U. ILL. L. REV. (forthcoming) (manuscript at 6, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1471555](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1471555) (follow "One-Click Download" hyperlink)).

ject to any meaningful constraints. For instance, if Los Angeles were to enact child labor ordinances based on the CRC that created protections above and beyond existing federal and state protections, sweatshops might move out of Los Angeles to a city (or country) less protective than Los Angeles pre-ordinance.<sup>101</sup> Sweatshops do not need the particular knowledge or transportation or set of neighbors unique to Los Angeles; it is easy for them to locate anywhere, though transportation costs increase if they move out of the country. Such relocation might be more than an equal swap because the capital accumulation due to the lax human rights environment may further discourage that city or country from ratifying human rights treaties or from adopting human-rights-friendly policies.<sup>102</sup>

## 2. *Avoiding Federalism and Foreign Policy Concerns*

Local implementation also avoids the ire of International Federalists and Flexible Foreign Policy Advocates. Although I identify a variety of political objections to the federal integration of human rights, the public as a whole seems to support the idea of human rights and much of their substantive content. Opinion survey data reveals that more than eighty percent of the domestic population believes that America should strive to uphold human rights at home for those that are being denied those rights.<sup>103</sup> When asked more specific questions to gauge their commitments, large majorities support issues such as equality, fairness, and freedom from mistreatment (as well as their framing as human rights),<sup>104</sup> though economic rights such as freedom from poverty and adequate healthcare receive less support.<sup>105</sup> Even so, two-thirds of Americans believe that the government should both protect and provide human rights even when it means expanding government assistance.<sup>106</sup> Yet the same data suggests that nearly half of Americans believe that sovereignty concerns should preclude U.S. membership in human rights treaties, and more than half believe that divergent cultures and values prevent the possibility of universally applicable human rights.<sup>107</sup>

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101. I am indebted to David Schleicher for this example.

102. See Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Climate Policies*, 155 U. PA. L. REV. 1961, 1966-72 (2007) (suggesting such a problem in the case of state and local regulation of environmental problems).

103. THE OPPORTUNITY AGENDA, HUMAN RIGHTS IN THE U.S.: OPINION RESEARCH WITH ADVOCATES, JOURNALISTS, AND THE GENERAL PUBLIC 3 (2007).

104. *Id.*

105. *Id.* at 4.

106. *Id.* at 5.

107. *Id.* at 6. This includes a high percentage of African Americans and Hispanics, often the most likely to benefit from human rights at home. *Id.* at 10. In fact, those most suppor-

Thus, if international federalism is driving the federal debate over human rights, city level passage should be unproblematic, since it neither binds the country to participating in international governance, nor allows the federal government to aggrandize its powers vis-à-vis sub-federal units. In addition, local integration does not force constituents to address thorny issues such as how the language and substance of human rights should apply abroad. Arguments about cultural relativism have substantially less salience when one is only talking about a domestic population. For instance, if Eugene, Oregon becomes a human rights city with a particularized notion of what constitutes gender discrimination and includes gender stereotyping, it need not deeply grapple over whether that interpretation is consistent with how other countries view gender discrimination or whether it properly respects other cultures.<sup>108</sup>

Relatedly, city integration avoids the dilemma of Flexible Foreign Policy Advocates as cities lack the foreign policy concerns of federal actors. While cities may seek international business or global social relationships, the constitution, as discussed below, generally bars them from explicitly conducting foreign affairs.<sup>109</sup> Many scholars have noted this as a constraint, such as in the Burma procurement policies, but in other ways, it is also liberating. Domestic integration sends no direct message about the direction of the country, though it may send a signal about the possibility of change. Cities need not worry as much about what message or example they set for other actors, nor need they worry that it will rupture preexisting relationships or irritate certain sets of international political actors. For instance, if San Francisco affirms the U.N. Human Rights Charter, a country will be hard-pressed to use that to criticize the United States for taking or not taking a particular position on a complicated international issue, such as the relationship between the Israeli government and Palestinians. Similarly, in interpreting treaty language or treaty concepts, cities need not concern themselves with whether their potentially idiosyncratic interpretations will be debated at treaty meetings, derided by foreign countries, or used to criticize third-party nation-states who do not agree with the city's interpretation.

