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Associate Professor of Law, Hofstra University Law School. This essay is based on a panel presentation at a conference on Human Rights on the Eve of the Next Century, Fordham University School of Law, February 28, 1997. Thanks to Curt Bradley, Eric Freedman, Jack Goldsmith, and Mark Movsesian for intervening comments, though none should be held responsible for conclusions herein.

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THE STATES AND INTERNATIONAL HUMAN RIGHTS

Peter J. Spiro*

Introduction

INTERNATIONAL human rights law is coming to cut closer to home. After several decades in which we could (perhaps with some justification) hold our domestic practice out as the measure against which to judge respect for human rights in other nations, we no longer can claim leadership in this realm. The United States has violated international human rights, on both an episodic and systemic basis. It has proven to be a serious laggard in acceding to near universally-adopted international human rights conventions; where the United States has signed on to such accords, it has included conditions methodically limiting the scope of ratification to existing U.S. practice, rendering acceptance a largely hollow, falsely symbolic act. The human rights movement is now turning its attention to conditions in the United States, and it is increasingly finding instances in which such practices fall short of international standards.

Federalism has played a complicating factor in this dynamic. It is state-level conduct that is most often condemned as violating international human rights, notably with respect to the use of the death penalty. These are violations for which the federal government refuses to accept responsibility, in either the political branches or the courts, the implication of important international interests notwithstanding. Federalism concerns also explain the Senate's refusal to consent to the major human rights treaties without restrictive conditions. Congress shows no intention of deploying the treaty power to force the states into conformity with international human rights standards.

This effective abdication on Washington's part has occurred in the face of longstanding rules of international law under which central governments are held accountable for the conduct of constituent authorities. In theory, the doctrine of state responsibility should facilitate compliance with international norms at all levels of government, as central authorities, assumed sovereign within their own realm, discipline political subdivisions in anticipation of or in response to international pressures themselves legitimized by international law. But where the powers of central governments have attenuated to the point where such pressure is to no likely reward, it will not be applied at all,

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or only in the most tokenly formalistic fashion. At the same time, the rule of state responsibility still absolves subnational entities such as our state governments of any responsibility for violations of international law.

This article first describes the increasing relevance of state-level action to international human rights. Many newly emerging human rights implicate areas of law, such as criminal and family law, which have been within the near-exclusive authority of state governments in the United States. Scholars, activists, and other countries now assert that such state activity is inconsistent with customary human rights norms, notwithstanding which the federal government has refused to press the states into conforming with such norms. Nor has Washington consented to ratification of international human rights accords, at least not in a fashion that would in any respect change state law.

In Part II, I argue that the dilution of national control over political subdivisions should find a corresponding dilution of the doctrine of state responsibility. That dilution should take the form of what I call "condominium" responsibility, in which both central and subnational governments are held responsible for the conduct of the latter. Condominium responsibility would allow for direct action against subnational units at the same time as it would preclude strategic behavior on the part of national governments, which might otherwise hide behind subnational responsibility for matters actually within their control.

My task here is in some part descriptive, for subnational responsibility is emerging as a matter of practice. As actors in the human rights arena, including nation-states and non-governmental organizations ("NGOs"), come to recognize the real-world significance of subnational authorities on matters of human rights, they are targeting their efforts directly at such authorities with increasing frequency. To the extent such activity becomes pervasive, it could by itself give rise to a new rule of customary international law.

But the analysis is also normative. Recognizing a new doctrine of subnational responsibility would lead to greater consciousness and more efficient enforcement of international human rights norms among and against a group of actors that has to date maintained an almost concerted ignorance of such standards. As human rights issues become an increasingly important element in the operation of the global marketplace, NGOs and other international actors could exact economic retribution, in the form of lost exports and investment, against subnational actors who are consistent rights violators. In the United States, such economic discipline could facilitate a competitive federalism towards improved compliance with human rights norms. A new doctrine of subnational responsibility would facilitate such disciplinary activity; a regime that allocates legal responsibility to those
actors who hold actual power is presumptively more efficient than one that does not.

By way of perfecting the coverage of conventional human rights, I also propose that subnational entities be afforded some mechanism to discretely associate with formal human rights regimes. In this frame, individual states would evidence their assent to such treaties as the Convention on the Rights of the Child, with Washington as messenger rather than commander. Better to have some parts of a nation than none at all; if thirty states signed on to the Children’s Rights Convention in the face of the Senate’s continuing failure to ratify it, then that by itself would represent a gain for the regime. Initial subnational accessions could also have competitive ripples. Accession by a critical proportion of subnational units in any given country would inevitably put pressure on other units to follow suit, especially where trade, investment, and other economic factors appear in the mix.

Subnational participation in human rights treaty regimes would no doubt represent an innovation. It would not, however, be without precedent, as subnational authorities are now able to sign on to at least one important international trade agreement. The proposition also serves to highlight how subnational responsibility could give rise to a form of international legal personality, in which subnational actors might play an increasing role in the making as well as the implementation of international law.

I. The Human Rights Devolution

Human rights has built significantly from the basic premise that nations cannot treat their subjects as they please. In addition to freedoms from torture, political executions, and other extreme forms of inflicted human suffering, human rights now cuts deeply to vindicate individual rights against a broad range of governmental activity, as well as to afford special protections to vulnerable populations. Human rights law now operates with respect to such matters as free speech and conscience; the practice of religion; health care, education, and shelter; social and cultural rights; criminal law, procedure, and the conditions of incarceration. It is also being invoked to fight discrimination and other disadvantages suffered by racial minorities, women, children, indigenous peoples, migrants, the disabled, and homosexuals. Many of these asserted human rights are contested, but the breadth of what is at least in play cannot. Many are specified in inter-
national conventions, which have in some cases come to represent customary norms even in the absence of universal accession.

Because they implicate in some way most issues of governance, next-generation rights have inevitably implicated all levels of government. This fact will not in most cases complicate compliance, at least not in unitary systems or ones in which international norms (conventional or customary) are incorporated into domestic law as a matter of course. But difficulties will arise in federal systems where the international norm intrudes on areas of protected subnational authority. Such difficulties appear to have been most pronounced in the United States, though they have arisen in other federal systems as well.

