

“BY SOME OTHER MEANS”:
CONSIDERING THE EXECUTIVE’S ROLE IN FOSTERING
SUBNATIONAL HUMAN RIGHTS COMPLIANCE

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ABSTRACT

The broad realization of human rights domestically requires strong partnership among all levels of government. Indeed, international and domestic law support an important role for state and local governments in implementing the United States’ human rights treaty commitments, with the federal government retaining ultimate responsibility. While the federal government’s responsibility is clear, its options for fostering and facilitating subnational compliance have not been fully explicated. United States’ human rights treaty ratification practices and recent Supreme Court jurisprudence primarily constrain the Executive’s ability to compel state and local compliance without congressional authorization. In the absence of such congressional action, the Executive nevertheless is empowered to, and has a vital interest in, engaging other, non-coercive measures to bring subnational governments, and thus the United States, into human rights treaty compliance. An exploration of the doctrinal, functional, pragmatic and normative concerns, interests and needs particular to federalism and domestic human rights implementation, and an examination of relevant instances of cooperative federalism in other contexts, reveals several core non-coercive federal Executive functions. Specifically, by setting standards, collecting and disseminating information, and incentivizing compliance, the Executive, in cooperation with Congress, can maximize state and local human rights treaty compliance and positively impact the United States’ ability to fulfill its human rights commitments.

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TABLE OF CONTENTS

INTRODUCTION	102
I. THE IMPLEMENTATION GAP	110
II. A FRAMEWORK FOR SURFACING THE FEDERAL ROLE	117
A. <i>The Doctrinal Landscape</i>	117
1. International Law and Federalism	118
2. <i>Medellin</i> and Constraints on the Executive's Authority	122
3. The Executive's Interest and Role in Treaty Compliance	124
B. <i>Localism in Practice: Functional and Pragmatic Concerns</i>	128
C. <i>Universality v. Variability: Normative Concerns</i>	136
III. TOWARDS A SET OF CORE FUNCTIONS	138
A. <i>Setting Standards</i>	140
B. <i>Collecting and Disseminating Information</i>	146
C. <i>Incentivizing Compliance</i>	149
IV. CHALLENGES TO THE APPROACH	152
CONCLUSION.....	159

INTRODUCTION

A recent United Nations review of the United States' human rights record highlighted the central role that states and localities play in ensuring that the United States fulfills its international human rights commitments. Numerous recommendations resulting from the Universal Periodic Review¹ (UPR) focused on issues within the jurisdiction of state and local government, including criminal justice, racial profiling, access to housing, and employment discrimination.² Indeed, throughout the process, United States administration officials recognized the need for strong partnerships among federal, state and local governments in addressing the human rights concerns raised during the review.³ This

¹ The Universal Periodic Review (UPR) was established in 2006 with the new U.N. Human Rights Council as a peer-review system. Under this mechanism, the Human Rights Council facilitates an inter-governmental review of the human rights record of each U.N. member state every four years. For a discussion of the UPR and its relationship with other U.N. mechanisms, see Felice D. Gaer, *A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System*, 7 HUM. RTS. L. REV. 109 (2007).

² Human Rights Council, Report of the Working Group on the Universal Periodic Review: United States of America, U.N. Doc. A/HRC/16/11 (Jan. 4, 2011).

³ See Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Response of the United States to Recommendations of the United Nations Human Rights Council (Nov. 9, 2010), <http://www.state.gov/s/l/releases/remarks/150677.htm> ("We believe the best human rights implementation combines overlapping enforcement by all branches of the federal government

Article seeks to explicate the appropriate role of the federal government in these partnerships, and particularly the role of the Executive in fostering subnational human rights treaty compliance.

Both international law and the United States' federal system assign a role to states and localities to ensure that the United States meets its international human rights treaty commitments.⁴ International law permits the federal government to allocate domestic implementation of human rights treaty provisions to subnational governments and their officials, with the national government remaining ultimately responsible.⁵ And, although the U.S. Constitution grants the federal government

working together with state and local partners.”); *see also* U.N. Human Rights Council Town Hall Meeting, Universal Periodic Review (UPR) of the United States's Human Rights Record, State Department Briefing, Fed. News Service (Nov. 5, 2010) [hereinafter State Department Briefing].

⁴ *See* Sarah H. Cleveland, Crosby and the “One-Voice” Myth in U.S. Foreign Relations, 46 VILL. L. REV. 975, 1008 (2001) (“U.S. treaty obligations to promote compliance with international human rights are binding on the several states, both as a matter of treaty text, through the Supremacy Clause and through federalism provisions adopted by the Senate.”); *see also infra* notes 17–20 and accompanying text. While the United States has somewhat notoriously failed to ratify several core human rights treaties, it has in fact undertaken a wide spectrum of human rights commitments by ratifying a number of treaties, optional protocols and charters protecting a broad array of rights. The United States has ratified the International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD]; the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; a number of International Labor Organization (“ILO”) treaties protecting labor rights, including Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 2133 U.N.T.S. 161, and Convention (No. 105) Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 292; and two optional protocols to the Convention on the Rights of the Child, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (Mar. 16, 2001) [hereinafter CRC Optional Protocols] (optional protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography). In addition, the United States has signed, but has not ratified, a number of other human rights treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; and the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]. By signing but not ratifying these treaties, the United States has indicated its commitment to not act in contravention of the intent of the treaty. Vienna Convention on the Law of Treaties art. 18, Jan. 27, 1980, 1155 U.N.T.S. 331 (stating that a country that has signed a treaty has an obligation “to refrain from acts which would defeat the object and purpose of a treaty” until it expresses its intention not to become a party). While the United States is not a party to the Vienna Convention, it recognizes that many of the Convention's provisions have become customary international law and has signaled its intention to abide by the principles contained in treaties it has signed. *See Vienna Convention on the Law of Treaties*, U.S. DEP'T OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited June 9, 2011).

⁵ *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 207(b) cmt. a, reporter's note 3 (1987); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346 (1995) [hereinafter Henkin, *Ghost of Bricker*] (“International law requires the United States to carry out its treaty obligations but, in

exclusive authority to conduct treaties with foreign powers,⁶ the United States typically ratifies human rights treaties with an understanding that state and local governments implement treaty obligations pertaining to matters within their jurisdiction.⁷ While the federal government's ultimate responsibility for treaty compliance is clear, its options for fostering and facilitating subnational compliance have not been fully explored. Framed by a set of considerations relevant to federalism and human rights implementation, this Article identifies cooperative federalism arrangements in other contexts to suggest a set of core functions for the federal government to adopt, through the Executive, in maximizing treaty compliance.

A central underlying premise of this Article is that states and localities are presently engaged in international human rights-related activities. "Outward-looking"⁸ activities, such as state legislation mandating disinvestment in rights-abusing countries and regimes, have been the subject of considerable jurisprudence and scholarship. In particular, courts have considered whether states and localities engaging in such activities infringe on the foreign relations powers of the federal government.⁹ Commentators have critiqued this jurisprudence¹⁰ and have not-

the absence of special provision, does not prescribe how, or through which agencies, they shall be carried out. As a matter of international law, then, the United States could leave the implementation of any treaty provision to the states. Of course, the United States remains internationally responsible for any failure of implementation."); *see also infra* notes 80–82.

⁶ U.S. CONST. art. 1, § 10.

⁷ 138 CONG. REC. 8071 (1992) (recognizing that state and local governments shall implement obligations under the ICCPR in areas within their jurisdiction); 140 CONG. REC. 14326 (1994) (same understanding regarding CERD); 136 CONG. REC. S17,486 (daily ed. Oct. 27, 1990) (same understanding for CAT).

⁸ This distinction between "inward-looking" and "outward-looking" draws on Gaylynn Burroughs' descriptive account of state and local human rights activities. *See* Gaylynn Burroughs, *More Than an Incidental Effect on Foreign Affairs: Implementation of Human Rights by State and Local Governments*, 30 N.Y.U. REV. L. & SOC. CHANGE 411, 414 (2006). *But see* Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 FORDHAM L. REV. 411, 423 (2008) [hereinafter Davis, *Upstairs, Downstairs*] (differentiating between internally focused laws ("incorporation" laws) and externally focused laws ("association" laws), but noting the significant limitations of this descriptive dichotomy); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 668–69 (2002) [hereinafter Resnik, *Categorical Federalism*] (challenging clear categorization of provisions like that at issue in *Crosby*).

⁹ For example, the Supreme Court held in *Crosby v. National Foreign Trade Council* that state efforts to ban state procurement as a means of protesting foreign violations of human rights was preempted by a federal law likewise imposing sanctions, thus infringing on the federal prerogative to "speak with one voice" in foreign relations. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379–88 (2000). Relatedly, the Court held in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), that an Executive branch agreement with foreign countries preempted a state law forcing disclosure of insurance companies operating during World War II. Interestingly, Congress authorized state and local divestment measures in enacting the Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 121 Stat. 2516, thereby explicitly allowing precisely the type of state and local action that was challenged in *Garamendi* and *Crosby* and held to be within the exclusive orbit of the federal government under its foreign

ed that its scope is limited to the context of activities intended to influence the actions of other nations.¹¹

States and localities are also embracing, and in some cases integrating, “inward-looking” human rights activities to influence *domestic* policy and practice. Some draw upon the Universal Declaration of Human Rights, generally, as a set of guiding principles for rights protection.¹² Others have adopted resolutions urging or endorsing human rights treaties that the United States has yet to ratify.¹³ Still others have fashioned more wholesale approaches to incorporating human rights principles included in both ratified and unratified treaties into local governmental functioning.¹⁴ A growing body of scholarship explores the appropriateness and utility of such efforts, recognizing the move away from a strict federalist approach to international human rights law towards one of overlapping federal, state, and local jurisdiction, with an increasingly important and appropriate role for state and local governments in “bringing human rights home.”¹⁵

Not all state and local human rights activity is aimed at positive expression, incorporation or implementation.¹⁶ Concurrent with the growth in affirmative human rights activity among states and localities is a growing trend of activity denouncing or blocking integration of human rights norms into domestic practice and policy. Several state legislatures have approved resolutions opposing U.S. ratification of human rights treaties.¹⁷ And, as state courts increasingly look to international human rights law and the law of foreign courts in developing jurispru-

affairs powers. See Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons From Coordination*, 73 MO. L. REV. 1185, 1193–94 (2008).

¹⁰ See Cleveland, *supra* note 4, at 979–1001.

¹¹ See, e.g., Burroughs, *supra* note 8, at 436–39; Davis, *Upstairs, Downstairs*, *supra* note 8, 435–38; Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland*, 73 MO. L. REV. 1105, 1142–43 (2008) [hereinafter Resnik, *Internationalism of American Federalism*]; Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1654–55 (2006) [hereinafter Resnik, *Law’s Migration*]; 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, 44–46 (2006) [hereinafter Wexler, *Take the Long Way Home*].

¹² See Portland, Or., Human Rights Commission, Bylaws (Jan. 7, 2009), available at <http://www.portlandonline.com/humanrelations/index.cfm?c=49504>; Carrboro, N.C., Res. No. 89/2008-09 (Apr. 21, 2009) (adopting the Universal Declaration of Human Rights as guiding principles); Chapel Hill, N.C., Res. 2009-11-23/R-11 (Nov. 23, 2009) (same).

¹³ See, e.g., Phila., Pa., Res. 980148 (Mar. 12, 1998) (urging U.S. ratification of CEDAW).

¹⁴ For a typology of such local efforts, see Lesley Wexler, *The Promise and Limits of Local Human Rights Internationalism*, 37 FORDHAM URB. L.J. 599, 618–621 (2010); and *infra* Part II.B for examples illustrating the range of inward-looking activities.

¹⁵ See *infra* text and notes accompanying Part II.B.

¹⁶ See Resnik, *Categorical Federalism*, *supra* note 8, at 676 (“To equate the ‘local’ with progressive human rights movements would . . . be erroneous.”).

¹⁷ See S.J. Res. 65, 2011 Leg., Reg. Sess. (Ala. 2011) (opposing U.S. ratification of the U.N. Convention on the Rights of the Child); H.R.J. Res. 369, 106th Leg., Reg. Sess. (Tenn. 2010) (same); H.R. Con. Res. 1033, 52d Leg., Reg. Sess. (Okla. 2010) (same).

dence on diverse issues, such as the juvenile death penalty¹⁸ and marriage equality,¹⁹ legislation pending in numerous states would prohibit state courts from considering international, foreign, and, in some cases, Sharia law.²⁰ Commentators have explored the appropriateness of state courts' consideration of international human rights law in interpreting state constitutions, statutes and questions of common law,²¹ and efforts to ban such consideration.²²

With a few notable exceptions,²³ less considered and theorized is the appropriate role of the federal government *vis-à-vis* state and local

¹⁸ *Simmons v. Roper*, 112 S.W.3d 397, 411 (Mo. 2003), *aff'd*, 543 U.S. 551 (2005) (citing CRC in holding the juvenile death penalty unconstitutional); *Brennan v. State*, 754 So. 2d 1, 14 n.18 (Fla. 1999) (Anstead, J., concurring) (same).

¹⁹ *In re Marriage Cases*, 183 P.3d 384, 426 n. 41 (Cal. 2008) (citing ICESCR, European Convention for the Protection of Human Rights and Fundamental Freedoms, and American Convention on Human Rights in declaring the fundamental interest that individuals have in marriage). For a comprehensive listing of state court decisions that cite to international human rights law, see THE OPPORTUNITY AGENDA, HUMAN RIGHTS IN STATE COURTS: AN OVERVIEW AND RECOMMENDATIONS FOR LEGAL ADVOCACY (2011), available at http://opportunityagenda.org/legal_and_policy_analysis_human_rights_state_courts_2011.

²⁰ Oklahoma voters recently approved State Question 755, which amends the state constitution to prohibit state court judges from "considering or using" foreign, international and Sharia law in making judicial determinations. Save Our State Amendment, H.R.J. Res. 1056, 52d Leg., Reg. Sess. (Okla. 2010) (amending article 7, section 1 of the Oklahoma state constitution). Similar amendments and legislation have been proposed in numerous other states. For detailed status reports on proposed state law bans on state court consideration of international, foreign and/or Sharia law, see Bill Raftery, *Bans on Court Use of Sharia/International Law: Michigan Becomes 22nd State to Consider, Texas House Tries Again to Get Senate to Adopt*, GAVEL TO GAVEL, (July 5, 2011), <http://gaveltogavel.us/site/2011/07/05/bans-on-court-use-of-sharia-international-law-michigan-becomes-22nd-state-to-consider-texas-house-tries-again-to-get-senate-to-adopt/>. For an examination of the potential impact and constitutionality of such provisions, see Martha F. Davis & Johanna Kalb, *Oklahoma and Beyond: Understanding the Wave of State Anti-Transnational Law Initiatives*, 87 IND. L.J. SUPPLEMENT 1 (2011), and Penny M. Venetis, *The Unconstitutionality of Oklahoma's SQ 755 and Other Provisions Like It That Bar State Courts from Considering International Law*, 59 CLEV. ST. L. REV. 189 (2011) [hereinafter Venetis, *The Unconstitutionality of SQ 755*]. Note that these state initiatives mimic the Constitution Restoration Act of 2004, S. 2082, 108th Cong. § 201 (2004), a proposed federal bill that would have prohibited federal courts from relying upon, *inter alia*, foreign or international law in interpreting and applying the U.S. Constitution.

²¹ See generally Shirley S. Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273 (1997); Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 222 (1997) (federalism understanding, in conjunction with non-self executing declaration, leaves state courts free to apply treaties directly in litigation relating to matters falling within the state's jurisdiction); Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359 (2006) [hereinafter Davis, *The Spirit of Our Times*]; Margaret H. Marshall, "Wise Parents Do Not Hesitate to Learn from Their Children": *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633 (2004); Florence Wagman Roisman, *Using International and Foreign Human Rights Law in Public Interest Advocacy*, 18 IND. INT'L & COMP. L. REV. 1 (2008).

²² See Davis & Kalb, *supra* note 20; Venetis, *The Unconstitutionality of SQ 755*, *supra* note 20.

²³ Tara Melish has noted the importance of a federal focal point for coordinating human rights treaty compliance across federal, state and local government, as well as the need for a na-

efforts to implement human rights, particularly the rights contained in treaties ratified by the United States. Given the United States' practice of ratifying human rights treaties with the declaration that they are non-self-executing,²⁴ Congress' potential role in ensuring subnational implementation is relatively clear: Congress can enact legislation implementing human rights treaty requirements and making them enforceable against the states. In the absence of such congressional action, the role of the Executive takes greater prominence. The Supreme Court's decision in *Medellin v. Texas* makes clear that, absent implementing-legislation, the President is constrained in his or her ability to compel states to comply with human rights treaty obligations.²⁵ Yet, it also indicates that there are other options at the President's disposal that could be used to bring the United States into compliance with treaty obligations, noting that "[t]he President may comply with the treaty's obligations *by some other means*, so long as they are constituent with the Constitution."²⁶

This Article explores the concept of "by some other means." While acknowledging both the important role that states and localities play in

tional-level monitoring body. Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT'L L. 389, 456–61 (2009). Catherine Powell has written on the importance of federal coordination of state and local efforts to implement unratified treaties. Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001) [hereinafter Powell, *Dialogic Federalism*]. And Johanna Kalb has urged a "dynamic" approach to federalism in the context of human rights treaty implementation, whereby the federal government sets a "floor" for state human rights treaty compliance, with primary responsibility resting with the states, subject to federal judicial review pursuant to general implementing legislation. Johanna Kalb, *Dynamic Federalism in Human Rights Treaty Implementation*, 84 TUL. L. REV. 1025, 1055, 1064 (2010) [hereinafter Kalb, *Dynamic Federalism*]; see also Davis, *The Spirit of Our Times*, *supra* note 21, at 389 (suggesting that the federal government make state efforts at human rights treaty compliance "more visible" to foster state-to-state competition and facilitate dialogue with the federal government and international bodies); Ahdieh, *supra* note 9, at 1229 (outlining federal role in coordinating state and local engagement in international law by ensuring systems of "horizontal coordination").

In addition, a number of commentators explore the federal role in inducing state compliance with the Vienna Convention on Consular Relations. See, e.g., Elizabeth Samson, *Revisiting Miranda after Avena: The Implications of Mexico v. United States of America for the Implementation of the Vienna Convention on Consular Relations in the United States*, 29 FORDHAM INT'L L.J. 1068, 1116–18 (2006); Joshua A. Brook, Note, *Federalism and Foreign Affairs: How to Remedy Violations of the Vienna Convention and Obey the U.S. Constitution, Too*, 37 U. MICH. J.L. REFORM 573, 590 (2004); Edward W. Duffy, Note, *The Avena Act: An Option to Induce State Implementation of Consular Notification Rights After Medellin*, 98 GEO. L.J. 795 (2010) (proposing federal legislation to induce state implementation of the VCCR through conditional grants).

²⁴ See *infra* notes 96–99 and accompanying text.

²⁵ See *Medellin v. Texas*, 552 U.S. 491 (2008). In *Medellin*, the U.S. Supreme Court held that judgments by the International Court of Justice ("ICJ") are not directly enforceable in U.S. courts and that the president cannot direct states to comply with a U.S. treaty obligation under the Vienna Convention on Consular Relations by enforcing a decision of the ICJ. The implications of the *Medellin* decision are explored in greater detail in Part II.A.2, *infra*.

²⁶ *Medellin*, 552 U.S. at 530 (emphasis added).

domestic human rights integration and implementation, and the need for cooperation between the federal branches in implementing treaty obligations, it takes the position that the federal Executive can play a greater role in fostering, coordinating, and engaging compliance with human rights treaties at the state and local level. Drawing upon relevant examples of cooperative federalism in other contexts, this Article suggests some core functions in this regard.