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tive of a domestic human rights agenda include the vast majority of African Americans and those with incomes below \$25,000. *Id.* at 21.

108. Of course, a city may face particularized local instances when those questions are raised, but I assume those are less pervasive than having to address the law's application in a foreign cultural context. In other words, determining whether a gender stereotyping law ought to apply to an individual Muslim's hiring practices in a U.S. city is much less difficult than the federal government determining whether a Muslim country must have the same gender stereotyping laws under an antidiscrimination treaty as the United States.

109. *See infra* Part II.C.1.a.

### 3. *Enhancing Warm Glow and Direct Gains*

Insights from psychology also suggest that cities might be more likely, and perhaps even better, first movers in this context. Many of those who support human rights initiatives do so because they are purely oriented to others, or because of the warm glow they receive in helping others. I argue that, to the extent that support for human rights is motivated by altruism, it is more likely to succeed at the local level than at the national level. This is because I believe warm glow is likely to be enhanced in the local environment and dampened in the federal and international setting. In another context,<sup>110</sup> I have described the importance of human rights treaties and their related discourse in overcoming a particular fundamental attribution error that bad things must happen to bad people who deserve them. I noted that as a result of the fundamental attribution error and the belief in a just world, when one sees something bad happen to individuals or groups, one often engages in victim blame and derogation.<sup>111</sup> This tendency is magnified when victims are perceived of as meaningfully different from the relevant community or if their suffering is likely to be difficult to remedy.<sup>112</sup> Conversely, the tendency toward victim-blaming is weakened when the people suffering are seen as similar to the witness,<sup>113</sup> as empathy triggered by similarities can muffle or trump the instincts aroused by the belief in a just world.<sup>114</sup>

I suggest in this paper that moving human rights to the local level can emphasize the close relationship between those providing and those receiving assistance as well as allowing people to see the direct benefits of the city's provision of social services. This seems likely to be particularly important for positive rights and positive rights-enabling ordinances—it may be the case that people are more likely to support such rights when they are closer to the recipients. When altruism exists, evidence suggests that people are most willing to self-sacrifice or redistribute with those with whom they share physical or cultural proximity. They often privilege their

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110. See Wexler, *supra* note 3, at 395-96.

111. Carolyn L. Hafer & Laurent Bague, *Experimental Research on Just-World Theory: Problems, Developments, and Future Challenges*, 131 PSYCHOL. BULL. 128, 128 (2005).

112. Claudia Dalbert, *Belief in a Just World, Well Being, and Coping with an Unjust Fate*, in RESPONSES TO VICTIMIZATIONS AND BELIEF IN A JUST WORLD 87, 100-01 (Leo Montada & Melvin J. Lerner eds., 1998); Melvin J. Lerner & Leo Montada, *An Overview: Advances in Belief in a Just World Theory and Methods*, in RESPONSES TO VICTIMIZATIONS AND BELIEF IN A JUST WORLD, *supra*, at 2.

113. SHARON LAMB, THE TROUBLE WITH BLAME: VICTIMS, PERPETRATORS, AND RESPONSIBILITY 92 (1996); Lerner & Montada, *supra* note 112, at 4.