A. U.S. States as Human Rights Offenders

Foreign nations, international organizations, and non-governmental organizations have in recent years condemned various subnational practices in the United States. Recent NGO and U.N. reports have alleged state human rights violations regarding police brutality and other enforcement excesses, as well as prison conditions. The most insistent criticism has involved state use of the death penalty. With


3. The problem would thus be least likely to trouble states in which international law is constitutionally incorporated as national law. See, e.g., Basic Law of the Federal Republic of Germany, art. 25, reprinted in Constitutions of the World (Gisbert H. Flanz trans., Albert P. Blaustein & Gisbert H. Flanz eds., 1994) ("The general rules of international law shall be an integral part of federal law. They shall override laws and directly establish rights and obligations for the inhabitants of federal territory.").

increasing success, the international human rights community has secured abolition of the death penalty in many nations, including most of the developed world.\textsuperscript{6} Because the death penalty remains almost entirely in the province of state law, it is state practices that have come under fire. Executions carried out by state authorities have


\textsuperscript{6} As of 1996, 108 countries had banned the death penalty (including all European states), while 83 had retained it. See William A. Schabas, \textit{The Abolition of the Death Penalty in International Law} 296 (2d ed. 1997). While universal abolition remains the ultimate goal, anti-death penalty activists have singled out some applications as particularly abhorrent, including the execution of juvenile offenders. See infra notes 16-18 and accompanying text. The use of the death penalty has also been criticized where it involves the mentally retarded, see, for example, UN ECOSOC Res. 1989/64 (recommending elimination of the death penalty for persons “suffering from mental retardation or extremely limited mental competence”), as well as where it has a racially disparate impact. See, e.g., Amnesty International, \textit{Open Letter to the President on the Death Penalty} 4-6 (Jan. 1994) (recommending the elimination of the death penalty because of its racial bias); Statement of Pierre Sané, Secretary General of Amnesty International at Tougaloo College, Jackson, Mississippi, \textit{reprinted in Amnesty International}, Secretary General to Brief Media on Tour of the South (Oct. 10, 1997) (press release) (criticizing American use of death penalty against juveniles, mentally retarded persons, and blacks).
drawn protests from foreign nations, international NGOs, the Vatican, as well as international organizations.

B. The Abdication of Federal Power

The federal government has persistently refused to correct state practices which may violate international human rights. It has, first of all, disclaimed responsibility for particular applications of the death penalty by state governments. The executive branch has deflected criticisms by other nations and human rights NGOs, asserting in effect that it is not the federal government's business how the states punish criminal offenders even in the face of international human rights con-

7. The most prominent recent example involved the execution in Virginia of convicted rapist/murderer Joseph O'Dell, who claimed that DNA testing of evidence used in his prosecution would prove his innocence. The case became a regular headliner in Italy; O'Dell was made an honorary citizen of Palermo (where he was later buried), and the case attracted attention at the highest levels of Italian government. See Vera Haller, *Italy Mourns O'Dell as Hero: Execution Seen as Rallying Point Against Death Penalty*, Wash. Post, July 25, 1997, at A26 (reporting Italy's protests and interest in O'Dell's execution); Laura LaFay, *On Eve of Court Arguments, European Officials Back O'Dell*, Virginian-Pilot (Norfolk), Mar. 18, 1997, at A1 (reporting on European Parliament call for the United States to reassess the evidence of O'Dell's innocence); see also Laura LaFay, *Virginia Ignores Outcry Death Penalty Cases Prompt International Intervention*, Roanoke Times & World News, July 6, 1997, at C1 (reporting that the Italian and Mexican governments have intervened in two death penalty cases); Sam Dillon, *Mexico Reacts Bitterly to Execution of One of Its Citizens in Texas*, N.Y. Times, June 20, 1997, at A6 (describing Mexico's protest of Texas execution); Gregory Katz, *Europe's Verdict on the Death Penalty; U.S. Executions Considered Barbaric, Ineffective*, Dallas Morning News, Feb. 18, 1996, at J1 (reporting efforts by French President and German Foreign Minister to halt execution of Mumia Abu-Jamal).


10. See Human Rights Committee, supra note 4, ¶ 16 (expressing concern at the "excessive number of offenses punishable by the death penalty in a number of States," and "deplor[ing] provisions in the legislation of a number of States which allow the death penalty to be pronounced for crimes committed by persons under 18 and the actual instances where such sentences have been pronounced and executed"); see also *S. Adele Shank & John Quigley, Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 St. Mary's L.J. 719, 746-47 (1995) (reporting on unsuccessful attempt by Inter-American Commission on Human Rights to have execution stayed).
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11. See, e.g., Amnesty International Report 1997, supra note 5, at 328 (condemning the Clinton Administration for its refusal to accept Amnesty findings on Georgia death penalty and for "denying that the death penalty was used in a racist manner"); Katz, supra note 7 (noting that Germans who protest execution receive form letters stating that execution policy is set at state level, with no possibilities for federal intervention).


14. See, e.g., Amnesty International Appeals to Governor Richards to End Executions in Texas, Austin Am.-Statesman, Sept. 1, 1993, at A11 (advertisement) (letter signed by delegates from international sections of Amnesty International citing "outrage at the increasing use of the death penalty in Texas" and calling upon Texas governor to abolish "this abhorrent practice"); see also Amnesty International Report 1997, supra note 5, at 328-29 (reporting communications with officials in Alabama, Arizona, California, Florida, Georgia, and New Jersey); id. at 77-79 (reporting Amnesty contacts with Tasmanian state authorities regarding anti-sodomy laws); id. at 158-60 (reporting Amnesty communications with authorities in German states of Bremen and North Rhine/Westphalia regarding police mistreatment); Amnesty International, Australia: Western Australia Government Continues to Block Death in Custody Inquiry (Jan. 30, 1997) (press release) (reporting contacts with subfederal authorities regarding death in police custody).

15. See, e.g., Ronan Doherty, Note, Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law, 82 Va. L. Rev. 1281, 1326-27 (1996) (citing examples); Spencer S. Hsu & Peter Finn, Allies of Inmate Push to Prevent Execution, Wash. Post, July 22, 1997, at E1 (reporting pleas for clemency to Virginia governor from Italian president and mayor of Palermo regarding Joseph O'Dell). Foreign countries have also made direct approaches to subfederal authorities with regard to other difficulties involving treatment of their nationals in the United States. See, e.g., Doherty, supra, at 1330 n.223 (describing visit
Nor will the political branches work to correct state practices even where their constitutional authority is apparent. This failure is dramatically evidenced by U.S. ratification of the International Covenant on Civil and Political Rights ("ICCPR"). Though for the most part tracking the U.S. scheme of constitutional protections, the ICCPR prohibits the execution of juvenile offenders.\textsuperscript{16} Consistent with the Carter and Bush administrations' treaty submissions, however, the Senate adopted a reservation from this prohibition,\textsuperscript{17} entrenching the United States as one of only a handful of mostly rogue states that continue to allow such executions.\textsuperscript{18}

Indeed, the Senate has consistently refused to effect any changes in state laws by way of the human rights treaties. Those conventions that have been ratified have been systematically conditioned to render them completely consistent with existing practice,\textsuperscript{19} including reservations on issues far less politically controversial than the execution of juvenile offenders.\textsuperscript{20} The conditions do not appear to be purely policy-driven (although many may be),\textsuperscript{21} a conclusion evidenced by the federal death penalty's own exception for juvenile offenders.\textsuperscript{22} In
other words, the treaty conditions appear ultimately grounded in federalism concerns, not policy ones. If the United States were a unitary state, we would likely have no death penalty for juvenile offenders. As if by way of insurance, recently ratified human rights instruments have included “federalism” understandings, under which the United States in essence appears to deny operability where a treaty provision would infringe on constitutionally protected state powers.23

At the same time that the United States finally moved on the ICCPR and one other major human rights convention,24 others remain stalled at least in part as a result of federalism concerns. Most notably, the Convention on the Rights of the Child, now ratified by virtually every other nation in the world,25 has been held up not only because it includes controversial substantive terms but also because it involves an area of almost exclusive state-level authority.26 The polit-

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23. Thus, for example, ratification of the ICCPR includes the following understanding:

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


ical branches thus appear unwilling to deploy the treaty power to constrain state lawmakers in areas of traditional state authority.