In so doing, this Article deepens and expands the understanding of “dialogical federalism” urged by Catherine Powell in the realm of human rights treaty implementation.²⁷ Powell urges cooperation between federal and local government as an avenue to meaningful implementation of human rights in the United States, to help overcome the “democratic deficit” inherent in international law, as well as to broaden coordination of state and local innovation.²⁸ She envisions a robust partnership among federal, state and local governments, with the federal government playing a strong coordinating function, particularly in the context of unratified treaties and where the United States has ratified treaties subject to particular limitations.²⁹

This Article takes the conversation a step further, focusing on the federal government’s role, and more specifically, the role of the Executive, where the U.S. is internationally obligated to ensure subnational compliance with its human rights treaty commitments.³⁰ It takes the position that, where the U.S. has undertaken human rights commitments through ratification, regardless of congressional action or inaction, the Executive can and should perform a set of core functions to guide and support state and local officials in upholding these commitments.

²⁷ Powell, *Dialogic Federalism*, *supra* note 23, at 262.

²⁸ *Id.*

²⁹ *Id.* at 265, 276. Powell focuses on CEDAW, which the United States has failed to ratify, as well as the reservation that the United States has taken to the ICCPR regarding the death penalty. Johanna Kalb similarly urges a “dynamic federalist” view, whereby the federal government must set a floor for human rights compliance beneath which states may not fall, leaving domestic implementation of human rights treaties in the primary responsibility of states, subject to federal review and oversight. Kalb, *Dynamic Federalism*, *supra* note 23, at 1064. Robert Ahdieh has likewise outlined a federal role in coordinating state and local engagement in international law. Cornerstones of this role include ensuring that systems of “horizontal coordination” among state and local entities operate freely, primarily by facilitating dialogue, encouraging consideration of policy alternatives, though he suggests a role of attempting persuasion, as well. Ahdieh, *supra* note 9, at 1229. He also suggests “benchmarking” along the lines of the Open Method of Coordination (OMC) within the European Union. *Id.* at 1230.

³⁰ In *Medellin*, the Court reiterated the understanding that, in the absence of a self-executing treaty or implementing legislation, the United States nevertheless remains internationally obligated to adhere to its international treaty commitments. 552 U.S. at 522–23. Thus, although ratified treaties may not be directly enforceable in U.S. courts, the United States can be held accountable for implementation of treaty provisions through other means, including its obligation to report on treaty compliance and through the Universal Periodic Review. See LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 235–36 (1979) (discussing forces that influence human rights compliance).

In making this claim, the Article does not urge a re-examination of federal-state relations *vis-à-vis* international human rights law.³¹ It leaves to the side arguments urging Congress to enact implementing legislation to compel state action and compliance with international human rights law³² and does not revisit the Court's rationale for limiting the President's authority to similarly compel state compliance with international treaties absent self-executing treaties or implementing legislation. Rather, by mapping the various doctrinal, functional, pragmatic and normative concerns pertaining to federalism and subnational human rights implementation, this Article offers a conceptual framework to explore the role of the federal government, particularly the executive branch, in facilitating implementation of ratified treaties at the subnational level and suggests a set of core functions for the federal Executive to maximize state and local human rights treaty compliance.

Part I sets the stage by providing a descriptive account of the growing domestic and international recognition of the need for federal oversight and coordination of state and local human rights implementation. Part II charts the terrain of overlapping, and sometimes competing, considerations pertaining to the role of the federal government in domestic subnational implementation of human rights commitments and obligations. Part III synthesizes the considerations identified in Part II to suggest several core functions for the federal government, primarily through the executive branch, to foster incorporation of human rights treaty obligations at the state and local level. This section draws upon relevant examples of cooperative federalism arrangements within the United States, and in particular the role of the Executive in those in-

³¹ Significantly, it does not join the debate revisiting federal authority under its treaty powers to legislate in areas traditionally reserved for the state and "commandeer" state functions. See, e.g., Curtis Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 450 (1998) (challenging the "nationalist view" of broad and plenary treaty power and asserting that treaty power should be subject to same federalism limitations as Congress' legislative powers); Mark Tushnet, *Federalism and International Human Rights in the New Constitutional Order*, 47 WAYNE L. REV. 841, 856-69 (2002) (noting the unworkability of devising subject matter limitations on the federal treaty-making power and examining approaches to reconciling broad treaty power with the anti-commandeering principle); Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 52 n.101 (1997) (calling into question the anti-commandeering prohibition articulated in *New York v. United States*, 112 S. Ct. 2408 (1992), as applied to the federal government's treaty-making power) (citing Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1260 (1995)).

³² See, e.g., Penny M. Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 ALA. L. REV. 97 (2011) [hereinafter Venetis, *Making Human Rights Treaty Law Actionable*] (making the case for universal implementing legislation that would make all ratified human rights treaties actionable in U.S. courts); Kalb, *Dynamic Federalism*, *supra* note 23, at 1065 (noting that the "federal floor" model she proposes, allowing for state autonomy in implementation with federal oversight, would require general implementing legislation to render human rights treaties enforceable in domestic courts).

stances, as a means of identifying a range of possibilities for addressing the interests particular to the context of human rights implementation. Finally, Part IV considers a number of challenges to the approach suggested.

I. THE IMPLEMENTATION GAP

The United States is increasingly engaging with the international human rights system and embracing the domestic incorporation of human rights obligations.³³ It reports more regularly to human rights treaty bodies, extends invitations to U.N. experts to visit the United States on fact-finding missions, engages in briefing and arguments at the Inter-American Human Rights Commission, and, most recently, showcases its robust engagement with the UPR as a model for other countries.³⁴

However, this federal engagement at the international level is not coupled with parallel engagement at the state and local level. The United States currently lacks a national human rights institution to regularly monitor human rights conditions at the subnational level, and it lacks a coordinated approach to ensure that human rights commitments are transmitted to, or implemented by, subnational government officials.³⁵ This gap in monitoring, implementation and coordination potentially leaves state and local officials unaware of and compromised in their ability to adhere to human rights commitments made by the U.S., a deficiency recognized both nationally and internationally.

The absence of a national human rights institution (NHRI) in the United States is in sharp contrast to the proliferation of NHRIs around the globe. These bodies are found in over 100 countries and vary in form, function and effectiveness.³⁶ Most were created as permanent, of-

³³ Melish, *supra* note 23, at 416.

³⁴ See Harold Koh, Legal Adviser, U.S. State Dep't, Official Highlights U.S. Commitment to U.N. Human Rights Council (Feb. 16, 2010), available at <http://geneva.usmission.gov/2010/02/16/harold-koh-hrc/> [hereinafter Koh, Official Highlights U.S. Commitment] (in remarks at the Brookings Institution, Koh stated, "Our goal is to make [a UPR] report which is a model for how such reports ought to be done."); see also Daniel B. O'Connor, *Rights at Home: U.S. National Tour Gauges Human Rights Performance*, U.S. DEPARTMENT ST. MAG., Dec. 2010, at 20 (detailing the administration's pre-review civil society consultation process).

³⁵ See Melish, *supra* note 23, at 454; Risa E. Kaufman, *Human Rights in the United States: Reclaiming the History and Ensuring the Future*, 40 COLUM. HUM. RTS. L. REV. 149, 159-161 (2008).

³⁶ See SHUBHANKAR DAM, EXECUTIVE SESSION ON HUMAN RIGHTS COMMISSIONS AND CRIMINAL JUSTICE, HRC NO. 5: LESSONS FROM NATIONAL HUMAN RIGHTS INSTITUTIONS AROUND THE WORLD FOR STATE AND LOCAL HUMAN RIGHTS COMMISSIONS IN THE UNITED STATES 5-6 (Marea L. Beeman ed., Aug. 2007) (describing the different models that NHRIs follow); Peter Rosenblum, *Tainted Origins and Uncertain Outcomes: Evaluating NHRIs*, in HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE: ASSESSING NATIONAL HUMAN RIGHTS INSTITUTIONS (Ryan Goodman & Thomas Pegram eds., 2011) (calling into question the

ficial, and ostensibly independent authorities charged with addressing human rights concerns arising from international human rights law.³⁷ A set of non-binding principles (“The Paris Principles”) establishes minimum standards for NHRIs.³⁸ As a general matter, these principles call for NHRIs to have a broad mandate, take on advisory, educational, and internationally participatory roles, be politically independent and comprised of a pluralistic membership.³⁹ Significantly, the Paris Principles explicitly call upon national human rights bodies to “setup local or regional sections” or “maintain consultation with the other bodies . . . responsible for the promotion and protection of human rights.”⁴⁰ In further recognition of the potential role that NHRI’s play in coordinating subnational human rights implementation, the U.N. Office of the High Commissioner for Human Rights recently undertook a study to identify best practices of NHRIs operating in federal states around the world.⁴¹

The United States likewise has no focal point charged with coordinating state and local governments’ implementation of human rights treaties. In 1998, former President Clinton signed Executive Order 13107, creating the Interagency Working Group on the Implementation of Human Rights Treaties to undertake a range of functions to oversee domestic implementation of the various U.N. treaties ratified by the

effectiveness of NHRIs).

³⁷ DAM, *supra* note 36 at 2.

³⁸ U.N. GAOR, 48th Sess., 85th plen. mtg., U.N. Doc. A/RES/48/134 (Dec. 20, 1993) [hereinafter Paris Principles].

³⁹ DAM, *supra* note 36, at 3–4 (describing the Paris Principles); *see generally* UNITED NATIONS, FACT SHEET NO. 19, NATIONAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS (Apr. 1993), *available at* www.ohchr.org/Documents/Publications/FactSheet19en.pdf (describing national human rights institutions and proposed guidelines for effectiveness); Stephen Livingstone & Rachel Murray, *The Effectiveness of National Human Rights Institutions*, in HUMAN RIGHTS BROUGHT HOME: SOCIO-LEGAL PERSPECTIVES ON HUMAN RIGHTS IN THE NATIONAL CONTEXT 137 (Simon Halliday & Patrick Schmidt eds., 2004); Brice Dickson, Harry Street Lecture, The Contribution of Human Rights Commissions to the Protection of Human Rights (Nov. 21 2002), *available at* lawvideolibrary.com/docs/NHRI.doc (describing essential characteristics of national human rights institutions and their potential value in promoting human rights).

⁴⁰ Paris Principles, *supra* note 38, Methods of Operation (e)-(f). A number of scholars and practitioners have suggested additional and alternative criteria necessary for NHRIs to be effective in promoting and protecting human rights. *See, e.g.*, Rachel Murray, *National Human Rights Institutions: Criteria and Factors for Assessing Their Effectiveness*, 25 NETH. Q. HUM. RTS. 189 (2007); Obiora Chinedu Okafor & Shedrack C. Agbakwa, *On Legalism, Popular Agency and “Voices of Suffering”: The Nigerian National Human Rights Commission in Context*, 24 HUM. RTS. Q. 662 (2002); Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1 (2000).

⁴¹ Interview with Vladlen Stefanov, Chief, Nat’l Insts. & Reg’l Mechanisms Section, Office of the High Comm’r for Human Rights, in New York, N.Y. (Mar. 1, 2011). The study is currently underway and is scheduled to be finalized and released in August 2011.

United States.⁴² The Bush administration abandoned the working group and replaced it with a Policy Coordinating Committee, which, by most accounts, was never fully operationalized.⁴³ The Obama administration has convened an ad-hoc policy-coordinating committee to engage in treaty reporting and the UPR.⁴⁴ However, the working group has no explicit mandate to coordinate and engage with state and local officials. Similarly, the State Department office that was created to liaise with state and local officials on foreign policy issues is not mandated to engage on issues related to domestic implementation of human rights.⁴⁵

⁴² Exec. Order No. 13,107, §§ 1–6, 63 Fed. Reg. 68,991 (Dec. 10, 1998). Among its functions, the Working Group was charged with (1) coordinating the preparation of treaty compliance reports to international organizations including the U.N. and OAS and the responses to contentious complaints that were lodged with these bodies; (2) overseeing a review of all proposed legislation to ensure conformity with international human rights obligations; (3) ensuring annual review of the reservations, understandings and declarations the U.S. attached to human rights treaties; and (4) considering complaints and allegations of inconsistency with or breach of international human rights obligations. *Id.* at § 4(c). In addition, the group was responsible for ensuring public outreach and education on human rights provisions in both treaty and domestic law. *Id.*

⁴³ In 2001, President George W. Bush superseded the Interagency Working Group with a National Security Presidential Directive establishing a Policy Coordination Committee (PCC) on Democracy, Human Rights, and International Operations, directed by the Assistant to the President for National Security Affairs. The Directive transferred the duties of the Interagency Working Group to the Committee. Memorandum from the Sec’y of State et al., on the Organization of the National Security Council System to the Vice President (Feb. 13, 2001), available at <http://www.fas.org/irp/offdocs/nspd/nspd-1.htm>; see also Melish, *supra* note 23, at 402.

⁴⁴ Conversation with Devon Chaffee, Legislative Counsel, Am. Civil Liberties Union (July 21, 2011).

⁴⁵ The Obama administration has established an office of the Special Representative for Global Intergovernmental Affairs, charged with building relationships “between state and local officials in the U.S. and their foreign counterparts around the world” in an effort to meet the United States’ foreign policy objectives. See Biography: Reta Jo Lewis, Special Representative, Global Intergovernmental Affairs, U.S. DEP’T OF STATE, <http://www.state.gov/r/pa/ei/biog/139472.htm> (last visited Jan. 13, 2012); see also State Department Briefing, *supra* note 3 (remarks of Assistant Secretary of State Esther Brimmer noting that Special Representative Reta Jo Lewis “works on these intersections between foreign policy issues and our state and local communities”). The office’s major initiatives and priorities are to work with elected state and local officials on issues of trade investment, national exports, promoting private sector initiatives abroad, tourism, energy, climate change and the environment; the Special Representative is not presently mandated to engage in outreach to state and local officials around human rights treaty implementation. Interview with Reta Jo Lewis, Special Representative for Global Intergovernmental Affairs, in New York, N.Y. (Mar. 31, 2011). Moreover, the Special Representative is not presently mandated to work with unelected state and local officials such as state and local human rights and human relations commissions. *Id.* The office’s primary engagement with human rights has been in relation to the Universal Declaration on the Rights of Indigenous Peoples. In that regard, the Special Representative was designated to coordinate government-to-government tribal consultations between the U.S. government and federally recognized tribes in conjunction with the U.S. government’s review of the U.N. Declaration on the Rights of Indigenous Peoples, in furtherance of Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 5, 2009). Interview with Reta Jo Lewis, Special Representative for Global Intergovernmental Affairs, in New York, N.Y. (March 31, 2011); see also OFFICE OF THE SPECIAL REPRESENTATIVE FOR GLOBAL INTERGOVERNMENTAL AFFAIRS, U.S. DEP’T OF STATE, TRIBAL CONSULTATION, <http://www.state.gov/s/rgia/c38301.htm> (last visited Jan. 13, 2012).

Nevertheless, the Obama administration has made some strides towards greater engagement with state and local officials regarding human rights implementation. Harold Koh, legal adviser to the State Department, has sent official communications to state governors, attorneys general and state and local human rights and human relations commissioners, apprising them of the human rights treaties that the United States has ratified and seeking their input on U.S. reports to U.N. treaty monitoring bodies.⁴⁶ Administration officials have spoken about international human rights obligations at gatherings of state and local human rights and human relations commission staff.⁴⁷ In its most recent report to the U.N. Human Rights Committee, the expert committee that monitors countries' compliance with the International Covenant on Civil and Political Rights (ICCPR), the administration recognized the importance of state and local officials in meeting the United States' obligations under the treaty by appending a catalogue of state, local, and tribal human rights agencies and programs that "play a critical role in U.S. implementation of the human rights treaties to which the United States is a party[.]"⁴⁸

However, these efforts and acknowledgments have not been coupled with robust monitoring, coordinated and affirmative outreach efforts, or incentives. Many state and local officials thus lack the necessary information regarding their ability to implement human rights obligations.⁴⁹

The impact of this lack of coordination and outreach to state and local officials is made evident when the United States' participation in the international system reveals human rights concerns at the state and

⁴⁶ Memorandum from Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, to State Governors on U.S. Human Rights Treaty Reports (Jan. 20, 2010), *available at* <http://www.state.gov/documents/organization/137292.pdf>; Letter from Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, to State and Local Human Rights Commissions (May 3, 2010).

⁴⁷ See INT'L ASS'N OF OFFICIAL HUMAN RIGHTS AGENCIES, *IAOHRA ANNUAL CONFERENCE: THE HUMAN RIGHTS AGENDA—2010 AND BEYOND* (Aug. 29–Sept. 1, 2010), *available at* <http://www.iaohra.org/2010-iaohra-conference-report/> (listing Scott Busby, Dir. of Human Rights, Nat'l Sec. Council, and Nina Schou, Att'y Advisor, U.S. Dep't of State, as conference presenters); INT'L ASS'N OF OFFICIAL HUMAN RIGHTS AGENCIES, *IAOHRA ANNUAL CONFERENCE: LIVING THE LEGACY, HONORING THE PAST* (Aug. 27–31, 2011), *available at* http://www.iaohra.org/storage/IAOHRAProgramBooklet_Agenda.pdf (listing Nina Schou, Att'y Advisor, U.S. Dep't of State and Karen L. Stevens, Acting Chief, Policy/Strategy Section, U.S. Department of Justice, as conference presenters).

⁴⁸ U.S. DEP'T OF STATE, *REPORT CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR): ANNEX A TO THE COMMON CORE DOCUMENT OF THE UNITED STATES STATE, LOCAL, TRIBAL, AND TERRITORIAL HUMAN RIGHTS ORGANIZATIONS AND PROGRAMS* (Dec. 30, 2011), *available at* <http://www.state.gov/j/drl/rls/179782.htm>.

⁴⁹ See Letter from U.S. Mayors and State and Local Human Rights and Human Relations Commissions, to Hillary Clinton, U.S. Sec'y of State (Mar. 24, 2011) [hereinafter Letter from U.S. Mayors] (on file with author).

local level.⁵⁰ Examples abound. In submitting its report to the U.N. Human Rights Council in conjunction with the UPR, the United States recognized the potential human rights concerns raised by Arizona's enactment of S.B. 1070,⁵¹ a state law mandating that police determine immigration status where there is reasonable suspicion that a person is an "illegal alien."⁵² Likewise, several recommendations resulting from the review focused on state and local programs that raise the potential for racial profiling in immigration enforcement.⁵³ Other recommendations offered broader statements regarding the need to address issues such as access to housing and gender equality at work,⁵⁴ issues that are typically within the jurisdiction of state and local authorities.

The observations and recommendations issued by U.N. monitoring bodies reviewing U.S. human rights treaty compliance further reflect state and local human rights concerns. In its 2006 review of the United States' compliance with the ICCPR, the Human Rights Committee made a number of recommendations pertaining to state and local issues. The Committee expressed concern over racial-profiling practices that persist at the state level, discrimination in prosecuting and sentencing in the criminal justice system,⁵⁵ as well as police brutality and excessive use of force by law enforcement officials.⁵⁶ The Committee noted "with concern[,] the failure to outlaw employment discrimination on the basis of sexual orientation in many states," and urged the United States to ensure that hate crime legislation at the federal and state levels address sexual orientation-related violence, and that both federal and state legislation outlaw discrimination on the basis of sexual orientation.⁵⁷ Likewise, the Committee expressed concern over employment discrimina-

⁵⁰ See Peter J. Spiro, *The States and International Human Rights*, 66 *FORDHAM L. REV.* 567, 570-71 (1997) (noting the increasing frequency with which subnational practices within the U.S. are criticized for violating human rights norms).

⁵¹ Human Rights Council, Working Group on the Universal Periodic Review, *National Report Submitted in Accordance with Paragraph 15 (a) of the Annex to Human Rights Council Resolution 5/1: United States of America*, ¶ 95, U.N. Doc. A/HRC/WG.6/9/USA/1 (Aug. 23, 2010).