114. Leo Montada, *Belief in a Just World: A Hybrid of Justice Motive and Self-Interest*, in RESPONSES TO VICTIMIZATIONS AND BELIEF IN A JUST WORLD, *supra* note 112, at 217, 243.

relationships with those nearby at the expense of those farther away.<sup>115</sup> Relatedly, “most citizens are much more likely to sacrifice for a compatriot than a noncompatriot, especially when giving to noncompatriots comes at the expense of needy compatriots.”<sup>116</sup> This conclusion is consistent with survey data which indicates “[a]n exceptional majority [of Americans polled] favor[] fixing pressing problems at home rather than addressing challenges to the United States from abroad” and a widespread American preference for funding domestic programs over foreign aid.<sup>117</sup>

Not all cities will engage in such behavior and not all people will feel the warm glow of giving, even if it is moved to the local level. As described above, some, like the Positive Rights Rejecters, fundamentally believe the provision of social services and positive rights is an inappropriate role for the government or one it cannot engage in successfully. My point is a more limited one: moving efforts down to the local level can dampen the belief that positive rights ought not be provided because the recipients are unworthy, outsiders, or that their problems are unsolvable.

Second, for those less concerned with the warm glow of altruistically passing human rights ordinances, local internationalism provides a definable set of benefits to citizens. While treaty signature and ratification is often touted as outward-looking and a mechanism to export our values abroad, domestic human rights integration is all about benefitting the local citizenry. Even if one does not anticipate needing the provision of social services, enhancing transparency and anti-discrimination of local government officials is ostensibly something that benefits all local citizens, and

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115. See Michael J. Green, *Institutional Responsibility for Global Problems*, 30 PHIL. TOPICS 79, 79-85 (2002) (discussing the “restrictive conceptions” of responsibility).

116. Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667, 1677 (2003). Of course, supporting government programs which redistribute is not exactly the same as giving yourself, but for our purposes, they are close enough. Acting at the city level allows altruistically-minded individuals to channel their efforts through local government institutions which are much more likely to make a difference than individual action alone. Government action solves the dilemma of collective action problems or the belief that someone else will step in and help.

117. CHI. COUNCIL ON GLOBAL AFFAIRS, ANXIOUS AMERICANS SEEK NEW DIRECTION IN UNITED STATES FOREIGN POLICY: RESULTS OF A 2008 SURVEY OF PUBLIC OPINION 6 (2008), available at [http://www.thechicagocouncil.org/UserFiles/File/POS\\_Topline%20Reports/POS%202008/2008%20Public%20Opinion%202008\\_US%20Survey%20Results.pdf](http://www.thechicagocouncil.org/UserFiles/File/POS_Topline%20Reports/POS%202008/2008%20Public%20Opinion%202008_US%20Survey%20Results.pdf). Furthermore, “[t]he U.S. public does not view helping to bring a democratic form of government to other nations as a high priority. This foreign policy goal is considered ‘very important’ by only 17 percent of Americans, placing it at the bottom of the list of fifteen goals.” *Id.* at 15.

they are more likely to see and experience the benefit than a similar reformation at the state or federal level.<sup>118</sup>

#### 4. Utilizing Structural Advantages

Finally, many cities are structurally better suited to pass the human rights proposals discussed below than the federal government is to ratify human rights treaties. The proposals and ordinances I discuss below could come from either mayors or city councils. While developing political consensus in favor of a new proposal is often difficult, particularly when such a proposal commits the city to spending resources or reforming its own bureaucracy, no city councils of which I am aware contain the sort of filibuster mechanisms embedded in the Senate. Of course, those cities run by either strong mayors opposed to proposals or coalitions of elites that oppose the substance of treaties will be unlikely to push such changes through. That being said, many of the stable coalitions that can arise in a city may be responsive to the public interest in favor of the treaties.<sup>119</sup>

It should be unsurprising that many cities possess a structure that allows the passage of ordinances more easily than the federal government can ratify treaties or pass human rights legislation. In many instances, the U.S. Senate is *sui generis* because the framers crafted it as an anti-democratic check on the House of Representatives.<sup>120</sup> No such concerns dominated the creation of city governance structures. Also, given the limited reach of city governments on the front end and states' broad ability to preempt city behavior on the back end, states might have been less concerned about embedding chokepoints for city action in the city structure itself. Moreover, constituent preferences tend to play a larger role in the behavior of local governments than in state or federal governments because individual citizens believe that their voices matter more in the local setting<sup>121</sup> and they have greater capacity to prevent capture by special interest groups.<sup>122</sup> Thus

118. Goldsmith, *supra* note 116, at 1677 (explaining why people are more altruistic to those that are closer).

119. Schragger, *supra* note 92, at 2551.

120. William N. Eskridge, Jr., *The One Senator, One Vote Clause*, 12 CONST. COMMENT. 159 (1995). Most state senates look much more like their sister house of representatives than the federal senate.

121. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 397 (1990).

122. See Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 MICH. L. REV. 277, 297 (2007) (noting that constituents of small local governments can ensure responsiveness by monitoring local officials and exercising exit); Matthew Parlow, *A Localist's Case for Decentralizing Immigration Policy*, 84 DENV. U. L. REV. 1061, 1070-71 (2007) (identifying the opportunities for participation in the decision-making processes of small local government).

the political homogeneity described above gains additional weight in city as opposed to state or federal politics.

In sum, given the combined effects of political homogeneity, the avoidance of federalist and foreign policy objections, the enhanced warm glow and other individual benefits, and the structure of many city governments, we should expect to see a few major blue cities like San Francisco, New York, and Chicago along with smaller cities like Eugene, Berkeley, and Chapel Hill adopting such policies. Other like-minded (and likely nearby)<sup>123</sup> cities that do not wish to be innovators may wait to see the outcome of the ordinances and then model themselves on the ones that succeed. That being said, I do not anticipate a quick, ensuing cascade to either more diverse or more politically moderate cities and suburbs. Just as some cities' political preferences will favor the substance of human rights ordinances, others will not. Successful innovation can convince sympathetic neighbors and over time may even influence the perception of human rights; but as described in the subsection below, city ordinances are not going to quickly turn red cities, states, and federal governments blue.<sup>124</sup>

### C. Limitations

#### 1. Structural

##### a. Federal Constitution

As I and others have dealt with these arguments elsewhere,<sup>125</sup> I wish to only briefly revisit the constitutional limits on city action in integrating international human rights law. First, the Constitution provides several textual limitations including the federal government's exclusive authority to conduct treaties with foreign powers,<sup>126</sup> which clearly precludes cities from joining a multilateral treaty regime or participating in its governance. These limits probably matter more for environmental agreements, which involve collective action problems, while many human rights agreements

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123. See Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1350-51 (2009) (explaining why a jurisdiction can more easily adopt a policy of its neighbor than of a distant jurisdiction).

124. Human rights need not correlate with red/blue party politics, but in practice they often do. Cities are all over the map with their approaches to immigration, ranging from hostile anti-employment and anti-housing policies to sanctuary cities devoted to non-cooperation laws that "make their boundaries safe-havens for undocumented immigrants." Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 371, 376-78 (2008).

125. See, e.g., Wexler, *supra* note 2, at 41-47.

126. U.S. CONST. art. 1, § 10.

govern seemingly purely internal matters. Even human rights treaties, however, include governance structures in which cities cannot participate. The Compact Clause also limits sub-federal actors' ability to conduct agreements and compacts: courts have interpreted this clause as requiring congressional approval for arrangements that increase a state's political power or encroach on the nation's power.<sup>127</sup> Thus, taking the clause to its logical conclusion, sub-federal actors like cities cannot bypass the U.S. Government if they seek to conclude binding commitments with other government actors. For agreements with foreign countries or foreign cities, American cities must find some other way to signal their intent to be bound, such as the use of memoranda of understanding and other non-binding pacts to signal their intentions.