One might go so far as to question whether the treaty power now encompasses a federal capacity to overcome state laws in spheres of traditional state authority, at least not on the basis of international human rights treaties. The Supreme Court, of course, found such a federal power in its 1920 decision in *Missouri v. Holland*, and one would have no reason to suppose that the Court would depart from that ruling if it were to reconsider the issue. But in the face of consistent senatorial unwillingness to impose treaty obligations in such areas as criminal and family law, it is unlikely that the Court will enjoy an opportunity to reaffirm its holding. In the absence of recent judicial consideration, one might argue that the uniform practice of the political branches has become more than mere “political reality” and assumed some constitutional significance.

Notwithstanding the 1954 defeat of the Bricker amendment, which would have formally limited the treaty power to the extent it otherwise trumped the constraints of federalism, the entrenched institutional position of the Senate on the issue appears to have achieved the same result. The federalism understandings constitute a formal in-

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27. *Missouri v. Holland*, 252 U.S. 416, 434 (1920) (“No doubt the great body of private relations usually fall within the control of [a] State, but a treaty may override its power.”).

28. Concededly, it is far more likely that the question will need to be readdressed in the wake of the Supreme Court’s recent decision in *United States v. Lopez*, in which the Court rediscovered limits on congressional powers under the Commerce Clause. *United States v. Lopez*, 514 U.S. 549 (1995) (striking down federal gun-free school zone measure as not within Congress’ commerce clause power). Prior to *Lopez*, federal action under the Treaty Power would have enjoyed alternative grounding in the Commerce Power so as to obviate reconsideration of the decision in *Holland*. The substantive provisions of the human rights conventions are exactly the sort that would no longer necessarily be sustained under the Commerce Clause. State use of the death penalty, for instance, would hardly seem to have the “substantial” effect on interstate commerce necessarily to justify congressional authority under *Lopez*. See *id.* at 567.


32. See Louis Henkin, *U.S. Ratification of the Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int’l L. 341, 349 (1995). Indeed, the pattern of a defeated amendment followed by a practice consistent with the amendment’s substance bears some resemblance to Bruce Ackerman’s and David Golove’s description of how the congressional-executive agreement came to win constitutional legitimacy outside of the Article II treaty process. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 799 (1995). In both episodes, proposed amendments were defeated in part because of informal institutional agreement to respect their substance. See Duane Tananbaum, *The Bricker Amendment Contro-
stitutional statement of law—analogous to opinio juris in international law—by a branch with the constitutional powers to maintain that interpretation. Although they have no international effect, and can be plausibly read as "wholly circular" and without independent meaning, the context of their adoption evinces a consistent refusal to displace state law with international human rights treaty obligations. It will thus take more than a change in political winds for Congress to impose international human rights norms on the states. If Holland

versus: A Test of Eisenhower’s Political Leadership 89, 199 (1988) (noting that Eisenhower promised to exercise Treaty Power only within “traditional limits,” consistent with the Bricker Amendment); Ackerman & Golove, supra, at 889-96 (describing how Senate accepted approval of agreements by bicameral majority). By way of a bit of historical irony, it may be that the Bricker era itself produced the most significant example of federal intrusion (albeit through non-treaty means) motivated at some level by international human rights concerns. See Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 Stan. L. Rev. 61 (1988).


34. One political scientist similarly stresses the “legalization” of the human rights treaty ratification debates, noting that arguments regarding the merits of particular treaties have been consistently subordinated to issues of constitutional capacity. See Kaufman, supra note 31, at 172-74.

35. Indeed, the ICCPR, for example, applies by its express terms to "all parts of federal states without any limitations or exceptions." ICCPR, supra note 1, art. 50.

36. See Neuman, supra note 29, at 52 (concluding that the federalism clause is meaningless insofar as undertaking to pursue “measures appropriate to the Federal system” including those permissible under Holland).

37. See, e.g., S. Exec. Rep. 103-29, at 24 (with respect to Race Convention, observing that “there is no intent to preempt . . . state and local initiatives or to federalize the entire range of anti-discrimination actions”); S. Exec. Rep. No. 102-23, at 9 (1992) (stating that ICCPR federalism understanding “clarifies the degree to which the federal government is obliged to ensure compliance with the Covenant by state and local entities”); id. at 18 (reproducing Bush Administration explanation that understanding “serves to emphasize that there is no intent to . . . ‘federalize’ matters now within the competence of the states”); see also S. Exec. Rep. No. 103-38, at 7 (1994) (stating that with respect to proposed federalism understanding to Women’s Convention, “[a]lthough U.S. law does not proscribe the Federal Government from committing its constituent units to the goal of non-discrimination, U.S. law does provide limitations on the Federal role in some areas”); Kaufman, supra note 31, at 171-72 (arguing that federalism understandings have “no doubt been proposed in order to provide reassurance of the maintenance of the traditional domains of authority that aroused so much controversy during the 1950s”). This evidence, coupled with the rule of construction under which superfluity is to be disfavored, see, e.g., Colautti v. Franklin, 439 U.S. 379, 392 (1979) (interpreting statute “so as not to render one part inoperative”), lead me to conclude that the federalism understandings state a rule of constitutional law in derogation of Holland, namely, that treaty obligations do not necessarily afford federal authorities a lever by which to invade otherwise protected state powers. See also U.S. Department of State, Civil and Political Rights in the United States: Initial Report of the United States of America to the U.N. Human Rights Committee Under the International Covenant on Civil and Political Rights (July 1994), reprinted in United Nations, Human Rights Committee: Report of the Human Rights Committee, U.N. Doc. CCPR/C/81/Add.4, HRI/CORE/1/Add.49 (1995) (noting that “some” consider the rule of Holland to be an interference with rights of states; “[e]nsequently, the expectation has been that any changes to U.S. law required by treaty ratification will be accomplished in the ordinary legislative process”).
were brought back before the Court, one can be sure that the Senate's practice would be cited in support of its reversal. 38

Even if one does not buy these tentative observations 39 as a matter of constitutional interpretation, political winds would have to change dramatically for the federal government to constrain state-level action in the name of international human rights. The problem is likely to be aggravated as human rights consolidates its footholds in other areas implicating state law. Nor have the courts shown any inclination to trump state laws with customary norms, even at the urging of scholar advocates. 40 In the face of continued federal abdication, the states have become, and will remain, key governmental players on important human rights issues.

38. Cf., e.g., Dames & Moore v. Regan, 453 U.S. 654, 682-83 (1981) (accepting historical practice as relevant to delineation of constitutional powers). Of course, the opportunity for the Court to reconsider Holland would itself involve a deviation in congressional practice, to the extent that a continuation of its current restraint would never present a justiciable controversy. I do not claim that Congress lacks the power to so deviate; all constitutional rules, whether developed by courts or by custom, are subject to evolution. But I think that an attempt to impose human rights norms on the states would pose more of an open constitutional issue than an analysis of Holland alone would suggest, in large part because of the consistent, more recent senatorial posture on the question.