⁵² S.B. 1070, 49th Leg., 2nd Sess. (Ariz. 2010). The Ninth Circuit upheld the United States' challenge to certain provisions of the Arizona statute on grounds that they are preempted by federal law. See *U.S. v. Arizona*, 641 F.3d 339 (9th Cir. 2011), *aff'g* 703 F. Supp. 2d 980 (D. Ariz. 2010). For commentary on the constitutionality of the law, see Gabriel J. Chin, Carissa Byrne Hessick, Toni Massaro & Marc L. Miller, *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 *GEO. IMMIGR. L.J.* 47 (2010).

⁵³ See U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review, United States of America*, ¶¶ 79, 101, 108, 110, U.N. Doc. A/HRC/16/11 (Jan. 4, 2011).

⁵⁴ *Id.* ¶¶ 81, 113, 116, 197.

⁵⁵ *Id.* ¶ 24.

⁵⁶ Human Rights Comm., *Concluding Observations of the Human Rights Committee, United States of America*, ¶ 30, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) [hereinafter Human Rights Comm., *Concluding Observations*].

⁵⁷ *Id.* ¶ 26.

tion against women, urging the United States to ensure adequate protection at the state level.⁵⁸

In its most recent review of the United States, the Committee on the Elimination of All Forms of Racial Discrimination (CERD) also raised concerns about state and local issues, including racial profiling by law enforcement,⁵⁹ residential segregation based on racial, ethnic and national origin,⁶⁰ and *de facto* racial segregation in public schools.⁶¹

In addition to highlighting specific human rights issues that are of state or local nature, human rights bodies have expressed concern over the lack of a coordinated approach to human rights implementation within the United States. In its review of the United States' compliance with its obligations under CERD, the CERD Committee noted that within the United States, there are no "appropriate and effective mechanisms to ensure a co-ordinated approach towards implementation of the Convention at the federal, state and local levels," and recommended establishing such mechanisms.⁶² Similarly, in its review of U.S. compliance with the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, the Committee on the Rights of the Child (CRC) recommended strengthening coordination in the areas covered by the Optional Protocol at the federal and state levels.⁶³ The U.N. Human Rights Committee expressed regret that the United States' 2006 Report on its compliance with ICCPR provided "only limited information . . . on the implementation of the Covenant at the state level."⁶⁴

Most recently, during the UPR, ten countries urged the United States to establish a national human rights institution in accordance with the Paris Principles, with many of the countries noting the need for such an institution to strengthen rights protection at, and ensure coordination among, the federal, state and local levels.⁶⁵

⁵⁸ *Id.* ¶ 28.

⁵⁹ Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, ¶ 14, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008) [hereinafter Comm. on the Elimination of Racial Discrimination, *Concluding Observations*].

⁶⁰ *Id.* ¶ 16.

⁶¹ *Id.* ¶ 17.

⁶² *Id.* ¶ 13.

⁶³ Comm. on the Rights of the Child, *Concluding Observations: United States of America*, ¶ 13, U.N. Doc. CRC/C/OPSC/USA/CO/1 (June 25, 2008).

⁶⁴ Human Rights Comm., *Concluding Observations*, *supra* note 56, ¶ 4; *see also id.* ¶ 39 (requesting additional information from the United States regarding treaty implementation at the state level).

⁶⁵ Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, *supra* note 53, at ¶ 92.72–.74; *see also* Davis, *The Spirit of Our Times*, *supra* note 21, at 387–88 (detailing additional examples in which international bodies have noted the "implementation gap" that occurs in the United States at the state and local level).

These observations and recommendations in the international arena reflect the growing recognition within the United States of the need for more robust subnational human rights implementation, including federal coordination and support for state and local efforts. The issue is highlighted repeatedly in civil society shadow reports to the U.N. treaty monitoring bodies,⁶⁶ and was prominent in stakeholder reports submitted in conjunction with the U.S. UPR.⁶⁷

U.S. government officials, too, recognize the need for increased federal support and coordination of state and local human rights implementation. At a post-UPR town hall meeting with U.S. representatives of civil society organizations, two assistant secretaries of state, the State Department's legal adviser, and an assistant secretary for housing and urban development (HUD) recognized the role that state and local officials play in bringing the United States into compliance with its human rights obligations and the need for the federal government to engage them more deeply in this process.⁶⁸ In response to a question re-

⁶⁶ For example, in a report submitted to the U.N. Committee on the Elimination of Racial Discrimination, which in February 2008 considered the U.S. government's compliance with CERD, the U.S. Human Rights Network's CERD Working Group on Local Implementation and Treaty Obligations traced the United States' failure to fully implement its obligations under CERD to the fact that it has no comprehensive human rights coordination mechanism, including no federal or state bodies with the necessary authority to monitor treaty compliance and implementation, issue recommendations, "collect and assess statistics, hold thematic hearings, and undertake promotional and education initiatives." TARA J. MELISH ET AL., U.S. HUMAN RIGHTS NETWORK'S CERD WORKING GROUPS ON LOCAL IMPLEMENTATION & TREATY OBLIGATIONS, A REPORT TO THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION ON: U.S. CERD OBLIGATIONS AND DOMESTIC IMPLEMENTATION 1 (Feb. 2008), available at <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN7.doc>. The Report also noted that the United States has failed to oversee, coordinate, and facilitate complaint initiatives at the state and local levels, and has failed to raise awareness of the Conventions' guarantees. *Id.* at 2; see also HUMAN RIGHTS WATCH, SUBMISSION TO THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 8-10 (Feb. 2008) (noting that the federal government has "done little to raise awareness" among states officials about CERD, and has failed to review state policies and report to the CERD committee on their efforts, and recommending greater education of state officials, collection of information, and the creation of a centralized permanent institutionalized mechanisms to review state policies), available at www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/HRW.pdf.

⁶⁷ See U.S. Human Rights Network, *The United States of America: Summary Submission to the U.N. Universal Periodic Review*, 9th Session of the UPR Working Group of the Human Rights Council, 3, 9 (Apr. 2010), available at http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/USHRN_HumanRightsNetwork.pdf; CERD Task Force et al., *From Civil Rights to Human Rights: Implementing US Obligations Under the International Convention on the Elimination of All Forms of Racial Discrimination*, Submission to the U.N. Universal Periodic Review, 9th Session of the UPR Working Group of the Human Rights Council, 8, 14 (2010), available at http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/USHRN_UPR_USA_S09_2010_Annex3_CERD%20Joint%20Report%20USA.pdf; Columbia Human Rights Inst. et al., *Treaty Ratification*, Submission to the United Nations Universal Periodic Review, 9th Session of the Working Group on the UPR Human Rights Council, 9 (2010), available at http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/USHRN_UPR_USA_S09_2010_Annex22_Treaty%20Ratification%20Joint%20Report%20USA.pdf.

⁶⁸ State Department Briefing, *supra* note 3.

garding the Obama administration's plan for reaching out to state and local officials after the review, Michael Posner, the assistant secretary of state for democracy, labor and human rights remarked:

[I]t's important for us to think about many of the issues we're discussing here. Police brutality, for example, lots of other issues are local issues or state issues. And it's critical that we begin to figure out in a more systematic way how to bring state and local governments into the process. . . . [F]rankly, this is an area where there's a lot of work for us to do. This is still largely at a federal level, and there's a huge state apparatus that's largely not engaged in this as they need to be. And if we're going to be really successful, it's got to take place at that level.⁶⁹

Likewise, assistant secretary for HUD, John Trasviña, highlighted how state and local agencies are key to HUD's success: "We cannot do our work on fair housing, ending housing discrimination without these partners."⁷⁰ State and local officials similarly note the need for more federal support for their efforts. In a letter to Secretary of State Clinton, a group of mayors, state and local human rights and human relations commissioners, and staff requested such assistance.⁷¹ And the major membership association of state and local human rights and human relations commissions has made it a top priority to advocate for federal resources to realize human rights in local communities.⁷²

II. A FRAMEWORK FOR SURFACING THE FEDERAL ROLE

Several overlapping and, at times, conflicting, doctrinal, functional, pragmatic and normative considerations inform the appropriate federal role in addressing the subnational human rights implementation gap described in Part I. Exploring the origins and implications of these considerations offers a framework for uncovering and assessing the essential functions for the Executive in negotiating and fostering state and local human rights treaty compliance.

A. *The Doctrinal Landscape*

A primary set of considerations informing the federal role, and particularly the role of the Executive, in subnational implementation of

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See Letter from U.S. Mayors, *supra* note 49.

⁷² International Human Rights, International Association of Official Human Rights Agencies (Aug. 31, 2010), available at <http://www.iaohra.org/approved-resolutions-2010/>.

human rights can be grouped around doctrinal concerns regarding international legal obligations, the U.S. Supremacy Clause, and U.S. human rights treaty ratification practices. International and domestic law support an important role for state and local governments in implementing the United States' human rights treaty commitments, with the federal government playing a strong coordinating and supervisory function. This account of shared federal-state-local responsibility for human rights treaty implementation, with ultimate federal accountability, navigates the concerns of commentators who adhere to a strong and broad federal role in foreign affairs,⁷³ those who see a robust role for the states in treaty implementation,⁷⁴ and those who raise concerns about federal encroachment on state functions through broad treaty-making powers.⁷⁵ While U.S. treaty ratification practice and Supreme Court jurisprudence primarily constrain the Executive's ability to compel state and local compliance, the Executive nevertheless maintains a strong foreign relations interest in fostering state and local governments' efforts to bring the U.S. into compliance with its international commitments.

1. International Law and Federalism

International law anticipates that federal governments may delegate implementation of human rights treaty provisions to their subnational entities;⁷⁶ the text of various treaties affirms their reach to subnational entities. Article 50 of the ICCPR, for example, states that "[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."⁷⁷ The federal government

⁷³ See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 191 (1996) [hereinafter HENKIN, *FOREIGN AFFAIRS*]; Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 530 (1991); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1089-1100 (2000); Harold Hongju Koh, *Commentary, Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1850 (1998).

⁷⁴ See, e.g., Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 516-21 (2004); Spiro, *supra* note 50, at 590-92.

⁷⁵ See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 396-97 (1998); Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98, 105-11 (2000).

⁷⁶ See Vienna Convention on the Law of Treaties, *supra* note 4, art. 29 ("[A] treaty is binding upon each party in respect of its entire territory.").

⁷⁷ ICCPR, *supra* note 4, art. 50; see also CERD, *supra* note 4, art. 2(1)(a) ("Each State party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.").

nevertheless remains internationally responsible for a state's failure to implement treaty obligations.⁷⁸

This arrangement is consistent with U.S. law and treaty ratification practice. Even when international treaties are deemed non-self-executing, they nevertheless create international law obligations for the United States.⁷⁹ Under the Supremacy Clause, such international treaties are the "supreme law of the land."⁸⁰ Indeed, the Supremacy Clause was incorporated into the U.S. Constitution with a specific purpose of preventing states from violating international treaties.⁸¹

And while the Constitution assigns exclusive authority to conduct treaties with foreign powers to the federal government,⁸² the United States has attached a "federalism" understanding to almost all of the core human rights treaties it has joined, setting forth a division of labor between federal, state, and local governments for domestic implementation.⁸³ For example, the federalism understanding to the ICCPR states:

[T]he United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state and local governments may take appropriate measures for the fulfillment of the Covenant.⁸⁴

⁷⁸ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 207(b), reporter's note 3 (1987); HENKIN, FOREIGN AFFAIRS, *supra* note 73, at 233–34; Henkin, *Ghost of Senator Bricker*, *supra* note 5, at 346 ("International law requires the United States to carry out its treaty obligations but, in the absence of special provision, does not prescribe how, or through which agencies, they shall be carried out. As a matter of international law, then, the United States could leave the implementation of any treaty provision to the states. Of course, the United States remains internationally responsible for any failure of implementation."); see also Powell, *Dialogic Federalism*, *supra* note 23, at 282 n.155 and authorities cited therein.

⁷⁹ See *Medellin v. Texas*, 552 U.S. 491, 522–23 (2008).

⁸⁰ U.S. CONST. art. VI, cl. 2. Note, however, that in a passage seemingly at odds with other points in the decision, the Court in *Medellin* potentially calls into question whether non-self-executing treaties are domestic law at all. See *Medellin*, 552 U.S. at 505 n.2 ("What we mean by 'self-executing' is that the treaty has automatic domestic effect . . . upon ratification. Conversely, a 'non-self-executing' treaty does not by itself give rise to domestically enforceable domestic law."). Commentators have called into question the breadth of this assertion. See Johanna Kalb, *The Persistence of Dualism in Human Rights Treaty Implementation*, YALE L. & POL'Y REV. (forthcoming 2012) [hereinafter Kalb, *The Persistence of Dualism*].

⁸¹ See Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1101–08 (1992); Venetis, *Making Human Rights Treaty Law Actionable*, *supra* note 32.

⁸² U.S. CONST. art. I, § 10, cl. 1.

⁸³ The United States did not attach a "federalism understanding" to the two Optional Protocols that it ratified to the CRC. See CRC Optional Protocols, *supra* note 4.

⁸⁴ 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992); see also 140 CONG. REC. S7634-02 (daily ed. June 24, 1994) (same understanding regarding CERD); 136 CONG. REC. S17,486-01

In its initial report to the U.N. Committee on Human Rights Concerning the ICCPR, the United States, under the administration of President George H. W. Bush, explained the significance of this understanding:

This provision is not a reservation and does not modify or limit the international obligations of the United States under the Covenant. Rather, it addresses the essentially domestic issue of how the Covenant will be implemented within the U.S. federal system. It serves to emphasize domestically that there was no intent to alter the constitutional balance of authority between the federal government on the one hand and the state and local governments on the other, or to use the provisions of the Covenant to federalize matters now within the competence of the states. It also serves to notify other States Parties that the United States will implement its obligations under the Covenant by appropriate legislative, Executive and judicial means, federal or state, and that the federal government will remove any federal inhibition to the abilities of the constituent states to meet their obligations in this regard.⁸⁵

The federalism understanding has been criticized by some commentators as being both constitutionally unnecessary and a counterproductive holdover from earlier political efforts to undermine all attempts at U.S. treaty ratification.⁸⁶ Other commentators point to the federalism understanding to support the proposition that, human rights treaty ratification notwithstanding, the federal government remains constrained by the constitutional arrangement of enumerated powers and thus may not rely upon its treaty powers to act in areas traditionally reserved to the states.⁸⁷ Yet, others offer a more positive interpretation of the federalism understanding, drawing upon it to support the proposition that states and localities are invited, and granted wide latitude, to implement

(daily ed. Oct. 27, 1990) (same understanding for CAT).

⁸⁵ *Initial Reports of States Parties Due in 1993: United States of America*, ¶ 4, U.N. Doc. CCPR/C/81/Add.4. (July 29, 1994) (State Party Report); see also *Third Periodic Reports of States Parties Due in 1999: Addendum: United States of America*, ¶¶ 165–68, U.N. Doc. CERD/C/351/Add.1 (Oct. 10, 2000) (Report to the Committee on the Elimination of Racial Discrimination); *Initial Reports of States Parties Due in 1995: Addendum: United States of America*, ¶¶ 19–20, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) (Report to the Committee Against Torture).

⁸⁶ See, e.g., Henkin, *Ghost of Bricker*, *supra* note 5, at 346; Neuman, *supra* note 31, at 52.

⁸⁷ Brad R. Roth, *Understanding the “Understanding”: Federalism Constraints on Human Rights Implementation*, 47 WAYNE L. REV. 891, 905, 907 (2002); see also Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights and Conditional Consent*, 149 U. PA. L. REV. 399, 422 (2001) (defending the federalism understanding on grounds that it “highlight[s] and voice[s] respect for the United States’s federal structure of government”). Cf. Carlos Manuel Vázquez, Breard, Printz, and the Treaty Power, 70 U. COLO. L. REV. 1317, 1356 (1999) [hereinafter Vázquez, Breard, Printz, and the Treaty Power] (suggesting that the federalism RUD, alongside the non-self-executing declaration, may run afoul of the anti-commandeering principles established in *Printz*).

human rights treaty obligations, and indeed the federal government relies upon them doing so.⁸⁸ At the very least, the federalism understanding communicates the federal government's intention to leave a substantial portion of international human rights treaty implementation to the states.⁸⁹

Indeed, such an arrangement is consistent with U.S. federalism more generally,⁹⁰ whereby states and localities are primarily responsible for domestic law and policy that touches upon many of the concerns covered by human rights treaties.⁹¹ As Justice Stevens has noted, "One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation."⁹² Often recognized in the context of social and economic rights,⁹³ state and local governments have jurisdiction over a wide swath of issues that implicate human rights concerns.⁹⁴ As with constitutional law, according to this arrangement, the federal government sets a minimum standard for international compliance, below which state and local governments may not fall.⁹⁵

⁸⁸ See, e.g., Buergenthal, *supra* note 21, at 222 (noting that the federalism understanding, when read together with the non-self-executing declaration, empowers state courts to apply treaties directly as an "appropriate measure[] for the fulfillment of the Covenant"); Kalb, *Dynamic Federalism*, *supra* note 23, at 1029; Ku, *supra* note 74, at 525 (suggesting that the non-self-executing declaration, in conjunction with the federalism understanding, "leaves the states in control of the implementation of international human rights obligations"); Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT'L L. 301, 330–31 (1999); Resnik, *Law's Migration*, *supra* note 11, at 1629.

⁸⁹ See HENKIN, FOREIGN AFFAIRS, *supra* note 73, at 150; Ku, *supra* note 74, at 520. *But see* Golove, *supra* note 73, at 1312 (challenging notion of independent state role in treaty implementation); Vázquez, Breard, Printz, and the Treaty Power, *supra* note 87, at 1354–57 (arguing that delegation of implementation duty to states runs afoul of the prohibition on commandeering of state activities and functions, in violation of *Printz*).

⁹⁰ See Letter from Duncan B. Hollis, Attorney-Adviser, Office of Treaty Affairs, Office of the Legal Adviser of the Dep't of State, to Nicolas Dimic, First Sec'y, Embassy of Canada (Jan. 13, 2000), available at <http://www.state.gov/s/l/c8185.htm> (describing federal/state arrangement of responsibility for treaty implementation in the United States).

⁹¹ See Ku, *supra* note 74, at 462–64.

⁹² *Medellin v. Texas*, 552 U.S. 491, 536 (2008) (Stevens, J., concurring).

⁹³ Assistant Secretary of State Michael Posner recently described the role of states in protecting social and economic rights: "Under the U.S. federal system, states take the lead on many economic, social and cultural policies. For example, all 50 states are committed through their constitutions to providing education for all children. But our federal Constitution makes no mention of rights to education, health care, or social security." Michael H. Posner, Assistant Sec'y, Bureau of Democracy, Human Rights & Labor, U.S. Dep't of State, Address to the American Society of International Law: The Four Freedoms Turn 70 (Mar. 24, 2011), available at <http://www.state.gov/j/drl/rls/rm/2011/159195.htm>.

⁹⁴ Indeed, the U.S. recognizes this arrangement in its Core Report for all U.N. Periodic Human Rights Reports. See International Human Rights Instruments, *Core Document Forming Part of the Reports of States Parties: United States*, ch. III, U.N. Doc. HRI/CORE/USA/2005 (Jan. 16, 2006).

⁹⁵ See Golove, *supra* note 73, at 1310 (asserting need for federal supervision over state treaty implementation); Kalb, *Dynamic Federalism*, *supra* note 23, at 1064 (describing need for federal government to establish a "floor" for human rights compliance for states to adhere to). Without

2. *Medellin* and Constraints on the Executive's Authority

This federalism arrangement, whereby states are expected to uphold human rights treaty obligations with the federal government retaining ultimate responsibility and international accountability, is complicated by significant limitations on federal authority to compel state and local compliance with human rights treaties. As previously noted, the United States ratifies most human rights treaties with a declaration that the treaty is non-self-executing.⁹⁶ The United States has enacted federal legislation implementing the Convention Against Torture and the Genocide Convention,⁹⁷ but not the other core human rights treaties that it has ratified. Scholars have questioned both the impact and the validity of non-self-executing declarations,⁹⁸ and noted the political unlikelihood that Congress would take steps to enact additional human rights implementing legislation.⁹⁹ And, in the wake of the Court's decision in *Medellin v. Texas*, the authority of the Executive to compel states to comply with non-self-executing human rights treaties, absent implementing legislation, has been significantly curtailed.