In addition to the textual constitutional limits on sub-federal action, the federal government retains the power to preempt sub-federal initiatives.<sup>128</sup> Thus, Congress may pass a statute to preempt a particular act of sub-federal integration or it may rely on courts to enforce its preferences.<sup>129</sup> In recent years, the Supreme Court has used statutory preemption in cases like *Crosby v. National Foreign Trade Council* to strike down a Massachusetts law banning state procurement from companies doing business in Burma, because the state ban interfered with the more calibrated federal sanctions policy.<sup>130</sup>

The Supreme Court has also found preemption on the basis of dormant federal powers. In the 1968 case *Zschemig v. Miller*, the Supreme Court suggested that any state laws with "more than some incidental or indirect effect" on foreign affairs would be invalid, regardless of any showing of direct conflict with federal actions or even any affirmative federal activity in the subject area.<sup>131</sup> The more recent case of *American Insurance Asso-*

127. See, e.g., *Cuyler v. Adams*, 449 U.S. 433, 438–42 (1981); see also Andrew A. Bruce, *The Compacts and Agreements of States with One Another and with Foreign Powers*, 2 MINN. L. REV. 500 (1918).

128. Courts have recognized the following varieties of preemption: (1) express preemption, in which a federal statute clearly expresses Congress's desire to exclude state activity; (2) obstacle preemption, in which a state statute stands as an obstacle to the accomplishment of the purposes and objectives of a federal statute; (3) conflict preemption, in which a state statute makes it impossible to comply with federal law; and (4) field preemption, in which the federal government has acted so definitely in a field that there is "no room for the States to supplement it," or the federal interest in controlling the subject is strong enough to presume federal law precludes state action. Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 205-06 (2000) (developing this useful taxonomy of preemption cases).

129. See generally Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127 (2000).

130. 530 U.S. 363, 366, 378-79 (2000).

131. 389 U.S. 429, 434-35 (1968) (internal quotation marks omitted).



*ciation v. Garamendi*<sup>132</sup> may have revived *Zschernig*'s long ignored foreign affairs preemption doctrine by raising the possibility of independent executive branch preemption authority.<sup>133</sup> Sub-federal integration deepens this uncertainty by raising the question of when treaty rejection or treaty avoidance constitutes a policy sufficient to preempt sub-federal action.

Ultimately, whatever constitutional limits exist, they constrain sub-federal action only to the extent that sub-federal actors either face or at least fear facing federal enforcement.<sup>134</sup> In many prior instances of sub-federal activism, the federal government has been reluctant to intervene. Despite the broad language in *Holmes v. Jennison*,<sup>135</sup> states have concluded numerous covenants with foreign entities, including environmental pacts, without seeking congressional approval.<sup>136</sup> Neither Congress nor the courts have spoken on these covenants,<sup>137</sup> nor have they acted to preempt a variety of questionable city behaviors such as those declaring non-binding nuclear weapons-free zones;<sup>138</sup> divesting stock from firms doing business in South Africa; restricting procurement of goods and services when the bidder for a city contract did business in South Africa;<sup>139</sup> and passing an or-

132. 539 U.S. 396 (2003).

133. The Court held that executive branch agreements with foreign countries to settle insurance claims arising out of World War II preempted a California law forcing disclosure of information on insurance companies operating during World War II. While the executive branch agreements did not expressly preempt state laws or even address all the countries covered by the California law, the state policy of forcing broad disclosure was found to undermine the executive policy of encouraging voluntary establishment of settlement funds and limiting disclosure of insurance policy information. *Garamendi* renders the future reach of preemption doctrine uncertain. Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 949-50 (2004) (acknowledging that *Garamendi* could increase executive power, but contending that *Garamendi* merely reflected the court's dissatisfaction with the "peculiar and overreaching scope of the [disclosure] statute").

134. Some government officials might also feel limited by their oath to uphold the Constitution, but I suspect few in substantive support for such policies would conceptualize their activities as violating the Constitution.

135. 39 U.S. (14 Pet.) 540 (1840).

136. Peter R. Jenetten, *State Environmental Agreements with Foreign Powers: The Compact Clause and the Foreign Affairs Power of the States*, 8 GEO. INT'L ENVTL. L. REV. 141, 168-72 (1995); Michael H. Shuman, *Dateline Main Street: Courts v. Local Foreign Policies*, 86 FOREIGN POL'Y 158, 163 (1992).