39. I should add that these observations are intended as positive descriptions of where constitutional law now stands, not normative descriptions of where it should be. It does seem, however, that in the face of persistent federal reluctance to constrain state laws that may violate international human rights, the human rights and civil liberties movement would better deploy its resources in state capitals than in Washington, as some apparently have been doing. See, e.g., supra note 14.


Indeed, the courts now appear reluctant to nullify state action even where inconsistent with treaty obligations. See, e.g., Murphy v. Netherland, 116 F.3d 97, 101 (4th Cir. 1997) (denying habeas relief based on alleged state violation of Vienna Convention on Consular Relations); Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996) (same); cf. Guaranty Trust Co. v. United States, 304 U.S. 126, 143 (1938) ("Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them."). Of course, there is venerable precedent under which inconsistent state laws must give way where a direct conflict with an international agreement is presented. See United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).
C. Federalism and Human Rights in Other Countries

Other countries are witnessing similar developments. Even before its crisis of nationhood, Canadian federal authorities lacked the authority to impose treaty obligations in spheres of exclusive provincial authority. It has more recently faced censure for the conduct of the province of Quebec. The parallels to Australian federalism are more striking. As in the United States, the Australian federal government enjoys the formal power to intrude on otherwise exclusive subfederal powers by way of treaty obligations. In the spirit of "cooperative" federalism, however, the federal government has been reluctant to exercise that power. Canberra balked, most notably, at overriding a Tasmanian anti-sodomy law even after it was found inconsistent with the ICCPR by the body responsible for the treaty's interpretation; it was the subfederal government, in the end, that repealed the measure of its own accord. More recently, the separatist republic of Chechnya executed two individuals notwithstanding Russia's efforts to halt capital punishment within its borders. Russian officials later denounced the conduct of the provincial officials on international law grounds.


43. See Brian R. Opeskin & Donald R. Rothwell, The Impact of Treaties on Australian Federalism, 27 Case W. Res. J. Int'l L. 1, 16 (1995). Australian ratification of human rights treaties has included federalism clauses similar to those deployed by the United States, providing, for instance, that "[t]he implementation of the treaty throughout Australia will be effected by the Federal, State, and Territory governments having regard to their respective constitutional powers and arrangements concerning the exercise." See id. at 19 n.82.


These examples (not based on an exhaustive study, I should add) tend to show that the phenomenon is not limited to the United States, and that a corresponding reexamination of relevant international processes would not be an exercise in conforming to American exceptionalism. It is at this subnational level that many crucial compliance decisions are now being made. To the extent devolution is an international trend, international human rights law should come to account for it.

II. State to Subnational Responsibility

Notwithstanding the subnational locus of human rights decision-making in at least some contexts, the longstanding doctrine of state responsibility holds nations exclusively responsible for the conduct of constituent territorial units under international law.47 This tenet of state responsibility has attracted little controversy in a century dominated by the state system. Its logic has hinged on two core elements of that system, and of sovereignty itself: first, that nation-states were presumed to enjoy absolute control over their territorial jurisdiction, and second, that nation-states interacted only with each other. As an increasingly post-national world brings both of these premises into question, so too should we problematize state responsibility. Where subnational authorities enjoy effective decision-making control on issues of international legal concern, and because subnational authorities are very much a part of the international dynamic, they should also be held legally responsible for violations of international law. At the same time that central government responsibility is retained, direct disciplinary action against subnational units should be available as an additional, and perhaps more effective, avenue for securing human rights compliance.

A. The Foundations of State Responsibility

State responsibility for the conduct of political subdivisions made sense in a state-centric world. Modern international relations have been grounded in the notion of sovereignty. In contrast to the medieval world, in which crowns more presided than ruled, sovereignty supposed a nation-state without public rival in its own realm. This both reflected and facilitated a corresponding reality. On the one hand, the

monarchs and other central public authorities of more recent centuries have in fact enjoyed at least potentially (if often reserved) absolute powers within their own borders.

On the other hand, to the extent that the presumption of control translated into legal responsibility, nations had an incentive to exercise such control where non-exercise would result in breached duties and accompanying liabilities to other nations. Just as domestic tort law encourages parents to discipline their children (or, better yet, their pets), so too did the doctrine of state responsibility encourage nation-states to bring their political subdivisions into line with international law. State responsibility was in this way important to the maintenance of public international order, for it efficiently allocated control of public authority at the national level. Central governments, for the most part, had the power to heel their constituent units. Where they failed to do so, they were answerable to their fellow states for that failure.

The flip side of this equation was the lack of accountability, either in law or reality, on the part of subnational authorities. The doctrine made no provision for subnational responsibility as a matter of law. Again, this both reflected and facilitated a reality in which subnational actors were not answerable, at the international level, for violations of international law. Those injured by such violations (by definition, only nations) had little or no discrete interaction with subnational governments. This was true at the basic level of communication.

48. See, e.g., Eagleton, supra note 47, at 7 (“This exclusive territorial control, which is a legal possession of the state, logically results in the acceptance by that state of responsibility for illegal acts occurring within the range of its control.”); W. Friedmann, The Growth of State Control Over the Individual, and Its Effect Upon the Rules of International State Responsibility, 19 Brit. Y.B. Int’l L. 118, 144 (1938) (“As long as the state is the recognized organ of international intercourse, it must bear that measure of international responsibility which corresponds to its real control.”).

49. See, e.g., John B. Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party 1440 (1898) (“The legislation of the republic must be adapted to the treaty, not the treaty to the laws.”) (quoting arbitral decision in the Case of the “Montijo”); 2 D.P. O’Connell, International Law 943 (2d ed. 1970) (emphasizing that in modern law the state’s responsibility “is in the direction of liability without fault, predicated on the social desirability of securing conformity with certain objective standards of behavior”). The ILC Report, supra note 47, [1971] 11(1) Y.B. Int’l L. Comm’n at 262, quotes the French foreign minister on the subject of Newfoundland’s compliance with bilateral undertakings. To summarize: if the colony of Newfoundland should subsequently come to evade the obligations which England has contracted, we would consider, and I am sure England considers, that it would be its duty and a matter of honour for it to take all the legislative steps necessary to overcome the resistance of the colony.

Id.

50. Cf Philip Quincy Wright, The Enforcement of International Law Through Municipal Law in the United States 5 (1916) (“The essential feature of international law is not that it lays down rules of conduct for states, but that it holds states responsible for the conduct of persons.”).

Although nations then and now maintain formal diplomatic relations only with each other, up until recent years they have undertaken very little in the way of any direct contact with the subnational authorities of other states.52

But it was also true at the level of remedies. To the extent a state suffered injury at the hands of the political subdivision of another, it had no means of redress.53 Because political subdivisions had no legal status in the sovereignty construct, they could not be haled in international legal tribunals. But nor could they be disciplined by other means. Where one nation had many diplomatic levers by which to hold counterpart nations accountable, none were available against the subnational actor.