Medellin is one in a series of cases challenging the failure of state authorities to comply with Article 36 of the Vienna Convention on Consular Relations (VCCR), requiring law enforcement officials to inform arrested foreign nationals, at the time of their arrest, of their right to re-

the federal government guiding uniform development and application of international law throughout the fifty states, the United States risks what Harold Koh has described, in the context of customary international law, as a balkanization of foreign policy and international affairs. Koh, *supra* note 73, at 1841.

⁹⁶ See, e.g., United Nations Treaty Collection, Status of Treaties, ICCPR, Declarations and Reservations: U.S., Declarations ¶ 1, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Jan. 10, 2012); United Nations Treaty Collection, Status of Treaties, CAT, Declarations and Reservations: U.S., n.12, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited Jan. 10, 2012); United Nations Treaty Collection, Status of Treaties, CERD, Declarations and Reservations: U.S., III, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (last visited Jan. 10, 2012); see also *supra* note 7.

⁹⁷ See, e.g., 18 U.S.C. § 1091 (2006) (creating the crime of genocide); 18 U.S.C. §§ 2340–2340A (2006) (criminalizing torture occurring outside the U.S.); 42 U.S.C. § 2000dd (2006) (protecting detainees).

⁹⁸ See, e.g., Damrosch, *supra* note 73, at 527–32; Henkin, *Ghost of Bricker*, *supra* note 5, at 346–48; Frank C. Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures*, 42 DEPAUL L. REV. 1241, 1244–46 (1993); David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 42 DEPAUL L. REV. 1183, 1202–03 (1993); David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35, 66–72 (1978).

⁹⁹ Kalb, *Dynamic Federalism*, *supra* note 23, at 1047–48 (noting the unlikelihood of Congress' willingness to enact implementing legislation "to legislate deeply and specifically in an area of traditional state control").

quest that the consular officials of their home country be notified of their arrest or detention.¹⁰⁰ Jose Ernesto Medellin was sentenced to death in Texas and raised his Article 36 claim in a federal habeas corpus petition. Concurrently, Mexico brought suit against the United States in the International Court of Justice (ICJ) for violations of Medellin's rights under the VCCR and those of fifty-three other Mexican nationals sentenced to death in criminal proceedings.¹⁰¹ The ICJ issued a ruling in the case, *Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, finding that the United States was in breach of its obligations under the VCCR, and ordering U.S. courts to provide effective "judicial review and reconsideration." Under Article 94 of the U.N. Charter, states that are a party to ICJ proceedings must comply with decisions by the court.¹⁰² The U.S. Supreme Court granted *certiorari* in the habeas case to consider the status of the ICJ (*Avena*) judgment in U.S. courts. Prior to oral argument, President George W. Bush issued a memorandum to the attorney general, directing state courts to give effect to the *Avena* judgment and to review the underlying pending cases.¹⁰³ Medellin's case returned to the Texas court system, and the Texas Court of Criminal Appeals rejected his claim for relief based on *Avena* and the Bush memorandum.

The Supreme Court granted *certiorari* again and affirmed the Texas court's decision, holding that the Optional Protocol to the VCCR, the ICJ Statute and the U.N. Charter, which create an obligation to comply with the *Avena* judgment, are all non-self-executing, and thus the *Avena* judgment is not directly enforceable in U.S. courts.¹⁰⁴ The Court also held that the President could not direct states to comply with a U.S. treaty obligation under the VCCR by requiring states to give effect to the ICJ's *Avena* decision.¹⁰⁵ In so holding, the Court rejected the United States' argument, which it raised as *amicus* in the case, that the President acted to implement the *Avena* judgment pursuant to his implicit authority under the Optional Protocol and the U.N. Charter, to implement the

¹⁰⁰ Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

¹⁰¹ *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12.

¹⁰² U.N. CHARTER art. 94, para. 1.

¹⁰³ Memorandum from President George W. Bush to Alberto R. Gonzales, U.S. Att'y Gen., on Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005), available at www.unhcr.org/refworld/publisher,USPRES,,429c2fd94,0.html; see also *Medellin v. Texas*, 552 U.S. 491, 503 (2008) (quoting the memorandum).

¹⁰⁴ *Medellin*, 552 U.S. at 506. The Court did not reach the question of whether the VCCR itself is self-executing, but rather assumed without deciding that Article 36 of the Vienna Convention "grants foreign nationals 'an individually enforceable right to request that their consular officers be notified of their detention, and an accompanying right to be informed by authorities of the availability of consular notification.'" *Id.* at 506 n.4. In addition, the Court noted that "[w]e do not suggest that treaties can never afford binding domestic effect to international tribunal judgments – only that [these particular instruments] do not do so." *Id.* at 519.

¹⁰⁵ *Id.* at 529–30.

Avena judgment, and that Congress acquiesced in its exercise of such authority.¹⁰⁶ The Court rejected, too, the government's argument that the President acted pursuant to his foreign affairs dispute resolution authority.¹⁰⁷ The *Medellin* Court likewise rejected the petitioner's argument that the President was acting pursuant to his "take care" powers in seeking to compel state courts to give effect to the *Avena* judgment.¹⁰⁸ In doing so, the Court noted simply that the "take care" clause "allows the president to execute the laws, not make them"; finding the *Avena* judgment to be unenforceable domestic law, the Court noted that, by extension, the President is unable to "take care" to enforce the judgment via a presidential memorandum.¹⁰⁹

3. The Executive's Interest and Role in Treaty Compliance

Medellin clarifies the President's inability to compel subnational compliance with international human rights treaty obligations absent a showing of intent that the treaty was to be self-executing, or explicit implementing legislation.¹¹⁰ The precise contours of the President's foreign relations powers are still somewhat unresolved, however, particularly in relation to Congress.¹¹¹ Sarah Cleveland notes that the Constitution carefully allocates responsibility for foreign affairs among the three branches of the federal government, and indeed bestows the "bulk" of foreign affairs authority on Congress.¹¹² The Executive's constitutionally

¹⁰⁶ *Id.* at 525–30.

¹⁰⁷ *Id.* at 530–32.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 532. At least one commentator has criticized the reasoning that classifies non-self-executing treaties outside the scope of "laws" for purposes of the Take Care clause. Edward Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 355–56 (2008) (urging a differentiation between non-self-executing treaty provisions under the Supremacy Clause and the Take Care Clause).

¹¹⁰ For a critique of the Court's reasoning, see John Quigley, *President Bush's Directive on Foreigners Under Arrest: A Critique of Medellin v. Texas*, 22 EMORY INT'L L. REV. 423 (2008). For a discussion of the ways in which *Medellin* illustrates the present reality and complexity of the implementation and enforceability of human rights treaties in our federalist system, see Kalb, *Dynamic Federalism*, *supra* note 23, at 1048.

¹¹¹ Indeed, in *Zivotofsky ex rel. Zivotofsky v. Clinton*, the Supreme Court held that the scope of the President's foreign affairs powers to recognize foreign sovereigns is justiciable, yet noted that its resolution is not simple. No. 10-699, 2012 WL 986813, at *9 (U.S. Mar. 26, 2012). Specifically, the Court remanded to the lower courts the question of whether section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, which directs the U.S. Department of State to record the place of birth of Israel in passports of American children who are born in Jerusalem, impermissibly infringes the President's power to recognize foreign sovereigns.

¹¹² Cleveland, *supra* note 4, at 984–85. Cleveland notes that this division of labor has resulted in numerous conflicts among the federal branches. *Id.* at 985–89; see also HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 75 (1990) (noting importance of doctrine of separation of powers in preventing allocation of foreign affairs powers in the President alone). *But see* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*,

grounded foreign affairs authority rests in Article II's grant of the Executive power,¹¹³ its authorization to receive ambassadors,¹¹⁴ enter into treaties and appoint ambassadors, subject to the advice and consent of the Senate,¹¹⁵ and act as commander-in-chief of the armed forces.¹¹⁶ Nevertheless, the President is dependent upon Congress' legislative authority in foreign affairs.¹¹⁷ And, because the President has no appropriations power, through the "power of the purse," Congress is able to reign in and "second-guess" foreign relations decisions of the Executive branch.¹¹⁸ The President's authority as commander-in-chief of the armed forces is similarly mediated by Congress's powers, including its authority to declare war.¹¹⁹

Nevertheless, the Executive's interest and role in ensuring that the United States meets its international treaty obligations is well-recognized.¹²⁰ The Court in *Medellin* affirmed that the President indeed has a compelling interest and plays a central role in vindicating U.S. interests and promoting foreign relations by ensuring compliance with international treaty obligations.¹²¹ Grounded in his powers to engage in foreign relations, the President is uniquely positioned and obligated to take action to ensure that the United States abides by its commitments at home in order to promote respect for human rights abroad.¹²² Indeed,

111 YALE L.J. 231, 251–52 (2001) (criticizing modern scholarship for failing to ground allocations of Presidential and Congressional foreign affairs powers in the text of the Constitution and arguing a textual basis for the President's residual Executive power over foreign relations, reliant upon Congress for giving it any domestic legal effect).

113 U.S. CONST. art. II, § 1, cl. 1.

114 *Id.* § 3.

115 *Id.* § 2, cl. 2.

116 *Id.* § 2, cl. 1.

117 Prakash & Ramsey, *supra* note 112, at 262 n.121 (noting that because this power, grounded in article I, section 8, clause 18, is derivative of the President's foreign affairs power, Congress must legislate in cooperation with the President).

118 Cleveland, *supra* note 4, at 985; *see also* Prakash & Ramsey, *supra* note 112, at 262.

119 U.S. CONST. art. I, § 8.

120 HENKIN, FOREIGN AFFAIRS, *supra* note 73, at 207 ("Responsibility for carrying out treaty obligations falls on the President under his foreign affairs powers, and it is upon him that foreign governments will call when there is failure in compliance by the United States.").

121 *Medellin v. Texas*, 552 U.S. 491, 524 (2008) ("In this case, the President seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. These interests are plainly compelling."). The decision, too, makes clear the critical need for federal oversight and encouragement of state and local compliance with human rights obligations. Ahdieh, *supra* note 9, at 1226 (noting that Stevens' concurrence underscores the federal role of impressing upon states their international legal obligation to respect international human rights commitments); *see also* Kalb, *Dynamic Federalism*, *supra* note 23, at 1052 (citing the VCCR as an example of where states are affirmatively obligated to implement treaty obligations, and where the federal government can encourage such compliance).

122 *See* HENKIN, FOREIGN AFFAIRS, *supra* note 73, at 198 n.93; *see also Medellin*, 552 U.S. at 537 (Stevens, J., concurring) (noting that failure to provide consular notification jeopardizes the U.S.'s interest in "ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international

without explanation or expansion, the *Medellin* Court notes that the President has “an array of political and diplomatic means available to enforce international obligations,” short of his ability to convert a non-self-executing treaty into a self-executing one.¹²³

Moreover, the Court’s limitations on the President’s authority in *Medellin* must be squared with the seemingly broad conception of the President’s foreign affairs power articulated by the Court just a few years prior in *American Insurance Ass’n v. Garamendi*.¹²⁴ In that case, the Court held that Executive branch agreements with foreign countries preempted a California statute requiring disclosure of insurance companies operating during World War II. In so holding, the Court noted that while the source of the President’s foreign affairs powers may not be set forth in textual detail, historically it has been recognized as encompassing the “vast share of responsibility for the conduct of our foreign relations.”¹²⁵ The Court noted that in this realm, the President has “a degree of independent authority to act.”¹²⁶ Thus, the Court held in *Garamendi* that Executive agreements, requiring no ratification by the Senate or approval by Congress, preempt conflicting state laws in the same way that treaties do.¹²⁷ Indeed, the Court noted the President’s independent authority to act “in the areas of foreign policy and national security” in the face of Congress’ failure to act.¹²⁸

To be sure, in the context of human rights treaties that the United States has ratified, the President has a strong foreign policy interest in facilitating and ensuring state and local human rights compliance to encourage global compliance with human rights norms and standards¹²⁹

law”). In signing the VCCR and agreeing to provide a set of rights to foreign nationals in the United States criminal justice system, the United States sought to secure reciprocal rights for U.S. nationals traveling abroad, particularly where the criminal justice systems might not afford protections from abuse. Margaret E. McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 791 (2006) [hereinafter McGuinness, *Horizontal Integration*].

¹²³ *Medellin*, 552 U.S. at 525; see *id.* at 529 (“None of this is to say, however, that the combination of a non-self-executing treaty and the lack of implementing legislation precludes the President from acting to comply with an international treaty obligation. . . . The President may comply with the treaty’s obligations by some other means, so long as they are consistent with the Constitution.”).

¹²⁴ *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003).

¹²⁵ *Id.* at 414 (internal quotation marks omitted) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)).

¹²⁶ *Id.* at 414.

¹²⁷ *Id.* at 416–17.

¹²⁸ *Id.* at 429 (internal quotation mark omitted) (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)); see also *id.* at 424 n.14 (citing *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381 (2000)).

¹²⁹ As Assistant Secretary of State Michael Posner noted in testimony to the Senate Judiciary Human Rights and the Law Subcommittee that “[o]ver the past 60 years, human rights has been a crucial element of this country’s leadership role in the world.” *The Law of the Land: U.S. Implementation of Human Rights Treaties: Hearing Before the Subcomm. on Human Rights & the Law of the Comm. on the Judiciary*, 111th Cong. 471–75 (2009) (statement of Michael H. Pos-

and serve as an international leader, rather than a laggard, in human rights.¹³⁰

In recent years, as the United States increasingly engages with the international human rights system and embraces domestic incorporation of human rights obligations, the Administration has sought to reclaim the mantle of human rights exemplar. In testimony before the Senate Judiciary Human Rights and the Law Subcommittee, Assistant Secretary of State for Democracy, Human Rights and Labor Michael Posner stated that “[i]n advancing human rights, in this country and around the world, we can and should draw from our own domestic experience and lead by example, providing a model for the advancement of human rights that other countries can emulate.”¹³¹ In remarks given upon the release of the State Department’s 2009 country reports on human rights practices, Secretary of State Hillary Clinton remarked that “[h]uman rights are universal, but their experience is local. This is why we are committed to holding everyone to the same standard, including ourselves.”¹³² Indeed, upon joining the U.N. Human Rights Council in 2009, the United States made a commitment to advance human rights at home and meet its own international human rights commitments in its efforts to advance human rights and fundamental freedoms around the world.¹³³ Thus, the present Administration has made compliance with human rights at home a cornerstone of its foreign policy objectives.¹³⁴

In this regard, the Obama administration addresses a common critique of U.S. exceptionalism, articulated perhaps most eloquently by Louis Henkin: in the cathedral of human rights, “the United States has not been a pillar of human rights but a ‘flying buttress’—supporting them from the outside,” and unwilling to subject itself to scrutiny.¹³⁵ As legal adviser to the State Department, Harold Koh attributed the United

ner, Assistant Secretary for Democracy, Human Rights & Labor, Department of State, Washington, D.C.) [hereinafter Posner Testimony].

¹³⁰ See Buergethal, *supra* note 21, at 215 (describing the growing trend of many countries strengthening domestic application and enforcement of international human rights commitments).

¹³¹ Posner Testimony, *supra* note 129.

¹³² Hillary Clinton, U.S. Sec’y of State, Remarks to the Press on the Release of the 2009 Country Reports on Human Rights Practices, U.S. Dep’t of State, Mar. 11, 2010, available at <http://www.state.gov/secretary/rm/2010/03/138241.htm>. Secretary Clinton went on to mention the U.S.’s participation in the UPR as an example of the U.S. holding itself accountable for human rights. *Id.*

¹³³ U.S. Dep’t of State, Bureau of Democracy, Human Rights, and Labor, Fact Sheet, *U.S. Human Rights Commitments and Pledges* (Apr. 16, 2009), available at <http://state.gov/g/drl/rls/fs/2009/121764.htm>.

¹³⁴ See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1487 (2003) (“[T]he perception that the United States applies one standard to the world and another to itself sharply weakens America’s claim to lead globally through moral authority.”).

¹³⁵ HENKIN, *THE AGE OF RIGHTS* 76 (1990); see also Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 308 (2002) (paraphrasing statement by Louis Henkin).

States' engagement with the UPR as an attempt to change the "dynamic" identified by Henkin.¹³⁶

To say that the Executive has a unique and strong interest and role in ensuring domestic human rights compliance does not negate or minimize the roles that Congress and the federal courts play in foreign affairs, and treaty implementation in particular. Specifically with regard to human rights treaty implementation, the potential role for Congress is clear: enacting legislation to implement the human rights treaties that the United States has ratified.¹³⁷ Present political realities may make realization of that role remote. Yet, this political resistance does not paralyze the Executive or preclude it from acting upon its articulated interest in broad domestic human rights compliance.

B. *Localism in Practice: Functional and Pragmatic Concerns*

A second strand of interests informing the role of the Executive in state and local human rights implementation revolves around the functional potential offered by localism in international law and human rights implementation, as well as the pragmatic concerns and constraints regarding such implementation.

A few examples illustrate the range of positive state and local human rights-related activity. In recent years, the City Council and Board of Alderman of Chapel Hill, North Carolina and Carrboro, North Carolina, respectively, each approved a resolution adopting the Universal Declaration of Human Rights (UDHR) as a set of guiding principles.¹³⁸ The Cincinnati, Ohio City Council adopted a resolution declaring that freedom from domestic violence is a human right, grounded in international instruments, including the UDHR, and declaring that state and local governments bear responsibility for securing that right.¹³⁹ The Madison, Wisconsin City Council passed a resolution recognizing housing as a human right and calling for the creation of an affordable and accessible housing plan and appropriate recommendations.¹⁴⁰ San Francisco adopted a local ordinance implementing the human rights norms and principles of the Convention on the Elimination of All Forms of

¹³⁶ See Koh, *Official Highlights U.S. Commitment*, *supra* note 34.

¹³⁷ The federal courts, too, play a role in human rights treaty implementation. See William M. Carter, Jr., *Treaties as Law and the Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation*, 69 MD. L. REV. 344 (2010) (proposing judicial enforcement of human rights treaties through mandamus actions).

¹³⁸ Chapel Hill, N.C., Res. 2009-11-23/R-11 (Nov. 23, 2009) (adopting the Universal Declaration of Human Rights as guiding principles); Carrboro, N.C., Res. No. 89/2008-09 (Apr. 21, 2009) (same).

¹³⁹ Cincinnati, Ohio, Res. 47-2011 (Oct. 5, 2011).

¹⁴⁰ Madison, Wis., Legis. File No. 23825 (Nov. 29, 2011).

Discrimination Against Women (CEDAW), requiring that government agencies and departments in San Francisco implement the standards of CEDAW and “integrate gender equity and human rights principles into all of its operations.”¹⁴¹ That ordinance has been amended to include reference to CERD and the need to recognize intersections of race and gender discrimination.¹⁴² The City of Chicago approved and adopted a resolution encouraging incorporation of the principles contained in the Convention on the Rights of the Child (CRC), calling for the city to “advance policies and practices that are in harmony with the principles of the [CRC] in all city agencies and organizations that address issues directly affecting the City’s children.”¹⁴³ In New York City, the proposed

¹⁴¹ S.F., CAL., ADMIN. CODE ch. 12K (2011) (Local Implementation of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Ordinance No. 128-98 (Apr. 13, 1998)). Under the ordinance, the city must eradicate all policies that discriminate, including those that have a discriminatory impact, and proactively identify barriers to the exercise of human rights. The ordinance also calls for human rights education for city departments and employees. The Commission on the Status of Women is designated as the implementing agency and is required to conduct gender analyses of the budget, services and employment practices of selected city departments to identify barriers and discrimination against women. See Risa E. Kaufman, *State and Local Commissions as Sites for Domestic Human Rights Implementation*, in HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM 89, 94 (Shareen Hertel & Kathryn Libal eds., 2011) [hereinafter Kaufman, *State and Local Commissions*]. As a result of the gender analyses, the Commission identified myriad discriminatory practices, raising awareness around the need for policy changes to benefit both women and men. For further analysis of the impact of the CEDAW ordinance, see WILD FOR HUMAN RIGHTS, RESPECT, PROTECT, FULFILL: RAISING THE BAR ON WOMEN’S RIGHTS IN SAN FRANCISCO (2008), available at <http://www.drew.edu/politicalscience/files/Final-CEDAW-SF-Report.pdf>, and DEP’T ON THE STATUS OF WOMEN, CITY & CNTY OF S.F., HUMAN RIGHTS IN ACTION: SAN FRANCISCO’S LOCAL IMPLEMENTATION OF THE UNITED NATIONS’ WOMEN’S TREATY (CEDAW) 5-13 (2010), available at <http://www.sfgov3.org/Modules/ShowDocument.aspx?documentid=314>.