137. Shuman, *supra* note 136, at 163.

138. *See id.* at 158 (detailing the "explosive growth of municipal foreign policy" in this area).

139. David D. Caron, *The Structure and Pathologies of Local Selective Procurement Ordinances: A Study of Apartheid-Era South Africa Ordinances*, 21 BERKELEY J. INT'L L. 159, 160-61 (2003). A suit was filed against the Baltimore ordinance but the Justice Department declined to join the suit. *Bd. of Trs. Employees Ret. Sys. of Balt. v. Mayor of Balt.*, 562 A.2d 720 (Md. 1989).

dinance repudiating torture committed by the Bush administration. On the other hand, Congress did expressly preempt state anti-boycott laws, which prohibited state residents from conducting certain transactions with Arab states.<sup>140</sup> Similarly, the Justice Department filed suit and defeated an Oakland ordinance that banned firms from doing weapons manufacturing work and restricted the transportation of nuclear materials through the city's jurisdiction.<sup>141</sup> Both *Crosby* and *Garamendi* suggest that federal courts may be embracing a more expansive preemption policy, which may in turn encourage more challenges.

*b. State Limits*

In addition to federal preemption, states can also place significant limits on their behavior.<sup>142</sup> To begin with, for much of their history, cities acted under the severe restraints of the Dillon Rule which only allowed localities to exercise those powers expressly granted by the state.<sup>143</sup> For the last century, the creation of home rule has allowed local governments to exercise all powers the state has not expressly reserved to itself.<sup>144</sup> Almost all states have granted most of their cities home rule powers which permit them to set up local constitutions and to legislate in areas of local concern. Even with home rule, however, states tended to significantly limit local policy making<sup>145</sup> and many state courts viewed the scope of purely local concern to be quite narrow.<sup>146</sup> This frustration led to a second round of reform, in which many states granted cities legislative home rule.<sup>147</sup> This expanded authority changed the courts' preemption analysis to a determination of whether the city ordinance conflicts with state law.<sup>148</sup>

Of course states can, like the federal government, also preempt city behavior through new, direct legislation or judicial interpretation of existing powers and legislation. States have shown limited, but real interest in

140. Howard N. Fenton III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 NW. J. INT'L L. & BUS. 563, 567 (1993).

141. *United States v. Oakland*, No. C-89-3305 (N.D. Cal. 1990).

142. See David J. Barron & Gerald E. Frug, *Defensive Localism: A View from the Field*, 21 J.L. & POL. 261 (2005).

143. Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1206-07 (2008).

144. Michael Monroe Kellogg Sebree, Comment, *One Century of Constitutional Home Rule: A Progress Report?*, 64 WASH. L. REV. 155, 156 (1989).

145. Barron & Frug, *supra* note 142, at 261.

146. See RICHARD BRIFFAULT & LAURIE REYNOLDS, *STATE AND LOCAL GOVERNMENT LAW* 282-83 (6th ed. 2004).

147. *Id.*

148. *Id.* at 260-70.

preempting some city ordinances consistent with human rights. For instance, some state courts have found city living wage ordinances to be impermissible intrusions on state power.<sup>149</sup> Moreover, after state courts upheld local ordinances under the city's authority, one state passed legislation explicitly preempting living wage laws.<sup>150</sup> This sort of preemption seems most likely to occur when a very blue city acts in a very red state that does not share its ideology, and the policy has negative spillover effects on other cities in the state.