Much of this element of state responsibility developed in the orbit of international legal obligations to protect aliens.54 On the one hand, the task of protecting aliens (from, for instance, mob violence) was as a practical matter one for local authorities. On the other, foreign nations had no mechanism by which to discipline local authorities, to the end of either preventing injuries to their citizens or securing redress for those harms done. They might in many instances not even have known the identity of such authorities (as sovereignty presumed they did not). And so international law sensibly rendered protection a matter of national responsibility. Central governments, in most cases, would enjoy means at least to encourage, and often to demand, adequate performance at the local level. Even where they did not, the nation could be held responsible for violations on pain of retaliation.

52. Indeed, in the United States such contact appears to have been actively discouraged by federal authorities. To a 1908 request by the German government that it be permitted directly to deal with the state of Georgia on behalf of German holders of defaulted railroad bonds, the Secretary of State replied that such contacts would be prohibited under the Constitution's Compact Clause. See 5 Green H. Hackworth, Digest of International Law 596 (1943); see also infra note 87 and accompanying text (discussing Compact Clause in context of U.S. state accession to human rights treaties).

53. As the State Department explained in a 1925 instruction to the U.S. agent in a U.S.-Mexico claims commission:

It must be remembered that foreign Governments cannot make representations to the States and demand reparation from them. Foreign Governments can only deal with the Government of the United States . . . . In view of the fact that, if the United States Government should make this defense it would leave the claimants without recourse in meritorious cases, and of the further fact that, if the United States should make such a defense Mexico could equally make a similar defense to American claims . . . the Department is of the opinion that you should not specially plead immunity from liability on the ground that the acts or omissions were those of State officials.

Reprinted in 5 Hackworth, supra note 52, at 594-95 (second set of ellipsis in original).

54. See, e.g., 2 Charles C. Hyde, International Law Chiefly As Applied by the United States 946-52 (1951); 2 O'Connell, supra note 49, at 968 ("The literature of responsibility has been concerned to an almost excessive degree with the case of injury to aliens caused by mob violence.").
by the nation whose citizen had been injured. Monetary damages were often paid, on a nation-to-nation basis, in such cases. 55

B. The Rising International Profile of Subnational Governments

The realities undergirding this once undeniably sound framework have changed, however, and the foundations of state responsibility for political subdivisions may be correspondingly shaken. Both the fact and potential of central government control, first of all, appear to have weakened. In the United States, though the federal government has never had an easy time of it, the formal power, fiscal means, and political will to secure compliance with international law clearly prevailed during the Cold War, to the point where some have explained no less an intrusion on state power than desegregation in geopolitical terms. 56 As described above, that power, and the means to secure it, may now be diminishing. Elsewhere, the general balance of power between central and subnational governments has been recast by the more plausible (albeit unlikely) threat of secession, a threat which now colors politics even in such non-hegemonistic states as Italy, the United Kingdom, and Canada. 57 This shift will not inevitably lead to intranational conflicts in all states regarding observance of international legal standards; as is true of states, most subnational governments obey international law most of the time. 58 But the power shift does herald an era in which such conflicts will become more frequent, and in which central governments will not always be able or willing (as a matter of politics if not of law) to compel compliance from their constituent units.

Perhaps the more significant development, however, is the rising profile of subnational governments on the international stage and its possible implications for international legal process. 59 The travel and

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55. See, e.g., Hyde, supra note 54, at 949 n.3 (discussing indemnification paid by the United States to foreign governments); 6 John B. Moore, Digest of International Law 740 (1906) (U.S. payment made to Italian government for 1891 lynching of eleven Italians in New Orleans).

56. See Dudziak, supra note 32.


58. Cf. Louis Henkin, How Nations Behave 47 (2d ed. 1979) ("[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.").

59. On the increased international activity of subnational actors, see, e.g., Brian Hocking, Localizing Foreign Policy (1993); Foreign Relations and Federal States (Brian Hocking ed., 1993); Jack Goldsmith, Federal Courts, Foreign Affairs and Federa-
Communications revolutions have afforded subnational officials a new independence to act directly at the international level, where they formerly had to work through national capitals. Such activity may be politically motivated; state and local governments are more frequently taking positions on international controversies, sometimes backed by substantial purchasing and investment powers. But where some subnational actors have remained silent on the political front, few can afford to forego the economic potential of an international presence. Local authorities now perceive the international marketplace to be an important factor in overall economic prosperity. They compete fiercely for global commercial opportunities, in placing exports as well as seeking foreign investment (and the jobs that both will generate). Official trade missions are now de rigueur for subfederal authorities in the United States and Europe, and almost all United States states have at least one permanent trade office abroad.

Subnational governments are thus repeat players at the international level, and contacts with foreign central governments (as well as counterpart political subdivisions) are now fairly routine. As a general matter, at least within the developed world, central governments have looked beyond the veil of sovereignty to understand the political divisions of power in other states.

Subnational governments are thus repeat players at the international level, and contacts with foreign central governments (as well as counterpart political subdivisions) are now fairly routine. As a general matter, at least within the developed world, central governments have looked beyond the veil of sovereignty to understand the political divisions of power in other states. There are no practical impediments to establishing direct transnational, inter-level contacts where

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60. This was evident in the anti-apartheid campaign of the mid and late 1980's, in which dozens of subfederal governments divested pension funds of and refused to procure from corporations with operations in South Africa. See Bilder, supra note 59, at 350-351. The same strategy is now being pursued with some success with respect to Burma and other nations accused of human rights violations. See, e.g., Paul Blustein, Thinking Globally, Punishing Locally: States, Cities Rush to Impose Their Own Sanctions, Angering Companies and Foreign Affairs Experts, Wash. Post, May 16, 1997, at G1; Guy de Jonquieres, Business Worried by US States' Sanctions, Fin. Times, Apr. 24, 1997, at 9.


62. Such sophistication is also in evidence with respect to the internal workings of central governments. Foreign states are, for example, becoming frequent amici participants in federal court proceedings as well as undertaking direct contacts with Congress where they would in the past have channeled all such approaches through the executive branch. See, e.g., Peter J. Spiro, The States and Immigration in an Era of Demi-Sovereignities, 35 Va. J. Int'l L. 121, 157 n.145 (1994) (listing examples of recent foreign government amicus briefs in Supreme Court litigation); Elaine Sciolino, New Protocol: Heads of State Now Court Congress, N.Y. Times, Apr. 8, 1995, at A3 (discussing examples of recent foreign government contacts with Congress); cf. Anne-Marie Slaughter, The Real New World Order, Foreign Aff., Sept.-Oct. 1997, at 183, 193 (describing "disaggregation" of national governments, so that component units increasingly deal directly with counterparts in other nations).
interests might demand them. at the same time that the niceties of diplomacy no longer appear to impede such communications. 63

This could have profound consequences for notions of state responsibility. The critical last step in the analysis: insofar as subnational actors see rewards in the global marketplace, they may also be subject to its discipline. The increased ease of communication with subnational entities by itself gives no cause to reconceive state responsibility; contact alone would not likely deter subnational entities from violating international law. 64 State officials in the United States will hardly be swayed by the mere entreaties of foreign governments entreaties where constituent (read: voter) preferences are to the contrary.