¹⁴² S.F., CAL., ADMIN. CODE ch. 12K.3 (2011) (stating that, “[i]n implementing CEDAW, the City recognizes the connection between racial discrimination, as articulated in the International Convention on the Elimination of All Forms of Racial Discrimination [CERD], and discrimination against women”); *id.* ch. 12K.1(e) (recognizing that discrimination based on gender is “interconnected and often overlaps with discrimination based on race and other criteria”); *id.* ch. 12K.1(f)(3) (stating the “the need to consider the intersection of gender and race in particular recognizing the unique experiences of women of color”).

¹⁴³ CITY OF CHI., ILL., COMM. ON FIN. & COMM. ON ECON., CAPITAL & TECH. DEV., EXPRESSION OF SUPPORT FOR CONVENTION ON THE RIGHTS OF THE CHILD, R2009-143, 55415 (Feb. 11, 2009), available at www.chicityclerk.com/journals/2009/feb11_2009/feb11_2009_part3optimize.pdf. Chicago joined nine other cities and five states that have passed resolutions in support of the Convention on the Rights of the Child. Cities include: Austin, Texas; Cambridge, Massachusetts; Cleveland, Ohio; Detroit, Michigan; Grand Rapids, Michigan; Kansas City, Missouri; Minneapolis, Minnesota; New York, New York; San Diego, California and Savannah, Georgia. State governments include: Hawaii, Rhode Island, Vermont, South Carolina and New York. Columbia Law Sch., Human Rights Inst., *State and Local Human Rights Agencies: Recommendations for Advancing Opportunity and Equality Through an International Human Rights Framework*, 20, n.53 (2009), available at <http://www.law.columbia.edu/human-rights-institute/publications>. Similarly, eighteen states, nineteen counties and forty-seven cities have passed resolutions in support of CEDAW. *Id.* at app. C (2009). Three cities—San Francisco, Berkeley and Los Angeles—have passed resolutions implementing the principles of CEDAW into local law.

New York City Human Rights in Government Operations Audit Law (Human Rights GOAL) seeks to integrate human rights principles of dignity and equality (based on CERD and CEDAW) into local policy and practice by requiring that the city train its personnel in human rights, undertake a human rights analysis of the operations of each city department, program and entity, and create action plans for how the city will integrate human rights principles.¹⁴⁴ Eugene, Oregon, has declared itself a “Human Rights City” and has adopted a human rights approach to city governance through a “Triple Bottom Line” framework analysis, which encourages city decision makers to take into account environmental, equity and economic impacts and benefits of policy proposals, budget choices and other city projects and initiatives.¹⁴⁵ The California Assembly and Senate recently passed legislation requesting the state attorney general “publicize the text” of the ICCPR, CERD and CAT, and requesting that state and local officials prepare the required periodic reports for the U.N. Committees that oversee these treaties.¹⁴⁶

As state and local governments have increasingly engaged in human rights activities, the literature extolling the virtues of localism has grown. Boosters of localism highlight the importance of respecting and enabling states and localities to serve as laboratories for innovative and responsive human rights implementation, giving content to the norms enshrined in human rights treaties and building their legitimacy at the local level while bringing the United States into compliance with its international human rights obligations.¹⁴⁷ Scholars note, too, the importance of state and local human rights activity as a means of norm internalization.¹⁴⁸ Judith Resnik, in particular, has written extensively on

¹⁴⁴ New York City Council, N.Y., Int. 0731-2008 (introduced Mar. 12, 2008), available at <http://nyc.legistar.com/LegislationDetail.aspx?ID=451855&GUID=C6D2F79E-D4F0-4C83-85C0-54899C9B0A2D&Options=&Search=>. The bill would create a taskforce comprised of community and government representatives to oversee its implementation and would provide avenues for community participation in the development of the human rights analysis and action plan.

¹⁴⁵ City of Eugene, Triple Bottom Line (TBL) Framework, available at <http://www.eugene.gov/portal/server.pt?open=512&objID=730&PageID=4572&cached=true&mode=2&userID=2> (last visited June 28, 2011).

¹⁴⁶ Assemb. Con. Res. 129, Leg., 2009-10 Reg. Sess. (Cal. 2010) (Relative to International Treaties), available at ftp://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0101-0150/acr_129_bill_20100602_amended_asm_v98.pdf.

¹⁴⁷ See, e.g., Resnik, *Law's Migration*, *supra* note 11, at 1633-52; Wexler, *Promise and Limits*, *supra* note 14, at 615-21; Martha F. Davis, *Thinking Globally, Acting Locally: States, Municipalities, and International Human Rights*, in 2 BRINGING HUMAN RIGHTS HOME 127, 127-28 (Catherine Albisa et al. eds., 2008) [hereinafter Davis, *Thinking Globally, Acting Locally*]; Davis, *Upstairs, Downstairs*, *supra* note 8, at 436; Burroughs, *supra* note 8, at 420-24; Powell, *Dialogic Federalism*, *supra* note 23, at 265-270, 276, 289-93.

¹⁴⁸ See, e.g., Powell, *Dialogic Federalism*, *supra* note 23, at 289-91 (noting that international norms “internalized at the subnational level can be transmitted back to the national level for fuller translation of these norms into federal law). *But see* Wexler, *Take the Long Way Home*, *supra* note 11, at 39 (noting the limited potential for norm internalization and “cascade”).

the role that state and local actors play in domestic integration of international human rights norms, and the potential for collective state and local action, particularly through what she terms “Translocal Organizations of Government Actors” (TOGAs), to enable state and local officials to influence national and transnational policy and to challenge the characterization of international law as being countermajoritarian.¹⁴⁹ Martha Davis describes states and localities as “laboratories of foreign affairs, testing policies before initiating full-blown national programs,” with the hope that these programs may eventually “trickle up” to the national level.¹⁵⁰

Commentators, including Catherine Powell, have likewise noted that state and local implementation can help to overcome the “democratic deficit” of human rights treaty implementation.¹⁵¹ Through more participatory mechanisms and “cultivating and amplifying the voices of state and local government in the implementation of human rights,” such state and local action may lead Americans to grow more accepting of human rights, thus bolstering their legitimacy¹⁵² and enabling norm development at the federal level.

Scholars note, too, the importance of state and local engagement with human rights as a means of contributing to the evolution and development of international norms, giving “wider voice” and salience to their own priorities and concerns.¹⁵³

Much of the literature in this area focuses on the dual-pronged value of state and local efforts to implement treaties that the United States has failed to ratify or significantly limited the scope of during the ratification process: bolstering the legitimacy of human rights norms and facilitating their internalization. Commentators specifically note how positive human rights activity at the state and local level can counter federal apathy and antipathy towards ratification.¹⁵⁴ Thus, this scholarship typi-

¹⁴⁹ See, e.g., Resnik, *Law's Migration*, *supra* note 11, at 1647-52, 1656; Judith Resnik, Joshua Civin & Joseph B. Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008) [hereinafter Resnik *et al.*, *Ratifying Kyoto*]; Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31 (2007) [hereinafter Resnik, *Rethinking Horizontal Federalism*].

¹⁵⁰ Davis, *Thinking Globally, Acting Locally*, *supra* note 147, at 127.

¹⁵¹ See Powell, *Dialogic Federalism*, *supra* note 23, at 251-52; see also Burroughs, *supra* note 8, at 420-21 (2006).

¹⁵² Powell, *Dialogic Federalism*, *supra* note 23, at 205, 260; see also Ahdieh, *supra* note 9, at 1241-42; McGuinness, *Horizontal Integration*, *supra* note 122, at 839; Resnik, *Law's Migration*, *supra* note 11, at 1656; Cindy Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 475 (2008).

¹⁵³ See Ahdieh, *supra* note 9, at 1209 (describing increasing subnational engagement in human rights as a way for state and local government to “involve themselves actively in its design and evolution”).

¹⁵⁴ See Powell, *Dialogic Federalism*, *supra* note 23, at 275; Wexler, *Take the Long Way Home*, *supra* note 11, at 5.

cally examines the importance of state and local action in the face of federal hostility or ambivalence to particular human rights treaties. And, it assumes states and localities are undertaking positive human rights activity.

In the realm of human rights commitments that the United States has acceded to, Tara Melish has noted the way in which state and local implementation is consistent with the principle of subsidiarity.¹⁵⁵ This principle, core to the human rights framework, embraces the importance of local decision-making and implementation.

As Melish notes, the principle of subsidiarity is foundational to international law, and articulates the shared responsibility and relationship between international, national, and subnational entities for the “shared project of ensuring human rights protection for all individuals.”¹⁵⁶ The principle of subsidiarity carries two correlated duties: non-interference and assistance, with the ultimate goal of greater interpretation and implementation of human rights at the most local level, closest to the affected individual and community.¹⁵⁷ The human rights system is designed to monitor human rights conditions and interfere only when domestic or local institutions are unable to or ineffective at addressing human rights concerns.¹⁵⁸ By respecting and enabling the primacy of local institutions, the human rights system ensures that human rights values and approaches reflect the concerns and needs of local communities, allowing for a more “authentic,” effective, and relevant approach to rights protection.¹⁵⁹

This attention to local needs and interests may, somewhat ironically, address some commentators’ concerns regarding the need to protect areas traditionally within state and local jurisdiction from the reach of international law. These concerns are exemplified by Curtis Bradley’s challenge to the breadth of issues encompassed by international law, and in particular human rights treaty law, noting that it overlaps and in some cases conflicts with domestic law, thus becoming particularly worrisome when that conflict occurs at the state level.¹⁶⁰

¹⁵⁵ Melish, *supra* note 23, at 428.

¹⁵⁶ *Id.* at 438. Melish quotes Paolo G. Carozza’s definition of subsidiarity: “The principle that each social and political group should help smaller or more local ones accomplish their respective ends without, however, arrogating those tasks to itself.” *Id.* (quoting Paola G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT’L L. 38, 38 n.1 (2003)).

¹⁵⁷ Melish, *supra* note 23, at 439, 440.

¹⁵⁸ *Id.* at 452.

¹⁵⁹ *Id.* at 453.

¹⁶⁰ Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 397 (1999). According to this view, Congress should be limited in its authority to enter into international treaties in the same way that it is limited by federalism constraints to make domestic law. *Id.* at 450. *But see* Golove, *supra* note 73 (challenging Bradley’s historical account and arguing against strictly constructed federalism restrictions on the treaty making power).

Their potential notwithstanding, there are limitations to state and local governments' ability to bring the United States into compliance with its treaty obligations. To be sure, there are challenges posed by political resistance, discussed in Part IV, *infra*. At a more basic and pragmatic level, state and local officials have limited information about human rights standards, obligations and best practices, as well as limited resources to conduct human rights monitoring and to engage in implementation.

First, state and local governments have limited information about human rights standards and practices. A 2008 study of state policy leaders found that they had minimal knowledge of international human rights treaties, with respondents unable to articulate the relevance of international human rights treaties to state-level legislation.¹⁶¹ Perhaps relatedly, as findings by international treaty monitoring bodies reflect, states and localities are engaging in practices, and in some cases issuing policies, that conflict with human rights norms and obligations.¹⁶²

Somewhat paradoxically, as the examples of state and local human rights implementation outlined here suggest, there is a growing interest among some state and local actors in engaging in positive human-rights-related activity. State and local human rights and human relations commissions, in particular, are increasingly interested in undertaking human rights activity, including documenting and reporting human rights concerns, considering local policy and practice in light of human rights standards, engaging in human rights education, and incorporating human rights principles into advocacy efforts.¹⁶³ The umbrella organization of state and local human rights and human relations commissions, the International Association of Official Human Rights

¹⁶¹ OPPORTUNITY AGENDA, PUBLIC OPINION: STATE POLICY LEADERS' VIEWS ON SOCIAL JUSTICE AND HUMAN RIGHTS 30 (2008), available at http://opportunityagenda.org/files/field_file/State%20Policy%20Makers%20Report-Oct%202008-Final%20Low%20Res.pdf.

¹⁶² See *infra* notes 55–65 and accompanying text.

¹⁶³ See Kaufman, *State and Local Commissions*, *supra* note 141, at 92–103. The more than 150 state and local commissions or agencies mandated by state, county, or city governments to enforce human and civil rights, and/or to conduct research, training, and public education, and issue policy recommendations on human intergroup relations and civil and human rights generally operate to prevent and eliminate discrimination through a variety of means, including enforcing anti-discrimination laws and engaging in community education and training in an effort to prevent discrimination and promote equal opportunity. See KENNETH L. SAUNDERS & HYO EUN (APRIL) BANG, EXECUTIVE SESSION ON HUMAN RIGHTS COMMISSIONS AND CRIMINAL JUSTICE, HRC NO. 3: A HISTORICAL PERSPECTIVE ON U.S. HUMAN RIGHTS COMMISSIONS 1-3 (Marea L. Beeman ed., 2007). Many state and local commissions date back to the 1940s and 1950s, when human rights and race relations commissions were established to address racial tension and violence that was erupting around the country. *Id.* at 4–10. Others were formed later, in the 1960s and 1970s, in reaction to the civil rights movement and in response to calls to eradicate racial discrimination. *Id.* Most agencies are organized into non-profit associations that are international (e.g., International Association of Official Human Rights Agencies), national (e.g., National Association of Human Rights Workers), or state-wide (e.g., California Association of Human Relations Organizations) in scope.

Agencies (IAOHRA), has adopted resolutions proclaiming support for domestic incorporation of human rights treaties, with its membership pledging to undertake actions to integrate human rights standards and strategies into their daily functioning.¹⁶⁴

A number of state and local commissions have begun to undertake this work.¹⁶⁵ For example, the City of Portland, Oregon's Human Rights Commission has incorporated the Universal Declaration of Human Rights into its bylaws.¹⁶⁶ The Washington State Human Rights Commission has integrated human rights standards into its advocacy work by drawing on international human rights principles in a report documenting, analyzing and addressing the severe lack of housing for farm workers in the state.¹⁶⁷ The Eugene, Oregon City Council voted to broaden its Human Rights Commission's mandate to explicitly support and promote the full range of human rights within the Universal Declaration of Human Rights.¹⁶⁸ Even prior to this official change in mandate, the Commission engaged in community education and outreach efforts, and conducted trainings for city advisory boards, commissions, staff, and managers, raising awareness about the potential for an international human rights framework to advance the equality and dignity of local

¹⁶⁴ See, e.g., International Human Rights, International Association of Official Human Rights Agencies, Res. No. 1, *supra* note 72; International Human Rights, International Association of Official Human Rights Agencies, Res. No. 9 (Sept. 1, 2009) (on file with author).

¹⁶⁵ Kaufman, *State and Local Commissions*, *supra* note 141, at 92-96 (detailing several examples of state and local commissions integrating international human rights standards and strategies into their work).

¹⁶⁶ Article II of the Commission's bylaws states:

The Human Rights Commission shall work to eliminate discrimination and bigotry, to strengthen inter-group relationships and to foster greater understanding, inclusion and justice for those who live, work, study, worship, travel and play in the City of Portland. In doing so, the Human Rights Commission shall be guided by the principles embodied in the United Nations Universal Declaration of Human Rights.

Portland, Or., Human Rights Comm'n, Bylaws, *supra* note 12. This incorporation is evident in the Commission's complaint mechanism, which engages in documenting and reporting a range of potential human rights violations, including abuse to the integrity of the person, denial of education, abuse of civil rights and liberties, incidents of bias, trafficking in persons and abuse of workers' rights. See PORTLAND, OR., OFFICE OF HUMAN RELATIONS, REPORT HUMAN RIGHTS INCIDENTS, <http://www.portlandonline.com/humanrelations/index.cfm?c=54120>.

¹⁶⁷ Kaufman, *State and Local Commissions*, *supra* note 141, at 93; WASH. STATE HUMAN RIGHTS COMM'N, FARM WORKER HOUSING AND THE WASHINGTON LAW AGAINST DISCRIMINATION 2 (2007), available at <http://content.knowledgeplex.org/kp2/cache/documents/17830/1783061.pdf>. The Commission primarily explored the issue through the lens of discrimination against farm workers on the bases of race and national origin, drawing on its mandate to enforce prohibitions against such discrimination contained in the state's anti-discrimination statute and federal fair housing laws. Yet in its report detailing its findings and recommendations for resolving the housing crisis, the Commission discusses the relevant domestic legal standards and also draws on international human rights principles, specifically highlighting article 25 of the UDHR.

¹⁶⁸ Eugene, Or., Ordinance No. 20481 (Nov. 28, 2011).

residents.¹⁶⁹ The Los Angeles County Human Relations Commission engages in documenting and reporting human rights violations, including collecting hate crime data in L.A. County,¹⁷⁰ and draws upon international human rights standards in advocacy efforts, including a recent campaign to address rising violence against people who are homeless.¹⁷¹ The City of Berkeley, California approved a proposal by its Peace and Justice Commission to engage in human rights reporting and to provide local statistical reports and information on local ordinances related to implementation of the major human rights treaties ratified by the United States to county, as well as to state and federal governments, and U.N. treaty bodies.¹⁷² The reports would correspond with the U.S. government's periodic treaty reporting obligations.¹⁷³

However, state and local officials, including commissions, have articulated significant barriers to engaging in this work. Most of these human rights activities occur on an *ad hoc* basis; there is no centralized clearinghouse of information regarding good or effective practices, or mechanisms to coordinate commissions in their efforts to report human rights concerns and to address their impact. Resources for commissions come from governmental as well as private sources, yet are often scarce, with budgets being cut in ways that compromise the commissions' ability to monitor and enforce even domestic laws.¹⁷⁴ Indeed, although

¹⁶⁹ See EUGENE, OR., EQUITY & HUMAN RIGHTS, WHAT IS THE HUMAN RIGHTS COMMISSION?, <http://www.eugene-or.gov/portal/server.pt?open=512&objID=723&PageID=326&cached=true&mode=2&userID=2>; E-mail from Ken Neubeck, Comm'r, Eugene Human Rights Comm'n, to author (June 30, 2011, 03:46 PM) (on file with author). In addition, the Commission is represented on the City staff-led Equity and Human Rights Board, which oversees implementation of the Diversity and Equity Strategic Plan, and was instrumental in shaping the Triple Bottom Line tool discussed in note 147, *supra*, to include attention to the full range of human rights in its section on social equity. *Id.*

¹⁷⁰ Kaufman, *State and Local Commissions*, *supra* note 141, at 95–96. Since 1980, the Commission has compiled, analyzed and produced an annual report of hate crime data in L.A. County based on data provided by law enforcement agencies, school districts, universities and community organizations. The Commission distributes the annual report to policy-makers, law enforcement agencies, educators and community groups throughout L.A. County and across the nation in an effort to raise awareness about the types, severity, location and content of hate crimes in L.A. County, to improve efforts to prevent, detect, report, investigate and prosecute these crimes, and to sponsor a number of ongoing programs related to combating hate crime. *Id.* In 2002 and 2003, the Commission contributed its data to a report by Human Rights Watch on racial discrimination. *Id.*

¹⁷¹ *Id.* The Commission drew on international human rights standards to encourage law enforcement agencies to collect relevant data and to engage in public education highlighting the rights and standards regarding shelter and housing.