Business and other interest groups may, and in fact are likely to, seek to use state courts and legislatures to preempt city ordinances.<sup>151</sup> For instance, Paul Diller credits successful city ordinances as prompting states to preempt the following ordinances: restaurant smoking bans, domestic partnership benefits for government employees, and rent control ordinances.<sup>152</sup> Sometimes the mere fear of city innovation will prompt proactive preemption in advance of city policies such as Louisiana's state law forbidding cities to increase the minimum wage above state levels.<sup>153</sup>

Businesses have two reasons to protest: they may fear that they will suffer specific high local costs in conforming to the regulation, and they may desire uniformity in regulation because the costs of complying with a patchwork of varying city regulations is higher than complying with a single policy.<sup>154</sup> For instance, businesses have opposed smoking bans, gay rights legislation, and living wage laws under this rationale.<sup>155</sup> One reason they

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149. *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So. 2d 1098, 1101-02, 1108 (La. 2002).

150. See WIS. STAT. ANN. § 104.001(2) (West 2010).

151. Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1113 (2007).

152. *Id.* at 1118-19. At least four states—Arizona, Colorado, Massachusetts, and Oregon—have legislation that expressly preempts local rent control ordinances. See ARIZ. REV. STAT. ANN. § 33-1329 (2010); COLO. REV. STAT. ANN. § 38-12-301 (West 2010); MASS. GEN. LAWS ANN. ch. 40P, § 5 (West 2010); OR. REV. STAT. ANN. § 91.225 (West 2010). State legislatures in other states—namely, New York and California—have passed legislation aimed at weakening local rent control laws. See *California Begins Easing Its Once-Strict Laws on Rent Control*, N.Y. TIMES, Dec. 31, 1995, at A21.

153. See LA. REV. STAT. ANN. § 23:642 (2009); Diller, *supra* note 151, at 1139 & n.117.

154. Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 22-23 (2007); Louis Uchitelle, *Minimum Wages, City by City; As More Local Laws Pass, More Businesses Complain*, N.Y. TIMES, Nov. 19, 1999, at C1.

155. *Modern Cigarette, Inc. v. Town of Orange*, 774 A.2d 969, 976 (Conn. 2001); *Lexington Fayette County Food & Beverage Ass'n v. Lexington Fayette Urban County Gov't*, 131 S.W.3d 745, 748 (Ky. 2004); *Allied Vending Inc. v. City of Bowie*, 631 A.2d 77, 78 (Md. 1993); *Tri-Nel Mgmt., Inc. v. Bd. of Health*, 741 N.E.2d 37, 40 (Mass. 2001); *Take Five Vending, Ltd. v. Town of Provincetown*, 615 N.E.2d 576, 578 (Mass. 1993); *C.I.C. Corp. v. Twp. of E. Brunswick*, 628 A.2d 753, 754 (N.J. Super. Ct. App. Div. 1993); *Vatore*

might succeed at the state level is because businesses hurt by the regulation will

often protest vociferously and, in some instances, receive the support of groups that purport to represent the entire business community, such as chambers of commerce. At the same time, perhaps out of a sense of “pro-business” solidarity, or because the gains from the proposed local regulation are too small and diffuse to those business [sic] that stand to benefit, support from the business community for many new local regulations is often muted or nonexistent.<sup>156</sup>

When the political preferences of the city override business interests, businesses can get the state government to explicitly override these ordinances.<sup>157</sup> The same reasons that favor the ordinance’s proponents seeking city rather than state reform, favor the businesses at the state level. Lobbying state legislatures is more expensive, which often benefits business interests,<sup>158</sup> though it does mean that they may not seek to undertake action where the costs of the ordinance are low.

Finally, in the absence of express preemption by the legislature, opponents of the ordinance may seek judicial preemption. State court jurisprudence is similar to what is described above in federal preemption jurisprudence. If there is no express preemption, federal and state courts will look for implied preemption which will either occur through conflict with state laws or state occupation of the field. In undertaking conflict preemption, state courts often ask “whether a local ordinance substantially interferes with state law or the state’s constitutional responsibilities.”<sup>159</sup> While preemption poses a real limitation—scholars present the courts’ jurisprudence in this area as a “problematic shadow”<sup>160</sup>—some room for local innovation still exists.