To the extent that foreign governments can put some heat behind their words, however, the scenario is transformed. A governor would no doubt listen more carefully to a foreign official were his message to implicate exports and investment. Such possibilities exist today in a way that they did not fifty or even fifteen years ago. At the time of anti-Japanese riots in the early twentieth century, for example, California would have been able to thumb its nose at a threatened Japanese boycott. Today it could not.

I have elsewhere described two episodes in which this phenomenon of targeted retaliation has emerged. 65 The first turned on a California tax scheme that disadvantaged foreign multinational corporations. The United Kingdom proceeded to enact its own legislation disadvantaging California corporations, which together with some ambivalent federal pressure sufficed to win repeal of the offending state law. 66 The second involved Proposition 187, the California ballot

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63. The suggestion that the federal government would seek to impede such contacts today seems fanciful, on a Compact Clause basis or otherwise, see supra note 52 (noting 1908 State Department warning to foreign government not to communicate with state), at least where they did not implicate core national security interests. The Logan Act might in theory be invoked in extreme cases, though its application appears never even to have been suggested in the context of official subfederal activity. See 18 U.S.C.A. § 953 (West Supp. 1996) (prohibiting correspondence with foreign governments “to influence the measures or conduct of any foreign government . . . in relation to any disputes or controversies with the United States”).


measure depriving undocumented aliens of public benefits. Mexican and other Latin American leaders, public and private, vocally opposed the law, and at times reminded California of the damage it might cause to Mexican-Californian commercial relations. The law was immediately enjoined in federal court, so as in effect to moot the issue, but the refusal of Texas and other states to follow California’s lead can in part be ascribed to that lesson of the Proposition 187 experience. A third example of such targeted retaliation, involving a Massachusetts selective procurement measure aimed at corporations with business ties to Burma, may lie just over the horizon.

Foreign opposition to Proposition 187 was styled, at least in part, in human rights terms. Similar activity appears possible with respect to other human rights issues, especially in the death penalty context, though there is as yet no other instance in which a subnational suffered direct international discipline. Direct communication with

brought by an affected British bank, thus presenting yet another episode of federal refusal to police state-level action with negative foreign relations implications. Barclays Bank PLC, 512 U.S. at 330-31.

70. The Massachusetts law prohibiting state contracting with companies doing business in Burma is now the subject of a complaint brought by the European Union and Japan in the World Trade Organization. See Mass. Ann. Laws ch. 7, § 22H (West Supp. 1997); Gordon Fairclough, Massachusetts Trade Law Is Challenged, Wall St. J., July 25, 1997, at B17. If the law is found to violate the free trade obligations, see infra note 96 and accompanying text (describing genesis of Massachusetts’ obligations under the Generalized Agreement on Trade and Tariffs), other countries could take retaliatory measures against the United States as a whole, but it is being suggested that such sanctions be directed at Massachusetts alone. See id. The Japanese appear to have reminded Massachusetts of its vulnerability on this score. See Michael Grunwald, Mass. Law Targeting Burmese Junta Could Spark Trade War with Japan, Boston Globe, Jan. 31, 1997, at A1 (reporting meeting between Japanese and Massachusetts state officials; noting that Japan is the largest export market for state goods after Canada and that 126 Japanese companies in Massachusetts employ 13,000 Americans).
72. Although not involving a boycott call outright, major human rights groups did attempt to use the 1996 Atlanta Olympics as a opportunity to focus on that state’s alleged human rights abuses. See, e.g., Amnesty International, The Death Penalty in Georgia, supra note 8. Such discipline has been attempted in domestic contexts. See Gay Rights Boycott Bites into Tasmanian Food Exports, The Guardian, Aug. 10, 1994,
subnational authorities regarding human rights matters has become routine. On the subject of pending executions, governors now appear to receive a raft of communications from foreign officials, nongovernmental organizations, and private individuals. None has yet to threaten retaliatory economic action for asserted human rights violations, and, as a result, their impact appears to have remained marginal.

But assuming the entrenchment of such a norm as that against the execution of juvenile offenders, and assuming its continued violation by particular states in the United States, the use of such international sanctions would seem almost inevitable. The NGO sector, increasingly powerful in the enforcement of international human rights, will likely lead the way, followed by nations with strong human rights records (at least to the extent permitted by increasingly constraining free trade regimes) and public relations-conscious multinational corporations. If it does come to pass, the threat of international economic retaliation would do far more than any protest to (or, for that matter, from) Washington in changing the death penalty policies of such states as Texas. The extralegal mechanism would thus plainly advance the coverage of international human rights.

C. Reconceiving Responsibility

The doctrine of state responsibility should be reconceived to reflect the realities of this new international dynamic, which point towards the growing international capacity of political subdivisions. By way of historical precedent, once various protectorates and colonies of the European powers, most notably the British dominions, began to undertake their own foreign relations short of full independence, they were held responsible under international law in the sphere of such relations. But it would also facilitate and entrench international


73. See supra notes 14-15 (citing examples).


76. See, e.g., Harvard Research, supra note 47, art. 3 (holding states responsible only for a colony or like possession that "does not independently conduct its foreign relations"); O'Connell, supra note 49, at 966 (noting that some protectorates have the
norms as such. To the extent that international law recognizes the responsibility of subnational actors, such actors will be less able to deny the relevance of international law to subnational decision-making, as they do today. At the same time, it would encourage other actors to focus their efforts on those authorities who hold responsibility as a matter of fact. Finally, it would raise subnational consciousness of the nature and gravity of international law in general.

I do not, however, suggest that central government accountability for political subdivisions be abandoned altogether. Central control may be flagging as a general matter, but some capitals could use the doctrinal innovation to avoid responsibility that should remain theirs. Central governments could, in other words, move to disclaim legal responsibility by pleading a lack of control (de jure or de facto) when in fact they retain (or could regain) such control. It also remains the case that many subnational actors, especially outside the developed world, have yet to join the global marketplace so as to make them amenable to its discipline. International law must thus continue to account for scenarios in which a central government pleads subnational responsibility as a defense, notwithstanding that 1) it is in fact complicit in violations, or 2) the international community enjoys no leverage over guilty subnational parties and the central government remains key to securing compliance.

These objections to transferring legal responsibility could be met by establishing "condominium" responsibility, under which both a central government and its political subdivisions would be held legally accountable even where central authorities assert an incapacity to control constituent units. This approach (similar to joint and several
liability under tort law) would allow those seeking to enforce an inter-
national norm to concentrate pressure on the unit of government that
is perceived to hold decision-making power, or, alternatively, on that
unit which is more vulnerable to international discipline. With respect
to next-generation rights in the democracies, global advocates (states
and NGOs) could press their case harder at the subnational level at
the same time as they continue to make increasingly symbolic de-
marches through diplomatic channels. With respect to the violation of
more basic norms in the non-democratic world (the former Yugoslavia
comes to mind), the more traditional government-to-government ap-
proaches would remain the dominant mechanism for extracting com-
pliance and redress.79

Recognizing subnational responsibility as a matter of law would not
mark the first breach in the edifice of state responsibility. The notion
of individual responsibility for genocide and crimes against humanity
was Nuremberg’s innovation.80 Unlike individual responsibility, the
establishment of subnational responsibility will not depend on the es-
tablishment of formal international institutions. It is already emerging
as a matter of practice, which, of course, as custom can itself give rise
to international norms. This is description. But these developments
should be welcomed on a normative basis, as well. Subnational re-
sponsibility would make enforcement of international human rights
more efficient by applying the law against entities actually responsible
for compliance decision-making. Subnational actors, perhaps the
American states most notably among them, would no longer be able
strategically to exploit their enhanced leverage against national
capitals. Instead, they would face the consequences of human rights
violations in the form of lost trade and investment. With the backstop

79. Condominium responsibility would also address the problem of disadvantag-
ing unitary states relative to federal ones, as would be posed by a system in which
responsibility were fully transferred to subfederal units. See Friedmann, supra note 48,
at 135 (stating that in considering state responsibility for individual conduct, noting
that “[e]ither rights and duties of states must be equal in principle, or the interna-
tional community will break up”).