¹⁷² PEACE & JUSTICE COMM'N, CITY OF BERKELEY, RECOMMENDATION: UNITED NATIONS TREATY REPORTS 1, available at http://www.ci.berkeley.ca.us/uploadedFiles/Clerk/Level_3_-_City_Council/2009/09Sep/2009-09-29_Item_19_United_Nations_Treaty_Reports.pdf.

¹⁷³ *Id.*

¹⁷⁴ A survey of U.S.-based IOAHRA Members by Columbia Law School's Human Rights Institute in conjunction with IOAHRA revealed that many organizations require more staff and other resources to effectively fulfill their current duties. Columbia Law Sch. Human Rights Inst. & IOAHRA, Survey (Dec. 2010) (on file with author); see also Sandy Nobel Cannon & Ray Sex-

commission staff express an interest in deepening their involvement with and use of international human rights, they note that financial and other resource limitations constrain their ability to do so.¹⁷⁵ As Judith Resnik has made clear, national and international associations of state and local actors offer important possibilities for information sharing and coordination.¹⁷⁶ There is a need, however, for wider collection and dissemination of information regarding effective state and local initiatives that seek to address human rights concerns and implement human rights obligations.¹⁷⁷ Moreover, funding is necessary to support such initiatives.

Thus, while the potential for state and local governments to help bring the United States into compliance with its human rights commitments is strong, the challenges are many, contributing to the implementation gap previously identified and suggesting a role for the federal government in providing necessary information and other resources.

C. *Universality v. Variability: Normative Concerns*

A third set of concerns informing the appropriate federal role in subnational human rights implementation involve normative considerations of variability in human rights implementation. As examples of state and local implementation proliferate, there is greater potential for varying approaches and, by extension, results. Indeed, as the previous

ton, Op-Ed., *City Poor Funding Civil Rights Agency Hurting Citizens, Missing Federal Match*, LEXINGTON HERALD-LEADER, May 15, 2011; Jason Clayworth, *Dozens of State Employee's Cut from Iowa's Payroll*, DESMOINESREGISTER.COM (July 7, 2011, 12:09 PM), <http://blogs.desmoinesregister.com/dmr/index.php/2011/07/07/dozens-of-state-employees-cut-from-iowas-payroll/> (reporting that the Iowa Department of Human Rights was going to lose staff members due to budget cuts); Anna Pratt, *Minneapolis Civil Rights Unit Still in Limbo*, TWIN CITIES DAILY PLANET, Jan. 20, 2010, <http://www.tcdailyplanet.net/news/2010/01/20/minneapolis-civil-rights-unit-still-limbo> (reporting that budget cuts threaten to close the Minneapolis Department Civil Rights and have already limited the number of services it can provide); Erin Hartness, *Equality Office Victim of Chatham Budget Cuts*, WRAL.COM (Jan. 10, 2011), <http://www.wral.com/news/local/story/8976221/> (Chatham County, N.C., eliminated the county's Human Relations Commission director, the only full-time staff position dedicated to enforcing civil rights law and regulations); TOPEKA HUMAN RELATIONS COMM'N, <http://www.topeka.org/hrc/> (last visited Jan. 11, 2012) (stating that a budget shortfall led to the elimination of the Topeka Human Relations Department and stripped the commission of its ability to investigate or resolve complaints); Press Release, Am. Civil Liberties Union of Pa., *ACLU-PA Decries Elimination of Lancaster County Human Relations Commission* (Nov. 17, 2010), *available at* <http://www.aclupa.org/pressroom/aclupadecrieseliminationof.htm>.

¹⁷⁵ See Columbia Law Sch. Human Rights Inst. & IOAHR, Survey (Dec. 2010) (on file with author), *supra* note 174.

¹⁷⁶ Resnik, *Rethinking Horizontal Federalism*, *supra* note 149, at 43–50.

¹⁷⁷ Powell, *Dialogic Federalism*, *supra* note 23, at 293; Melish, *supra* note 23, at 458.

section articulated, a benefit of local implementation is the opportunity for innovation and experimentation.¹⁷⁸

Weighing against (or alongside) this interest in innovation and experimentation is concern for preserving the normative goal of international human rights law: setting and encouraging adherence to universal standards.¹⁷⁹ A common set of standards comprise the concept of human rights: dignity, justice, fairness, and equality.¹⁸⁰ These rights are intended to be universal, “belonging to every human being in every society,” regardless of “geography or history, culture or ideology, political or economic system, or stage of societal development.”¹⁸¹

Yet, the realities and mechanics of human rights implementation in fact both allow for and anticipate some amount of variation in their interpretation and application. For example, countries typically ratify treaties with significant reservations, understandings and declarations limiting or modifying their effect, although there are limits to the extent to which countries can dilute the content and scope of human rights treaties through this process.¹⁸² In addition, particularly with respect to the economic and social rights treaties, it is anticipated that countries will realize rights “progressively,” rather than all at once and immediately.¹⁸³ The European Court of Human Rights has recognized the inevitability of variation in interpretation of and compliance with human rights treaties, in particular the European Convention on Human Rights, by adopting the doctrine of “margin of appreciation” to grant deference to member-states’ formulation of human rights obligations.¹⁸⁴ Here, too, there appears to be some normative value at stake; Judith Resnik notes that such variability can provide useful texture and productively expose contested meaning with regard to the content and scope of particular

¹⁷⁸ See, e.g., Davis, *Thinking Globally, Acting Locally*, *supra* note 147, at 128.

¹⁷⁹ See Margaret E. McGuinness, *Federalism and Horizontality in International Human Rights*, 73 MO. L. REV. 1265, 1275 (2008).

¹⁸⁰ See LOUIS HENKIN, *THE AGE OF RIGHTS* 2–3, 16–17 (2d ed. 1996).

¹⁸¹ *Id.* at 2; see also Thomas M. Franck, *Are Human Rights Universal*, 80 FOREIGN AFF. 191 (2001) (defending universality of human rights against claims of “cultural exceptionalism”); Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 VAND. J. TRANSNAT’L L. 527, 587–95 (2001) (reconciling the realities of cultural pluralism with the normative goal of universality in human rights); Fernando R. Teson, *International Human Rights and Cultural Relativism*, 25 VA. J. INT’L L. 869, 874 (1985) (asserting that international human rights law has a “substantive core” that must be given common meaning).

¹⁸² Under international law, countries are prohibited from adopting RUDs that are incompatible with a treaty’s object and purpose. Vienna Convention on the Law of Treaties, *supra* note 4, art. 19(c).

¹⁸³ ICESCR, *supra* note 4, art. II(1).

¹⁸⁴ See Judith Resnik, *Comparative (In)Equalities: CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production*, INT’L J. CONST. L. (forthcoming 2012) (citing the example of *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 47, 49 (1976)) [hereinafter Resnik, *Comparative (In)Equalities*].

rights.¹⁸⁵ It can also privilege local approaches to local concerns and issues.¹⁸⁶

This tension between valuing human rights localism and ensuring promotion and adherence to a universal set of human rights norms and standards reveals a mediating role for the federal Executive, and a need to negotiate the space in between while respecting the essential values of both.

By exploring these doctrinal, functional, pragmatic and normative considerations pertaining to state and local implementation of human rights treaty commitments, we are able to see more clearly the range of interests and concerns that the federal government, primarily through the Executive, must mediate and accommodate in seeking to effectuate broad, positive subnational human rights implementation. Specifically, this framework reveals the need for and challenges of ensuring compliance with international human rights obligations at every level of government while respecting the federal government's primary role in guiding foreign affairs, state and local governments' functions and interests in areas within their jurisdiction, and the Executive's limited ability to compel state and local action. It likewise underscores the importance of ensuring overlapping supervision so that decisions are made closest to affected groups and individuals. And it surfaces the need for, and barriers to, monitoring human rights conditions on the ground, disseminating best practices and standards, and providing necessary information and funding. Finally, it highlights the inherent tension in promoting adherence to a universal set of standards while allowing for, and fostering, local innovation. From these interests and concerns emerge several critical functions that the Executive can play in fostering subnational domestic human rights implementation. The next Part seeks to explicate these functions.

III. TOWARDS A SET OF CORE FUNCTIONS

Medellin makes clear that, without express authorization from Congress, the President is precluded from compelling subnational compliance with non-self-executing human rights treaties. By acting outside of the treaty power in this way, the President risks violating core separation of powers and federalism principles.¹⁸⁷ Yet, as in other federalism

¹⁸⁵ *Id.*

¹⁸⁶ Melish, *supra* note 23, at 453.

¹⁸⁷ Note that the federal government can ratify treaties covering a large swath of activities, even those touching on state functions, and not run afoul of commandeering. See *Missouri v. Holland*, 252 U.S. 416, 432–33 (1920) (holding that the test for validity of a treaty is not the same as for a stand-alone act of Congress). For scholarship supporting the result in *Holland*, see

contexts, there are an array of alternative means for the Executive to promote subnational action and compliance, short of compelling it.

A wide body of scholarship discusses “cooperative federalism” and its many variations, suggesting a spectrum of ways in which federal, state and local governments act in partnership across a variety of fields and interests.¹⁸⁸ Indeed, there are numerous examples of shared federal-state-local responsibility in implementing federal programs and policies and addressing federal interests and priorities responsive to state and local concerns and needs; federal-state-local cooperation and coordination exists in countless areas, many of which have established mechanisms and systems that are relevant when considering the appropriate federal role in subnational human rights implementation. Drawing on concepts of cooperative federalism and all of its variants, and considering the unique role and interests of the federal Executive in foreign relations, the particular strengths and needs of subnational governments in complying with human rights treaty commitments, and the normative interests in promoting uniform adherence to universal standards while

for example Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630, 1646 (1999) (stating that Justice Holmes’s methodological approach in *Holland* is correct and that the case’s outcome is “consistent with the original purpose of the Treaty Clause”); for scholarship criticizing the broad federal role in treaty ratification, see for example Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998).

¹⁸⁸ See, e.g., THOMAS J. ANTON, AMERICAN FEDERALISM AND PUBLIC POLICY: HOW THE SYSTEM WORKS (1989); Daniel J. Elazar, *Cooperative Federalism*, in COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 65 (Daphne A. Kenyon & John Kincaid eds., 1991); John Kincaid, *The Competitive Challenge to Cooperative Federalism: A Theory of Federal Democracy*, in COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 87 (Daphne A. Kenyon & John Kincaid eds., 1991); Roderick M. Hills, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813 (1998) (articulating a theory of cooperative federalism that defines the limits of federal power to obtain state and local implementation of federal policy); Phillip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001) (proposing judicial approach to implementation of cooperative federalism regulatory arrangements); see also David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2007) (discussing a model of “adaptive federalism” to meet the concerns of cooperative federalism in the field of environmental regulation); Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007) (arguing for enhanced local autonomy, bounded by federal involvement, in areas such as disaster response, economic development, social services and immigration); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008) (urging shared federal-state-local authority in immigration law); Judith Resnik, *Afterword: Federalism’s Options*, 14 YALE L. & POL’Y REV. 465, 474 (1996) (proposing a “noncategorical” approach to federalism as a way of reflecting the range of federal-state jurisdictional arrangements that are possible); Resnik, *Categorical Federalism*, *supra* note 8, at 622 (challenging false dichotomy of national and local, and proposing “multi-faceted federalism” which presumes that governance cannot accurately be described as residing at a single site); Robert A. Shapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005) (urging a concept of “polyphonic federalism[,]” characterized by the existence of multiple, independent sources of political autonomy and the necessary interaction between state and federal power).

fostering innovation, there emerges a core set of functions that the Executive may undertake in seeking subnational compliance with international human rights treaty commitments.

When considering the appropriate role for the federal Executive, we must be attentive to the capacity and likelihood for state and local governments to engage in both positive and negative human rights activity. The federal role must address both scenarios, fostering and facilitating innovation while ensuring basic compliance.

A. *Setting Standards*

The United States' international legal obligation to comply with its treaty commitments, the Executive's interest in promoting human rights internationally by ensuring compliance at home, state and local officials' pragmatic need for more information regarding their human rights treaty obligations, and the normative concern of ensuring respect for universally accepted standards, all require a clear articulation of the international standards to which subnational governments are obligated to adhere. They also require oversight and guidance to ensure that state and local officials act in conformity with these standards. There is, thus, a "standard setting" role for the federal government.¹⁸⁹ The Executive branch can fulfill this role by engaging in education and training on relevant norms and obligations, providing guidance on the applicability of international human rights standards in particular situations, and enforcing domestic law coextensive with international human rights commitments.

Broad-based human rights education is an essential component of human rights implementation.¹⁹⁰ The UDHR calls for education that

¹⁸⁹ Robert Adhie and Judith Resnik have discussed the importance of horizontal coordination of subnational entities as a means of standard setting in the realm of foreign affairs. See Adhie, *supra* note 9, at 1215–21 (describing *de jure* and *de facto* mechanisms for group standard setting, and drawing upon network and game theory to explicate the need for horizontal coordination of subnational authorities); Resnik, *Rethinking Horizontal Federalism*, *supra* note 149, at 44. This literature describes the dynamic role of subnational entities in standard setting through horizontal coordination. In contrast, here, I suggest a stronger role for the federal government in setting and maintaining such standards for subnational entities, consistent with its international obligations to adhere to its treaty commitments.

¹⁹⁰ Signifying the importance of human rights education, the U.N. named 1995–2004 the "United Nations Decade for Human Rights Education," G.A. Res. 49/184, U.N. Doc. A/RES/49/184 (Dec. 23, 1994), and 2008–2009 as the "International Year of Human Rights Learning," G.A. Res. 62/171, U.N. Doc. A/RES/62/171 (Mar. 20, 2008). It established a World Programme for Human Rights Education in 2004, Phase II of which calls for human rights education and training programs for, among others, civil servants, law enforcement and military personnel at all levels. G.A. Res. 59/113, U.N. Doc. A/RES/59/113 (Feb. 17, 2005); Human Rights Council Res. 15/28, 15th Sess., U.N. Doc. A/HRC/15/28 ¶ 11 (July 27, 2010) (draft plan of action for the second phase (2010–2014) of the World Programme).

strengthens respect for human rights and fundamental freedoms.¹⁹¹ CERD includes a specific provision committing countries that are party to the Convention to undertake education aimed at upholding the purposes and principles of the UDHR and the treaty, among others.¹⁹² CAT obligates countries party to the convention to train law enforcement, public officials, and other relevant personnel on the prohibition against torture.¹⁹³ The general periodic reporting guidelines issued by the U.N. Secretary-General call upon U.N. member states to include information about “special efforts” to promote awareness of the rights contained in human rights instruments, including whether the text of human rights instruments have been disseminated.¹⁹⁴ The CERD made this recommendation specific to the United States in its most recent review, calling upon the United States to

step up its efforts to make government officials, the judiciary, federal and state law enforcement officials, teachers, social workers and the public in general aware about the responsibilities of the State party under the Convention, as well as the mechanisms and procedures provided for by the Convention in the field of racial discrimination and intolerance.¹⁹⁵

Commentators have noted that human rights training and education have the potential to prevent and correct human rights violations by raising awareness of government officials regarding their role to en-

¹⁹¹ Article 26 of the UDHR states that

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

Universal Declaration of Human Rights, art. 26, § 2, available at <http://www.un.org/en/documents/udhr/index.shtml#a26>.

¹⁹² CERD, *supra* note 4, art. 7.

¹⁹³ Article 10 of the CAT states that

Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

CAT, *supra* note 4 art. 10.

¹⁹⁴ U.N. Secretary-General, *Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties*, ch. I(4), U.N. Doc. HRI/GEN/2/Rev.2 (May 7, 2004).

¹⁹⁵ Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, U.N. Doc. CERD/C/USA/CO/6 ¶ 36 (May 8, 2008) [hereinafter CERD Concluding Observations].

sure that human rights are protected and to create a culture of respect for human rights.¹⁹⁶

Because of its facility and engagement with the international system, as well as its obligation to and interest in ensuring broad treaty compliance, the federal Executive is well situated to provide a clear statement of state and local officials' human rights treaty obligations, along with guidance for how to meet them. Such information would delineate the substance of human rights treaty obligations, as well as the way in which federal, state and local government share responsibility for their implementation.

The federal government already performs this role to some extent. Pursuant to federal law,¹⁹⁷ the State Department publicizes treaties and international agreements to which the United States is a party in the Treaties and Other International Acts Series and in a compilation document, *Treaties in Force*,¹⁹⁸ contained on the State Department's website. It also occasionally communicates directly with state and local officials about the existence of human rights treaties and the role that they play in contributing data to national reports presented to treaty monitoring bodies.¹⁹⁹

The federal executive branch can deepen and expand this role by providing specific guidance to state and local authorities regarding their obligation to adhere to treaty standards in particular situations.²⁰⁰ For example, several international bodies reviewing U.S. compliance with its treaty obligations have raised concern over racial profiling by state and local law enforcement. The Human Rights Committee, reviewing U.S. compliance with the ICCPR, recommended that the U.S. intensify its efforts to put an end to racial profiling by state law enforcement officials.²⁰¹ Similar recommendations were made by CERD,²⁰² the Special Rapporteur on contemporary forms of racism, racial discrimination,

¹⁹⁶ Sonia Cardenas, *Constructing Rights? Human Rights Education and the State*, 26 INT'L POL. SCIENCE REV. 363, 366, 375 (2005).

¹⁹⁷ See 1 U.S.C. § 112a(a) (2006).

¹⁹⁸ See, e.g., U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2010, available at <http://www.state.gov/s/l/treaty/tif/index.htm>.

¹⁹⁹ Memorandum from Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, to State Governors (Jan. 20, 2010) (concerning U.S. Human Rights Treaty Reports); Letter from Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, to State and Local Human Rights Commissions (May 3, 2010).

²⁰⁰ See Letter from Duncan B. Hollis, Att'y-Adviser, Office of Treaty Affairs, U.S. Dep't of State, to Nicolas Dimic, First Secretary, Embassy of Canada (Jan. 13, 2000), available at <http://www.state.gov/s/l/c8185.htm> (describing instances when the U.S. government has communicated particular treaty obligations directly to state governments).

²⁰¹ U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: United States of America*, U.N. Doc CCPR/C/USA/CO/3 ¶ 24 (Sept. 15, 2006).

²⁰² CERD Concluding Observations, *supra* note 195, ¶ 14.

xenophobia and related intolerance,²⁰³ and in the course of the UPR.²⁰⁴ Notably, the federal government accepted the UPR recommendations pertaining to racial profiling, noting that it is prohibited under the federal Constitution and federal legislation.²⁰⁵

The Department of Justice (DOJ), in particular, can play a role in communicating these concerns and providing guidance to state and local officials in an effort to bring the United States into compliance with international norms that prohibit racial profiling. To this end, the DOJ might supplement its existing efforts to eradicate racial profiling by state and local police by distributing the recommendations issued by the treaty monitoring bodies and those resulting from the UPR to law enforcement officials, state and local human rights commissions, and other agencies, along with clear guidance as to what practices violate established human rights norms. More specifically, the DOJ might issue clear guidance on the use of race by law enforcement agencies, amending its 2003 *Department Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*, which does not appear to apply to state and local law enforcement agencies that are cooperating with federal agencies or that are receiving federal funds.²⁰⁶ The federal government might also provide greater guidance, training, and oversight over programs, such as the 287(g) program²⁰⁷ and the Secure Communities Initiative,²⁰⁸ where-

²⁰³ Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, Follow-up to and Implementation of the Durban Declaration and Programme of Action*, Human Rights Council, U.N. Doc. A/HRC/11/36/Add.3 ¶ 101 (Apr. 28, 2009).

²⁰⁴ See, e.g., Human Rights Council, *supra* note 2, ¶¶ 92.68, 92.101.

²⁰⁵ See Human Rights Council, *Report of the Working Group on the Universal Periodic Review, United States of America, Addendum*, ¶ 5, U.N. Doc. A/HRC/16/11/Add.1 (Mar. 8, 2011).