## 2. *Limited Spillover: State, Federal, and International*

On occasion, city innovation has spurred state spillovers. Though human rights ordinances face a significant uphill battle, such experiments may hasten state or federal action in at least two instances. If the federal government and the states resist human rights efforts because they are un-

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v. Comm’r of Consumer Affairs, 634 N.E.2d 958, 958-59 (N.Y. 1994); *Amico’s, Inc. v. Mattos*, 789 A.2d 899, 901 (R.I. 2002).

156. Diller, *supra* note 151, at 1134.

157. See BRIFFAULT & REYNOLDS, *supra* note 146, at 282-83 (noting this is particularly when the city has legislative home rule).

158. Diller, *supra* note 151, at 1139-42.

159. *Id.* at 1142 & n.131.

160. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2366 (2003).

sure of the benefits of such programs, then spillover would be a strong possibility after successful city action.<sup>161</sup> In such a world, cities bear the costs and risks of innovating and the states and federal government could simply free ride off of their efforts. Second, and perhaps more importantly, if city efforts change constituents' underlying objections to the promotion of positive rights, then spillover is also a possibility. In the final work of this cycle, I intend to discuss the ways in which local efforts can serve as a mechanism to articulate and justify human rights principles. Perhaps such justifications might be persuasive to those outside the jurisdiction in which the human rights are enacted. If so, then spillover is possible, though I anticipate this process to be a very long one with limited effects given the power of other constraints. Though part of the point of this series of articles is to point out that the United States is in need of international law's influence and that domestic law does not perfectly mirror the content of international human rights treaties, existing city-level efforts are, in general, unlikely to trigger widespread state, federal, or global change.

Those other constraints can be distilled from many of the observations described above. Though citizens may experience warm glow or more direct personal benefits from human rights ordinances, such policies often raise significant costs as well. While one reason posited for the emergence of city and state environmental mini-Kyoto policies is the possibility of economic gain, human rights treaties are unlikely to present similar short term economic gains. Providing positive rights is likely to prove quite expensive. Perhaps, highly motivated, politically homogenous groups are willing to bear those costs, but the discussion of preemption suggests most other participants in state-level politics are not. Resistance may come from those most likely to pay for such proposals or from those unconvinced of human rights' theoretical soundness. So just as most large cities are blue with some willingness to support such efforts, many smaller cities are red and passing ordinances in the opposite direction for much the same reasons—they are politically homogenous, feel their ideological preferences are underrepresented on the federal and state level, and receive a warm glow from public oriented legislation such as anti-immigration policies and restrictions on sex offenders.

Further constraints hamper the domestic and the international level. While many are optimistic that building up domestic human rights will also translate into greater ability to promote human rights treaties, that relationship does not necessarily follow. To return to the arguments made at the beginning of the paper, city ordinances simply do not have to grapple with

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161. Galle & Leahy, *supra* note 123.

some of the most important objections to human rights treaties. Many Americans believe that they ought not “interpret and enforce human rights for people living in other countries”<sup>162</sup> even as they support human rights at home. Similarly, city experiments provide us no data about the legitimacy of the International Federalists and Flexible Foreign Policy Advocates arguments. If local experiments fail to address these objections, then opponents will continue to use senatorial chokepoints to block treaty ratification. In turn, that limits, though does not extinguish, the possibilities for international human rights relationships to develop and grow.

### CONCLUSION

As this Article posits, the world in which the federal government will not ratify human rights treaties, local human rights internationalism may provide a second best option. Politically homogenous cities may be able to pass ordinances that express support for human rights treaties, enable the exercise of human rights, reform state behavior that violates human rights, and create the first step toward the utilization of positive rights. These ordinances can matter a great deal to the individuals that benefit from them and the communities that embrace them. Yet isolated ordinances alone seem unlikely to create the sort of justification for expansive human rights that will spillover to widespread state endorsement and federal ratification. Thus, the next article in this project will address the question of how to use the administrative state to create a better foundation for widespread domestic human rights support.

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162. THE OPPORTUNITY AGENDA, *supra* note 103, at 28.