80. See Agreement for the Prosecution and Punishment of the Major War
Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1455, 82 U.N.T.S. 280 (1951);
see also Convention on the Prevention and Punishment of the Crime of Genocide,
Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (providing for prosecution of individuals
for crime of genocide). Although the analogy is not precise, the doctrine of individual
responsibility emerged both as a recognition that individuals were in fact responsible
for such crimes, even where committed pursuant to superior orders, but also by way
of deterring violations. Just as subnational responsibility can only work where subna-
tionals are vulnerable to discrete economic attack, the efficacy of individual responsi-
bility turns on the possibility for direct discipline, which now motivates the various
international criminal tribunals established or proposed. Finally, it is also a condo-
minium responsibility, in that the state shares legal responsibility with the individual
for crimes committed; see id. art. 9 (providing for jurisdiction of International Court
of Justice over disputes relating to the Convention, “including those relating to the
responsibility of a State for genocide”).
of continued central government accountability, the innovation is a modest one, but one that could significantly advance the cause of new international human rights.

III. The States as Treaty Partners

By way of a more dramatic and visible mechanism to advance compliance with international norms, subnational governments could be afforded some formal means to associate with the international human rights conventions. Subnational participation in treaty regimes would enhance the coverage of the conventions and underlying norms on a preemptive basis, at the same time crystallizing a doctrine of subnational responsibility. It would be consistent with the internal law of many federations, including the United States, and enjoys some precedent in the context of international trade law. Though direct accession by political subdivisions would not be possible under the letter of existing conventions, a similar result could be accomplished by the terms of national participation in such regimes. Discrete subnational agreement to human rights accords also suggests the possibility of direct subnational participation in treaty negotiation and interpretation.

A. Affording Subnationals a Choice

Leaving the constitutional question aside, Congress stands fortified against federal imposition of the human rights treaties to the point that the required change in the practice of even a single state would likely qualify ratification accordingly. As undesirable as that result may be, however, it remains at least the political reality. But one can safely assume within that reality that those states whose practice already conformed with treaty requirements would agree unconditionally to such terms if allowed an independent choice to do so (that is, outside of a collective body such as the Congress, where log-rolling and other factors distort decision-making). For example, though the United States refused to agree to the ICCPR's ban on executing juvenile offenders, about half of the states already prohibit such executions on their own. Many, presumably, would sign on to the treaty prohibition if given the opportunity. From a human rights frame, one would prefer any number of such subnational participants,

81. See supra notes 27-38 and accompanying text.
82. It might be explained, politically, in simple public choice terms: Assume Texas is the only state to execute 16-year-olds, inconsistent with the terms of the ICCPR. In considering the ratification of the treaty, Texas would express a strong preference for attaching a condition to allow its practice to continue, at the same time that other states will themselves see no threat to their own interests (or only a very diffuse one) by such a reservation. For a similar analysis of how concentrated state-level interests can be imposed at the federal level in the context of immigration law, see Peter J. Spiro, Learning to Live with Immigration Federalism, 29 Conn. L. Rev. 1627 (1997).
83. See U.S. Department of State, supra note 37, at 66.
relative to the alternative of no coverage as prevails under the existing system of treaty accession.

True, some states might resist for fear of locking themselves into a policy that might later become politically inconvenient. That hesitation, however, would dissolve as against any economic advantage to participation, even if slight. Once some states indicated their assent, the failure of others would come into some relief. One could thus lay the groundwork for the sort of competitive model described above, in which compliance with human rights norms is furthered through the dynamics of the global marketplace. On an issue that has captured intense international attention, such as juvenile executions, the possibility of such competition is not implausible.

Although there have been widely scattered examples of state and local governments formally indicating assent to various international human rights accords, the success of this model (unlike that governing responsibility) would depend on the establishment of some institutional arena in which to regularize subnational participation. This could in theory be accomplished by allowing direct subnational accession to human rights conventions. Such participation would serve an important information-forcing and clearinghouse function. It would also be consistent with the internal law of most federal states, which extend some treaty-making capacities to component units in areas of their competence; in the United States, the consent of Congress would surely resolve any Compact Clause concerns. But direct subnational accession would likely pose difficulties in treaty-regime management. Major human rights conventions have adopted substantial reporting requirements, the processing of which through treaty com-


85. Cf. Restatement, supra note 2, § 102 reporters’ note 2 (noting that improvements in modern communications have facilitated the formation of customary norms, by making “the practice of states widely and quickly known”).


87. See U.S. Const. art. 1, § 10, cl. 3 (“No State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State, or with a foreign Power.”). In light of that constitutional authority, there would seem no serious political obstacles at the federal level to an individual state’s accession to a human rights convention. Even the Texas delegation would have a hard time opposing New York’s agreement to prohibit juvenile executions, so long as Texas maintained the capacity on its own turf.
mittees already demands the devotion of substantial U.N. resources. Moreover, existing conventions would have to be formally amended to allow for subnational participation, an unlikely prospect at least in the near term.

As perhaps a more workable alternative, subnational acceptance of international accords could be channeled through central governments. National accession would be undertaken only to the extent of subsequent subnational agreement. For example, the United States might have conditioned acceptance of the ICCPR on Reserving the right to execute juvenile offenders except in those subfederal jurisdictions accepting the ICCPR's prohibition. For reporting purposes, the federal government would gather compliance information from the states (as it apparently already does for those provisions accepted without reservation). Thus, it would also accept responsibility for treaty violations by those states accepting specific obligations. As coupled with the condominium approach sketched above, relevant subfederal authorities would share that responsibility.

B. Precedent: The WTO Agreement on Government Procurement

This opt-in model of treaty accession has been adopted in at least one context outside of human rights. The plurilateral Agreement on Government Procurement applies to the practices of "sub-central" governments only to the extent that such entities have agreed to coverage, as notified to the World Trade Organization by the relevant central government. States remain the only formal parties to the agreement. They also remain responsible for the compliance of subnational governments, but only with respect to those whose acceptance has been notified. The regime gives sub-national authorities, in effect, an option to accept the treaty regime.