²⁰⁶ U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (June 2003), available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf. Advocates have raised additional concerns about the 2003 guidelines, including its exemption for "activities and other efforts to defend and safeguard against threats to national security or the integrity of the Nation's borders." See AM. CIVIL LIBERTIES UNION ET AL., THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES, A FOLLOW-UP REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION 19 (2009), available at http://www.aclu.org/pdfs/humanrights/cerd_finalreport.pdf.

²⁰⁷ Section 287(g) of the 1996 Immigration and Nationality Act authorizes the Department of Homeland Security's Immigration and Customs Enforcement Agency (ICE) to enter into agreements with state and local law enforcement agencies, delegating specific immigration enforcement duties to them. See 8 U.S.C. § 1357(g) (2006). Numerous advocates, the Government Accountability Office, and the Office of Inspector General of the Department of Homeland Security have strongly criticized the program for its lack of internal controls, including effective training and oversight mechanisms necessary to prevent racial profiling and other civil rights abuses. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (2009); OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-10-63, THE PERFORMANCE OF 287(G) AGREEMENTS (Mar. 2010); RANDY CAPPAS ET AL., MIGRATION POLICY INST., DELEGATION & DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT (2011); AM. CIVIL LIBERTIES UNION ET AL., *supra* note 206, at 24-

by the Department of Homeland Security relies upon state and local police to enforce federal immigration laws. Advocates have urged the cessation of these programs on the grounds that they often enable racial profiling by state and local law enforcement in violation of the United States' human rights obligations under CERD and the ICCPR.²⁰⁹

In so doing, the government might draw on its experiences coordinating and supporting state and local efforts to implement national security interests.²¹⁰ Since September 11th, the federal government relies increasingly on state and local government to be the "eyes and ears" in local communities to diffuse terrorist threats, partly by entering into Joint Terrorism Task Forces.²¹¹ Not incidentally, state and local governments' role in implementing national security interests also raises the potential for human rights abuses, particularly with respect to racial profiling and abusive immigration enforcement policies.²¹² Nevertheless, Matthew Waxman recognizes that state and local law enforcement are uniquely situated to play an affirmative role in "contributing to national security law and policy formulation[.]"²¹³ and, in return, the federal government appropriately engages in capacity building and information sharing, often requiring that state and local law enforcement abide by a proscribed set of guidelines and standards in return.²¹⁴

28.

²⁰⁸ See Immigration and Customs Enforcement, *Fact Sheets*, ICE.GOV, <http://www.ice.gov/news/library/factsheets/#SecureCommunities> (last visited July 6, 2011). The Secure Communities initiative is an immigration enforcement initiative that allows state and local law enforcement to check the fingerprints of arrestees against DHS's civil immigration databases, as well as the FBI's criminal databases. It has been criticized for incentivizing law enforcement officials to arrest people based on racial or ethnic profiling and for pre-textual reasons so that law enforcement officials can check immigration status. See, e.g., MICHELE WASLIN, IMMIGRATION POLICY CENTER, *THE SECURE COMMUNITIES PROGRAM: UNANSWERED QUESTIONS AND CONTINUING CONCERNS* (2010); AM. CIVIL LIBERTIES UNION ET AL., *supra* note 206, at 24–28 (2009). A growing number of states and cities have halted participation in the program, noting concerns that the program weakens law enforcement relations with communities, resulting in feelings of distrust and non-cooperation. See, e.g., Ruxandra Guidi, "Secure Communities" Program Comes Under Fire, KPBS.ORG (June 20, 2011), <http://www.kpbs.org/news/2011/jun/20/secure-communities-program-comes-under-fire/>.

²⁰⁹ AM. CIVIL LIBERTIES UNION ET AL., *supra* note 206, at 24–28 (2009); RIGHTS WORKING GROUP ET AL., *THE PERSISTENCE, IN THE UNITED STATES, OF DISCRIMINATORY PROFILING BASED ON RACE, ETHNICITY, RELIGION AND NATIONAL ORIGIN*, SUBMISSION TO THE UNITED NATIONS UNIVERSAL PERIODIC REVIEW 5–7 (2010).

²¹⁰ See Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289 (2012).

²¹¹ See *id.* at 291.

²¹² See *supra* notes 206 and accompanying text; see also Waxman, *supra* note 210, at 342 (noting that the federal government should work to promote, support, and link state and local law enforcement to ensure that states and localities provide a minimum threshold of national security as well as civil liberties).

²¹³ Waxman, *supra* note 210, at 319.

²¹⁴ Waxman, *supra* note 210, at 291–95, 307–09 (describing federal-local collaborations around intelligence gathering, information analysis, and information sharing, and federal tools of "influence" to extract state and local compliance, including financial grants and training

The federal executive branch already educates and provides guidance to state and local authorities on some international treaty obligations. The State Department's extensive efforts with respect to the VCCR offer an instructive model. Though unable to compel compliance or provide a judicial remedy for non-compliance,²¹⁵ the executive branch nevertheless endeavors to ensure U.S. compliance with VCCR obligations at the state and local level. The State Department works with federal, state and local law enforcement, as well as corrections and criminal justice officials, to clarify their legal obligations to provide information to foreign consular officers and to permit consular officers to assist their nationals in the United States.²¹⁶ The State Department publicizes the fact that it has conducted approximately 450 trainings, classes, briefings, presentations, meetings and other events on this issue in forty U.S. states and territories,²¹⁷ distributed over one-million pieces of instructional materials to law enforcement, corrections, and criminal justice agencies, and published articles and training manuals on consular notification and access, including the highly-detailed *Consular Notification and Access Manual*.²¹⁸

In addition to educating state and local officials on human rights standards and providing guidance regarding how particular practices might violate the United States' human rights commitments, the Executive branch is also uniquely situated to enforce domestic laws, where appropriate, to ensure that state and local officials comply with human rights standards. The DOJ does this, for example, when it challenges state courts' failure to provide adequate translation services²¹⁹ in violation of Title VI of the Civil Rights Act.²²⁰ By enforcing Title VI in this way, the DOJ brings states into compliance with their obligations under

programs with attached conditions).

²¹⁵ *Medellin v. Texas*, 552 U.S. 491, 522–32 (2008).

²¹⁶ U.S. Dep't of State, *State Department Activities to Advance Consular Notification and Access Awareness and Compliance*, http://travel.state.gov/law/consular/consular_2244.html.

²¹⁷ *Id.*

²¹⁸ See Bureau of Consular Affairs, U.S. Dep't of State, *Consular Notification and Access*, http://travel.state.gov/law/consular/consular_753.html.

²¹⁹ See LAURA ABEL, BRENNAN CENTER FOR JUSTICE, LANGUAGE ACCESS IN STATE COURTS (2011), available at http://brennan.3cdn.net/684c3cdaaa2bfc8ebc_6pm6iywsd.pdf (describing the uneven way in which state courts provide adequate translation services to persons with limited English proficiency).

²²⁰ In June 2011, the Department of Justice entered into a Memorandum of Agreement with the Colorado Judicial Department requiring the state's Chief Justice to issue a directive providing for free and competent interpreter services in all criminal and civil proceedings and court operations, as well as developing a plan for addressing oral interpretation and translation of important documents. Memorandum of Agreement Between The United States of America and the Colorado Judicial Department, Dep't of Justice No. 171-13-63 (June 28, 2011), available at http://www.justice.gov/crt/about/cor/agreements/Colorado_MOA_6_28_11.pdf. The agreement was the resolution of a Department of Justice investigation into a complaint of alleged violations of Title VI of the Civil Rights Act of 1964 and the nondiscrimination provisions of the Omnibus Crime Control and Safe Street Act of 1968. *Id.*

the ICCPR and CERD.²²¹ Likewise, federal legislation banning racial profiling by state and local law enforcement, which has been proposed in both the House and the Senate, would allow the DOJ to address the human rights concerns implicated by state and local law enforcement engaged in racial profiling.²²² Indeed, the Executive branch plays a particularly important role in enforcing domestic laws that prohibit racial profiling and policies that have a disparate impact on racial minorities. International human rights treaties ratified by the U.S. specifically prohibit such practices;²²³ yet, U.S. Supreme Court jurisprudence has eroded individuals' ability to challenge such practices under domestic law.²²⁴

B. *Collecting and Disseminating Information*

The considerations explored in Part II suggest a central role for the federal government in collecting and disseminating information about local human rights conditions and promising and effective practices to address areas of concern. The Executive branch is well positioned to take the lead in fulfilling this function, as well.

The United States has an international legal obligation to collect and disaggregate data related to government policies and practices related to each of the treaties that it has ratified.²²⁵ This reporting must contain information about compliance at every level of government: federal, state, and local.

This obligation is consistent with the broad recognition that information collection (i.e., human rights documenting) is an essential component, and perhaps a goal, of broad human rights treaty imple-

²²¹ See ICCPR, *supra* note 4, art. 9; CERD, *supra* note 4, art. 5(a); CERD Concluding Observations, *supra* note 195, ¶ 20.

²²² End Racial Profiling Act of 2010, H.R. 5748, 111th Cong. (2d. Sess. 2010).

²²³ See CERD, *supra* note 4, art. 1(1); ICCPR, *supra* note 4, art. 26.

²²⁴ See *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that individuals have no private right of action to enforce Title VI's disparate-impact regulations); see also Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (2003); Sara Rosenbaum & Joel Teitelbaum, *Civil Rights Enforcement in the Modern Healthcare System: Reinvigorating the Role of the Federal Government in the Aftermath of Alexander v. Sandoval*, 3 YALE J. HEALTH POL'Y L. & ETHICS 215 (2003); Sam Spital, *Restoring Brown's Promise of Equality After Alexander v. Sandoval: Why We Can't Wait*, 19 HARV. BLACKLETTER L.J. 93 (2003); cf. Comm. on the Elimination of Racial Discrimination, General Recommendation No. 24, 55th Sess., U.N. Doc. A/54/18, annex V (1999) (clarifying reporting obligations of Article 9 of CERD and defining discrimination to include disparate impact)

²²⁵ See, e.g., Human Rights Comm., General Comment 31 [80]: The Nature of the Legal Obligation Imposed on States Parties to the Covenant, 80th Sess., Mar. 29, 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (clarifying the legal obligations imposed by the ICCPR); CERD, *supra* note 4, art. 9; Comm. on the Elimination of Racial Discrimination, General Recommendation No. 04, 8th Sess., Aug. 25, 1973, U.N. Doc. A/9018 (1973); General Recommendation No. 24, *supra* note 223; CAT, *supra* note 4, art. 19; CRC Optional Protocols, *supra* note 4, annex I, art. 8; *id.* annex II, art. 12.

mentation.²²⁶ Documentation and reporting are particularly important for ensuring government accountability for human rights compliance.²²⁷

The United States has made recent strides towards fulfilling this function. Recognizing the potential role that state and local human rights and human relations commissions can play in assisting the federal government with its treaty reporting obligations²²⁸ in 2010, the State Department's Legal Adviser, Harold Koh, sent a letter to all state and local commissioners seeking information for the U.S. government's reports on compliance with legal obligations contained in three U.S. ratified human rights treaties: CERD, ICCPR, and CAT.²²⁹ In its 2011 report to the Human Rights Committee regarding ICCPR compliance, the U.S. included this data in a fairly extensive catalogue of state, local and tribal human rights agencies, enforcement mechanisms and outreach programs, noting that these programs help to bring the United States into compliance with its human rights treaty commitments.²³⁰ Although the annexed material fails to address the resource constraints faced by state, local and tribal human rights agencies, and does not discuss the role of state and local officials more broadly (including mayors, law enforcement personnel, city council members, and state attorneys general), such a catalogue of state and local implementation efforts has

²²⁶ See Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171, 177 (2003) (noting that "improved human rights documentation and reporting are themselves part of the process of incorporation").

²²⁷ See, e.g., Paris Principles, G.A. Res. 48/134, U.N. Doc. A/RES/48/134 (Mar. 4, 1994).

²²⁸ For example, the Pennsylvania Human Relations Commission became involved in the 2008 reporting process for CERD, providing information to the U.N. Committee overseeing the Convention, including disaggregated data on cases involving race, color, and national origin in employment, housing accommodation, and education. Kaufman, *State and Local Commissions*, *supra* note 141, at 97. The City of Berkeley has committed itself to engaging in similar reporting, approving a resolution requiring the city to provide local statistical reports and information on local ordinances related to implementation of the major human rights treaties ratified by the U.S. to the county, state, and federal governments and to the U.N. treaty bodies. Berkeley City Council, Annotated Agenda, Item 19, United Nations Treaty Reports (Sept. 29, 2009), available at <http://www.ci.berkeley.ca.us/ContentDisplay.aspx?id=38244>; see also Peace & Justice Comm'n, City of Berkeley, United Nations Treaty Reports: Recommendation, available at http://www.ci.berkeley.ca.us/uploadedFiles/Clerk/Level_3_-_City_Council/2009/09Sep/2009-09-29_Item_19_United_Nations_Treaty_Reports.pdf (text of approved recommendation).

²²⁹ Letter from Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, to State and Local Human Rights Commissions (May 3, 2010).

²³⁰ See U.S. DEP'T OF STATE, REPORT CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR): ANNEX A TO THE COMMON CORE DOCUMENT OF THE UNITED STATES STATE, LOCAL, TRIBAL, AND TERRITORIAL HUMAN RIGHTS ORGANIZATIONS AND PROGRAMS (Dec. 30, 2011), available at <http://www.state.gov/j/drl/rls/179782.htm> This is in contrast to the U.S.'s 2007 CERD report, in which it spotlighted state civil rights laws, enforcement mechanisms and outreach initiatives in four states (Illinois, New Mexico, Oregon, and South Carolina). U.S. DEP'T OF STATE, COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (CERD) REPORT: ANNEX I: EXAMPLES OF STATE CIVIL RIGHTS PROGRAMS (2007), available at http://www.state.gov/g/drl/rls/cerd_report/83405.htm.

²³⁰ CERD Concluding Observations, *supra* note 195, ¶¶ 26, 37, 38.

the potential to enhance the picture of human rights at the state and local level, highlighting where states and localities are engaging in positive activity and where problems and gaps exist.

By collecting and requesting such information directly from state and local entities, the federal government, through the executive branch, can also create a clearinghouse for data shared by state and local government on human rights conditions and facilitate information exchange regarding state and local strategies to address areas of concern.²³¹ The federal government, through the Executive branch, already communicates “best practices” to state and local governments on an array of issues. For example, the DOJ’s Civil Rights Division has created and disseminated the *ADA Best Practices Tool Kit for State and Local Governments*, which is designed to assist state and local officials in improving their compliance with Title II of the Americans with Disabilities Act and ensure equal access to state and local government programs, services and activities.²³² The U.S. Environmental Protection Agency has created a Local Government Climate and Energy Strategy Series, intended to provide local policy makers with strategies for reducing greenhouse gas emissions.²³³ The Series includes examples and case studies of state and local government efforts to address climate change, for example, highlighting strategies that local school districts have implemented to reduce energy consumption and costs.²³⁴

Another useful model upon which the Executive might draw in coordinating and communicating state and local human rights concerns and efforts to address them is the White House Office of Urban Affairs. Established by executive order,²³⁵ the Office is charged with leading and coordinating across the federal agencies and departments the development of a policy agenda for cities, ensuring consideration and efficient and effective targeting of programs aimed at benefiting urban areas. Significantly, the Office is mandated to engage in outreach and “work closely with state and local officials, nonprofit organizations, and the private sector” to develop urban policy and ensure that “federal pro-

²³¹ See Powell, *Dialogic Federalism*, *supra* note 23, at 283; Davis, *The Spirit of Our Times*, *supra* note 21, at 389; Melish, *supra* note 23, at 458.

²³² U.S. DEP’T OF JUSTICE, ADA BEST PRACTICES TOOL KIT FOR STATE AND LOCAL GOVERNMENTS, available at <http://www.ada.gov/pcatoolkit/toolkitmain.htm> (last updated Sept. 14, 2009).

²³³ STATE & LOCAL CLIMATE & ENERGY PROGRAM, U.S. ENVTL. PROT. AGENCY, LOCAL GOVERNMENT CLIMATE AND ENERGY STRATEGY SERIES, available at <http://www.epa.gov/statelocalclimate/resources/strategy-guides.html>.

²³⁴ U.S. ENVTL. PROT. AGENCY, LOCAL GOVERNMENT CLIMATE AND ENERGY STRATEGY SERIES, ENERGY EFFICIENCY PROGRAMS IN K-12 SCHOOLS: A GUIDE TO DEVELOPING AND IMPLEMENTING GREENHOUSE GAS REDUCTION PROGRAMS 37–45 (2011), available at http://www.epa.gov/statelocalclimate/documents/pdf/k-12_guide.pdf.

²³⁵ Exec. Order No. 13,503, 71 Fed. Reg. 8139 (Feb. 24, 2009).

grams advance the objectives of that policy.”²³⁶ In fulfilling its mandate, the Office of Urban Affairs launched a “National Conversation of American’s Cities and Metropolitan Areas,” which became known as the “Urban Tour,” to identify, disseminate and support best practices and innovative policies that emerge from cities across the country to address concerns, including affordable housing, transportation, and economic development.²³⁷ The Urban Tour is intended to identify local innovations that can be replicated and expanded on a national scale, and disseminate best practices to other cities.²³⁸ The Office of Urban Affairs made visits to several major U.S. cities and posted its findings online.²³⁹

Drawing on these and other examples, and building upon its current efforts to collect data from state and local human rights commissions, the Executive branch can collect information from state and local governments about local human rights conditions and concerns, as well as initiatives for addressing problems and implementing U.S. human rights treaty commitments more generally. After assessing the information, it can distill useful examples and strategies and disseminate them more broadly to state and local officials with jurisdiction over areas relevant to human rights implementation. This would enable states and localities to learn from one another’s experiences, and perhaps foster healthy competition in implementing effective human rights treaties.²⁴⁰

C. Incentivizing Compliance

Limitations on the Executive’s ability to compel state and local compliance with human rights treaties notwithstanding,²⁴¹ boosters of localism articulate strong rationales for *encouraging* state and local hu-

²³⁶ *Id.* § 3(e).

²³⁷ See OFFICE OF URBAN AFFAIRS, WHITE HOUSE, NATIONAL CONVERSATION OF AMERICAN’S CITIES AND METROPOLITAN AREAS, available at <http://www.whitehouse.gov/administration/eop/ous/initiatives> (last visited Jan. 11, 2012).

²³⁸ *Id.*

²³⁹ Adolfo Carrión, Jr., *A “Fresh” Conversation on the Future of America’s Cities and Metro Areas*, WHITEHOUSE.GOV (Aug. 4, 2009, 1:15 PM), <http://www.whitehouse.gov/blog/A-Fresh-Conversation-on-the-Future-of-Americas-Cities-and-Metro-Areas/>. For example, at its stop in Flagstaff, Arizona, the tour explored how the City of Flagstaff brings together public and private partnerships to incubate emerging technology business in Northern Arizona. At the conclusion of the visit, the tour held a community forum to discuss best practices and explore ways for the federal government to promote Flagstaff’s efforts. Adolfo Carrión, Jr., *A Small Town Doing Big Things for the Global Economy*, WHITEHOUSE.GOV (Oct. 8, 2009, 1:06 PM), http://www.whitehouse.gov/blog/09/10/08/A_small_Town_Doing_Big.

²⁴⁰ See Davis, *The Spirit of Our Times*, *supra* note 21, at 389 (noting the potential practical benefits to greater visibility of state efforts at human rights implementation—namely, fostering competition among states for effective approaches to implementation).

²⁴¹ See *supra* notes 96-110 and accompanying text.

man rights activities and allowing them to flourish.²⁴² Pragmatic concerns, namely resource constraints faced by state and local officials, indicate a need for resources to enable sustained human rights activity at the local level. Thus, there appears to be a role for the federal government in providing financial support and incentives to encourage and enable state and local governments to undertake human rights education, monitoring, reporting, and other implementation efforts.²⁴³ The executive branch can take the lead in creating, championing and administering such incentives.