Such acceptance has been prevalent in the United States. Thirty-seven states have indicated their assent to the treaty terms to the Office of the U.S. Trade Representative, which in turn has transmitted

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89. See, e.g., ICCPR, supra note 1, art. 48 (Covenant only open to State Parties).
90. See generally U.S. Department of State, supra note 37.
92. See id. art. XXIV(2) (limiting accession to WTO members).
93. Id. art. XXIV(5) (requiring governments to ensure conformity of "entities" included in appended lists).
acceptance to the WTO secretariat. This success in securing subfederal agreement has occurred notwithstanding the absence of any direct benefits for subfederal entities accepting the agreement's obligations. (Acceptance does not, most notably, result in more favorable reciprocal treatment by other covered entities; businesses from U.S. states that have not signed on to the agreement, for instance, are no worse off in competing for contracts in other party nations by virtue of that failure.) A Massachusetts state law restricting procurement from corporations doing business in Burma is now the subject of a WTO complaint by the European Union and Japan asserting a violation of the agreement. Although that dispute has not yet been resolved, it does not appear to have resulted in the equivalent of de-accession by other subfederal governments.

The analogy to some human rights norms is a strong one. As with such rights that are within traditional spheres of state authority, the procurement methods of state and local governments may be in large part beyond federal power; and even if Washington could constitutionally impose procurement standards on subfederal authorities by way of the treaty power, the political likelihood of such action would be slight. In the face of this federal impotence, voluntary subfederal participation becomes the next-best option. The same reasoning applies with respect to those international human rights norms implicating traditional state authorities. The procurement arrangement demonstrates the plausibility, at least, of removing treaty choices to the lower level of actual decision-making authority.

C. Towards Legal Personality for Subnational Actors

One might further suggest the possibility of subnational participation in developing the substance of treaty norms. Insofar as certain norms concern authorities exercised primarily at the subnational level, subnational governments should be entitled to participate in the formulation of such norms. This is a matter of process legitimacy, for those who are governed by law should have a say in its making. Central governments may have different concerns and priorities than constituent authorities, and could trade away subnational prerogatives

95. See 1 Law & Practice of the World Trade Organization, booklet 10B, at 157 (Joseph F. Dentm, ed. 1997) (listing U.S. states "which Procure in Accordance With the Provisions of This Agreement"). Hold-outs appear concentrated in the South, including Alabama, Georgia, North and South Carolina, and Virginia. See id.

96. See supra note 70 and accompanying text.

97. Thus, procurement decisions of state authorities are not constrained by the dormant commerce clause, under the so-called market participant exception. See Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). Constraints imposed directly by Congress would, however, seem constitutionally acceptable under Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

98. For a similar argument in favor of NGO participation in international lawmaking, see Spiro, New Global Communities, supra note 74, at 51-54.
more quickly than their own; alternatively, they may simply be ignorant of matters outside their ken. In either case, the lawmaking process suffers from inefficient results.

Such would clearly be the case where a specific subfederal practice or enactment is under scrutiny before an international body. The national government may just want the subnational measure to go away, especially where it is out of step with the laws of other constituent units and thus in no sense represents a national policy, as well as where it poses complications for other matters of national foreign relations. The tendency will be for the national government to offer a less vigorous defense of the challenged practice than would the subnational entity itself. This appears to have been the case with respect to Australia's appearance before the Human Rights Committee to defend Tasmania's anti-sodomy law, in which Australia effectively conceded the law's inconsistency with the ICCPR.99 Regardless of one's position on the substantive question, it must be assumed that law made in the absence of vigorous representation will be less durable and legitimate.

To accompany the innovation of discretionary subnational acceptance of human rights agreements, it would thus be normatively desirable to establish a practice under which covered subnational entities would participate in proceedings relating to their own laws. Indeed, one might expect subnational entities to make such participation a condition of acceptance. This practice would not require formal changes in treaty procedures, but rather could be undertaken as part of national practice. Again, an analogue from the trade context: U.S. law now requires close federal-state consultation with respect to state-level measures challenged in the WTO.100 And in contrast to Australia's weak representation of its component unit, Canada afforded Quebec the opportunity to defend a challenge against one of its laws with a direct appearance before the Human Rights Committee.101

One might even envision subnational participation, in some form, at the level of standards-setting and treaty drafting. Sub-central governments have made independent appearances at some international negotiations, most notably at the 1992 Rio Conference on the

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99. See Toonen v. Australia, supra note 44, ¶¶ 6.1, 6.7 (noting concession of state party). Australia did recount Tasmania's justifications for the law in its submissions to the Committee, at the same time that it noted its disagreement with them. See id. ¶¶ 6.5, 6.8.


101. See Ballantyne v. Canada, supra note 42, ¶¶ 8.5-8.10 (considering arguments made by provincial government of Quebec in a submission "made through the Federal Government of Canada").
Environments as well as at the more recent Habitat II summit in Istanbul, and under the banner of "local authorities" they have joined together in what appears to be an increasingly energized international movement. Some regional units in Europe have direct official representation in the European Union. One might fairly ask, if Moldova enjoys a seat at international negotiating tables, why not California? Because subcentral governmental experience, expertise, and interests may systematically diverge from those of national capitals, the ultimate success of regimes implicating subnational powers will benefit from, and may ultimately depend on, affording subnational authorities a discrete voice in foundational standards-setting processes.

**Conclusion**

Human rights has come increasingly to implicate matters within the competence of subnational authorities at the same time as national governments are losing an important measure of control over their constituent units. In the face of these developments, international process should afford some place to subnational governments as both

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102. This participation was reflected in Agenda 21, the Rio plan of action, which expressly recognized the importance of local government involvement in international environmental protection activities. See Commission on Environmental Law of the IUCN—The World Conservation Union, Agenda 21: Earth's Action Plan ¶ 28 (Nicholas Robinson ed., 1993) (recognizing "vital role" of local authorities).

103. See *City Lights in Istanbul*, N.Y. Times, June 17, 1996, at A14 (reporting in an editorial the attendance of approximately fifteen thousand local officials at U.N. Habitat II summit).


106. The international status of Hong Kong, its anomalous origin notwithstanding, might provide the precedent for such representation in appropriate cases. Though now under the sovereign control of China, Hong Kong enjoys discrete membership in the WTO (China does not), as well as in other international organizations. See Yash Ghai, *Hong Kong's New Constitutional Order* ch. 10 (1997) (describing international aspects of new Hong Kong Special Administrative Region). As an historical matter, such entities as the principalities of the old German empire were afforded a degree of international legal personality under the moniker of "demi-sovereigns." See, e.g., Martens, *Summary of the Law of Nations* 25, 31 (William Cobbett trans., Thomas Bradford 1795); L. Oppenheim, *International Law* 159 (3d ed. 1920) ("One is obliged to acknowledge that the member-States of a Federal State can be International Persons in a degree.").
receivers and makers of human rights law. Legal responsibility should mirror actual responsibility—hence the need for a new doctrine of subnational responsibility—as well as the utility of allowing discrete subnational acceptance of human rights treaty terms. Both innovations would advance the efficient enforcement of human rights norms, especially to the extent that non-compliance creates competitive disadvantages in the global marketplace. Some subnational officials will come to respect human rights only when it shames their jurisdiction and hits their pocketbooks. That day may yet come soon.