Many examples of cooperative federalism involve the federal government providing funding and training to states and localities to assist with enforcement of federal law or to implement federal policy. The federal Equal Employment and Opportunity Commission (EEOC) contracts with state and local human rights and human relations commissions (Fair Employment Practice Agencies) to enforce federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act of 1990.²⁴⁴ By providing funding and training, the EEOC enables state and local agencies to manage federal claims of discrimination through work-sharing agreements with the federal government. Similarly, the Department of Housing and Urban Development Fair Housing Initiatives Program (FHIP) provides grants to state and local human rights commissions to conduct fair housing education and outreach.²⁴⁵

Grants disseminated by the DOJ under the Violence Against Women Act (VAWA)²⁴⁶ offer another potential model. Federal VAWA grant programs are administered through the U.S. Departments of Justice and Health and Human Services for allocation to state agencies, Indian tribal governments, local government and private non-profit groups.²⁴⁷ The Department of Justice, through its Office on Violence Against Women (OVW), administers a broad array of VAWA grants

²⁴² See *supra* Part II.B.

²⁴³ See Powell, *Dialogic Federalism*, *supra* note 23, at 272 (noting that working cooperatively with states allows the federal government to avoid the concern of “commandeering” that might otherwise be required to meet its international legal obligations).

²⁴⁴ See 42 U.S.C. § 2000e-8(b) (2006) (giving the EEOC authority to cooperate with local human rights commissions, including the ability to “engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission”).

²⁴⁵ Housing and Community Development Act, 42 U.S.C. § 3616 (1987), *amended by* Housing and Community Development Act, 24 C.F.R. § 125 (1992).

²⁴⁶ 42 U.S.C. § 3793 (2006).

²⁴⁷ See OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP’T OF JUSTICE, GRANT PROGRAMS, <http://www.ovw.usdoj.gov/ovwgrantprograms.htm> (last updated Mar. 2012).

designed to aid law enforcement officers and prosecutors, encourage arrest policies, stem domestic violence and child abuse, establish and operate training programs for victim advocates and counselors, and train probation and parole officers who work with released sex offenders.²⁴⁸ All VAWA grantees are required to collect and maintain data that measure the effectiveness of their grant-funded activities²⁴⁹ and are required to submit semi-annual progress reports. The OVW monitors and assists grantees in implementing approved programs.²⁵⁰

Drawing on these examples, the federal government might enter into contracts with state and local governments, perhaps through their human rights and human relations commissions, to engage in periodic monitoring, reporting and data analysis under the human rights treaties ratified by the United States.²⁵¹ Through an entity such as a national human rights commission, the federal government could issue grants to state and local agencies to develop and engage in general human rights education and training for the public, as well as education of state and local officials. Such education and training would include information on relevant international human rights standards, and international, regional and national human rights mechanisms that are in place for human rights monitoring and enforcement. Training would also assist staff within state and local agencies to collect and analyze data, and report on how well their jurisdictions are complying with civil rights laws and human rights treaties.

Federal funding can also incentivize state and local innovation in areas beyond education and data collection. The Safe Schools/Healthy Students Initiative, a collaboration of the U.S. Departments of Education, Health and Human Services, and Justice,²⁵² is a discretionary grant program that provides students, schools and communities with federal funding to develop and implement integrated programs focused on promoting healthy childhood development and preventing violence, as well as alcohol and other drug use. The program, which requires coordination with community-based organizations, invites local educational agencies, local law enforcement agencies, public mental health authorities, and juvenile justice agencies to apply jointly for federal funding to

²⁴⁸ *Id.*

²⁴⁹ Victims of Trafficking and Violence Protection Act, H.R. 3244, 106th Cong. (2d Sess. 2000).

²⁵⁰ See, e.g., OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUSTICE, OVW FISCAL YEAR 2011: STOP VIOLENCE AGAINST WOMEN FORMULA GRANT PROGRAM, available at <http://www.ovw.usdoj.gov/docs/stop-vw-program-fy2011.pdf>.

²⁵¹ Other commentators have suggested that the federal government condition federal funding on state compliance with international treaties, particularly in the context of compliance with the Vienna Convention on Consular Relations, through its spending powers. See Duffy, *supra* note 23, at 808–10; Brook, *supra* note 23, at 595.

²⁵² Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. No. 89–10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

support a variety of activities and services. Similar examples can be found in the Department of Education's "Race to the Top" fund, which provides challenge grants to states in an effort to encourage education reform,²⁵³ and the new Better Buildings Initiative "Race to Green" challenges, which incentivizes states to strengthen their commercial building energy efficiency standards.²⁵⁴

Similar to these initiatives, the federal government might invite state and local agencies to partner with community organizations and other civil society institutions to create more integrated and comprehensive approaches to addressing local human rights concerns, such as racial profiling and access to housing.

To be sure, the role of the Executive in creating and funding incentives for state and local government is more dependent upon Congress than might be the case with the other functions suggested in this section; the Executive must rely upon Congress for approval and appropriations. Nevertheless, the executive branch can still play an important role in initiating such programs by creating pilot programs, proposing legislation, and re-purposing existing and discretionary funding. Ultimately, to bring these programs to scale and institutionalize them over the longer term, the Executive must work cooperatively with Congress to create effective state and local incentives. Nevertheless, there may be political support for the Executive and Congress to work together to establish and fund programs that seek to encourage, rather than compel, state and local governments to engage in, and innovate, human rights treaty compliance.

IV. CHALLENGES TO THE APPROACH

An exploration of the appropriate role for the Executive in subnational human rights implementation would not be complete without considering the challenges to greater federal involvement in encouraging state and local human rights treaty implementation, and the particular limitations on the Executive in this regard. A primary challenge in

²⁵³ U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM: EXECUTIVE SUMMARY 2 (Nov. 2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>. The Race to the Top Program aims to create conditions for education reform and innovation by encouraging development in four core areas: standards and assessments aimed at preparing students for college, data systems that measure student growth and can be used to improve instruction, staff recruitment and development, and supporting the lowest-achieving schools. The program grants awards to schools that can raise their achievement levels and develop the best plans to accelerate future development.

²⁵⁴ Press Release, Office of Media Affairs, White House, President Obama's Plan to Win the Future by Making American Businesses More Energy Efficient Through the "Better Buildings Initiative" (Feb. 3, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/02/03/president-obama-s-plan-win-future-making-american-businesses-more-energy>.

establishing a stronger federal role may be encountered in significant pushback from states and localities that are resistant, and in some cases hostile, to domestic incorporation and implementation of international human rights. A secondary challenge lies in the pragmatic constraints that all governments, including the federal government, face. Underlying the approach in total are the constraints of federalism and separation of powers.

First, significant negative state and local human rights activity calls into question the effectiveness of the mostly “carrot” approach that this Article suggests. It is no doubt easier to encourage human rights implementation within states and localities that are already inclined towards positive human rights activity. The reality, however, is that within the United States, the majority of states may not be inclined to engage in activity aimed at compliance with international human rights treaty obligations. Indeed, there is significant political resistance to domestic incorporation of human rights, as exemplified by the burgeoning movement to enact local resolutions opposing ratification of the CRC²⁵⁵ and state laws that ban state courts from considering international, foreign and Sharia law.²⁵⁶

Other provisions that less directly implicate human rights treaties, but nevertheless arguably violate human rights norms that the United States is obligated to respect, indicate hostility towards state and local human rights implementation and compliance. Restrictive immigration provisions, such as Arizona’s S.B. 1070,²⁵⁷ and copycat legislation enacted in Georgia²⁵⁸ and Alabama²⁵⁹ fall into this camp. Indeed, Arizona

²⁵⁵ See *supra* note 17 and accompanying text.

²⁵⁶ See *supra* note 20 and accompanying text.

²⁵⁷ Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010). The federal government sued Arizona to enjoin enforcement of the provisions of S.B. 1070; the Ninth Circuit recently upheld the District Court’s preliminary injunction. See *supra* note 52.

²⁵⁸ Illegal Immigration Reform and Enforcement Act, H.B. 87, 151st Gen. Assemb., Reg. Sess. (Ga. 2011). The statute requires all public employers and some private employers to use the federal E-Verify system to confirm the employment eligibility of employees and/or contractors. *Id.* § 3. The statute also forbids the “transport[ing]” or “harbor[ing]” of “illegal aliens,” though it excepts the provision of certain services, such as emergency medical service. *Id.* § 7. The statute further provides that a “peace officer” is authorized to verify the immigration status of any person provided the officer has “probable cause” to suspect that the person has violated state or federal criminal law. *Id.* § 8. A federal district court recently issued a preliminary injunction against enforcement of sections 7 and 8 of H.B. 87. *Georgia Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317, 1340 (N.D. Ga. 2011).

²⁵⁹ In Alabama, House Bill 56 was signed into law on June 9, 2011, authorizing a host of anti-immigration measures. H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011). Like the Arizona provision, it requires law enforcement officers make a “reasonable attempt” to determine a person’s immigration and citizenship status when the officer makes a lawful stop, detention, or arrest and has a “reasonable suspicion” that the person in question is unlawfully present in the United States. *Id.* § 12(a). In addition, the Alabama statute (i) requires public elementary and secondary schools to determine whether a student was born outside the United States “or is the child of an alien not lawfully present in the United States,” *id.* § 28(a)(1); (ii) establishes that no court

Governor Jan Brewer protested the U.S. government's mention of S.B. 1070 in its UPR report, calling such inclusion "downright offensive," "internationalism run amok, and unconstitutional."²⁶⁰ In such a context, it is unlikely that the federal government's offer of federal funding or more education and training will have a real impact on state and local officials endeavoring towards greater human rights compliance. Federal enforcement of domestic protections that are coextensive with international norms can supplement the more "carrot-like" functions suggested in this Article.²⁶¹

The approach outlined here is not intended as a panacea, and the Executive cannot act entirely alone in its efforts to seek state and local human rights compliance. Ultimately, it needs the cooperation of Congress, and indeed may need for Congress to authorize more robust enforcement actions. An inability to encourage a significant number of states and localities to partner with the federal government in implementing human rights obligations on a more voluntary basis in a particular area may provide political support for efforts and augment pressure on Congress to enact federal implementing legislation for a specific treaty, allowing for federal enforcement of state and local non-compliance.

The U.S. State Department's efforts with respect to the VCCR may be instructive here, too. As *Medellin* and related cases illustrate, several states, including Texas, have shown extreme resistance to offering remedies for breaches of the United States' obligation to notify foreign nationals of their rights to contact their consulate upon arrest.²⁶² Aggressive outreach to and training of state and local officials by the U.S. State Department has been mildly successful in ensuring greater consular notification, with a 2011 news report noting that eighty of the 133 foreign

in Alabama may enforce or consider valid the terms of a contract between a party and "an alien unlawfully present in the United States," if the party involved had knowledge of that person's situation, *id.* § 27(a); (iii) criminalizes transporting undocumented immigrants or providing them with accommodations or renting housing to them, *id.* § 13(a)(1),(4); and (iv) prohibits undocumented immigrants from working, looking for work, or doing any business transaction with a government agency, including applying for a driver's license or non-driver identification card, a motor vehicle license plate, or a business license. *Id.* §§ 11(a), 30(a).

²⁶⁰ See Letter from Janice Brewer, Governor of Arizona, to Hillary Clinton, Sec'y of State (Aug. 27, 2010), available at <http://janbrewer.com/uploads/08-27-10%20Letter%20to%20Secretary%20Clinton.pdf> (protesting the State Department's report to the United Nations Human Rights Council concerning S.B. 1070).

²⁶¹ See *supra* notes 220–24 and accompanying text.

²⁶² Humberto Leal Garcia, Jr.'s case is the most recent example of Texas's continued non-compliance with the VCCR. See Brian Knowlton, *Texas Death Row Case Resonates to a Treaty*, N.Y. TIMES (June 15, 2011) <http://www.nytimes.com/2011/06/16/us/16iht-consular16.html>. Leal Garcia's petitions to the U.S. Supreme Court for certiorari, a writ of habeas corpus and a stay of execution were denied. *Garcia v. Texas*, 131 S. Ct. 2866 (2011). He was executed on July 7, 2011. Adam Liptak, *Mexican Citizen Is Executed As Justices Refuse to Step In*, N.Y. TIMES, July 8, 2011, at A16.

nationals currently on death row in the United States claim that they did not receive notification in accordance with the VCCR.²⁶³ This fact may support efforts to enact legislation, such as the proposed Consular Notification Compliance Act, implementing the VCCR obligations in capital cases,²⁶⁴ illustrating the need for such legislation to ensure broader compliance where states and localities are most resistant.

Resistance to a greater federal role in subnational human rights implementation may also be found in states and localities that are resistant to federal and international “interference” in areas traditionally within the jurisdiction of state and local government, more generally. This resistance is exemplified in many of the political arguments opposing U.S. ratification of the CRC and CEDAW, and criticizing U.S. ratification of CERD. Opponents of U.S. treaty ratification often assert the need to preserve sovereignty in areas traditionally delegated to the states.²⁶⁵ These groups warn that domestic implementation and integration of human rights will result in the imposition of international norms on traditionally local issues, such as family relations.²⁶⁶

Here, a stronger federal role in encouraging and facilitating states and localities in implementing U.S. human rights obligations may in fact help to counter some of the hostility towards human rights implementation. By facilitating greater state and local involvement in human rights implementation, the federal government can enable state and local governments to promote their own interests and concerns. As several commentators have noted, this is indeed a benefit of state and local human rights implementation, as it can counter the criticisms that international law is somehow “anti-democratic.”²⁶⁷ Rather, by allowing for greater subnational implementation, federal, state and local govern-

²⁶³ Knowlton, *supra* note 262.

²⁶⁴ Consular Notification Compliance Act of 2011, S. 1194, 112th Cong. (2011).

²⁶⁵ See, e.g., Kim R. Holmes, *How Should Americans Think About Human Rights?*, HERITAGE FOUNDATION (June 13, 2011), <http://www.heritage.org/Research/Reports/2011/06/How-Should-America-Think-about-Human-Rights>; Steven Groves, *Ratification of the Disabilities Convention Would Erode American Sovereignty*, HERITAGE FOUNDATION (Apr. 26, 2010), <http://www.heritage.org/Research/Reports/2010/04/Ratification-of-the-Disabilities-Convention-Would-Erode-American-Sovereignty>; see also Resnik, *Categorical Federalism*, *supra* note 8, at 666–67 (noting that federalism is often used to justify opposition to ratification of international human rights treaties focusing on women and children as means of preserving traditional gender roles); Susan Kilbourne, *The Convention on the Rights of the Child: Federalism Issues for the United States*, 5 GEO. J. ON FIGHTING POVERTY 327, 329–30 (1998) (detailing federalism-based opposition arguments to ratification of the CRC).

²⁶⁶ See, e.g., Peter Kamakawiwoole, *Why We Oppose It*, PARENTALRIGHTS.ORG (Nov. 11, 2008), http://www.parentalrights.org/index.asp?Type=B_BASIC&SEC={55EE90CC-F282-48CF-A7BD-C326F6524FCC}&DE= (arguing that the CRC interferes with parental rights and family life); Grace Melton, *CEDAW: How U.N. Interference Threatens the Rights of American Women*, HERITAGE FOUNDATION (Jan. 9, 2009), <http://www.heritage.org/Research/Reports/2009/01/CEDAW-How-UN-Interference-Threatens-the-Rights-of-American-Women>.

²⁶⁷ Ahdieh, *supra* note 9, at 1242; Resnik, *Law's Migration*, *supra* note 11, at 1656; Resnik, *Rethinking Horizontal Federalism*, *supra* note 149, at 41.

ments can partner to ensure that local concerns and interests are addressed.²⁶⁸ For example, more human rights reporting at the local level will illuminate where states and localities are doing well and the location of real concerns. By supporting and then communicating state and local efforts to address those concerns, the federal government ensures that solutions to local problems are generated at the local level, where they would be most responsive to the communities' values and interests. In this way, a greater federal role keeps the focus of human rights implementation appropriately local.

Less stark resistance may be found from states and localities with an interest in human rights but little engagement with and infrastructure for human rights implementation. In such instances, states and localities may be positively inclined towards human rights implementation, but have little expertise and comfort. Such cases would indicate a need for greater federal outreach and training.

The federal government, and particularly the executive branch, is not immune to many of the pragmatic concerns that plague state and local officials, namely infrastructure and resource constraints. As discussed, *supra*, the federal government currently lacks the infrastructure to coordinate and engage with state and local governments about subnational human rights implementation. There is no national human rights institution or federal coordination mechanism charged with monitoring, coordinating, or liaising with state and local government. This lack of infrastructure would hamper the Executive's efforts to undertake many of the core functions suggested here.

Proposals calling for a revived and improved Inter-Agency Working Group for Human Rights²⁶⁹ and a transformed and strengthened U.S. Civil and Human Rights Commission²⁷⁰ would build the infrastructure needed to help the federal government perform these core func-

²⁶⁸ See Ahdieh, *supra* note 9, at 1208.

²⁶⁹ A pending proposal to the Obama administration would reconstitute and improve the Clinton-Era Working Group by expanding its membership to include more relevant agencies and departments, and by expanding its mandate to include more robust implementation duties. CATHERINE POWELL, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, HUMAN RIGHTS AT HOME: A DOMESTIC POLICY BLUEPRINT FOR THE NEW ADMINISTRATION (2008) [hereinafter POWELL, BLUEPRINT], available at <http://www.acslaw.org/files/Powell%20full%20combined.pdf>. Significantly, the proposal calls for expanding the working group's mandate to require that it coordinate with state and local governments. *Id.* at 15–16, app. B; see also Melish, *supra* note 23, at 458 (calling for a National Office in Human Rights Implementation as a focal point for domestic human rights implementation at the national, state and local level).

²⁷⁰ POWELL, BLUEPRINT, *supra* note 269, at 4–5 (recommending the creation of a monitoring body in the form of a national human rights commission); see also LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUC. FUND, RESTORING THE CONSCIENCE OF A NATION 44–45 (2009) [hereinafter LCCHR REPORT], available at http://www.protectcivilrights.org/pdf/reports/commission/lccref_commission_report_march2009.pdf (recommending changing the name and mandate of the U.S. Civil Rights Commission to the “United States Commission on Civil and Human Rights”).

tions, ensure that the United States is coordinated in its approach to human rights compliance, and help to facilitate subnational incorporation of human rights.

First, as a federal human rights implementing body, an Interagency Working Group on Human Rights would serve as a focal point within the federal government to ensure coordination among all of the federal agencies and departments around human rights issues, and could also help to coordinate state and local efforts.²⁷¹ Such coordination could also occur through a separate office, similar to the White House's Special Representative on Global Intergovernmental Affairs, but be mandated to liaise with state and local officials on human rights issues.

An independent national human rights institution, such as a human rights commission, would monitor the U.S.'s compliance with its treaty obligations, and regularly gather and process human rights complaints and concerns. Significantly, it could also support and coordinate state and local efforts at human rights compliance and implementation by serving as a clearinghouse for information, highlighting "best practices" of state and local governments engaging in human rights implementation and sharing these examples with other state and local officials.²⁷²

Both a federal human rights implementing body and an independent monitoring body could provide critical support for integration of and compliance with human rights at the subnational level, specifically through staff dedicated to liaising and coordinating with states and municipalities.²⁷³ Through such mechanisms, the federal government

²⁷¹ See POWELL, *BLUEPRINT*, *supra* note 269, at 13–19; Melish, *supra* note 23, at 456–58.

²⁷² Kaufman, *State and Local Commissions*, *supra* note 141, at 104–07.

²⁷³ Elsewhere, I have outlined the core functions for such staff, which include: receiving reports, suggestions, and recommendations from state and local human rights and human relations commissions, and other relevant state and local officials, on matters falling within the jurisdiction of the U.S. Commission; soliciting input from and consulting with state and local human rights and relations commissions and other relevant state and local agencies on reports to international and regional human rights bodies, and initiating and forwarding advice and recommendations to state and local commissions and other relevant state and local officials on matters that the Commission has studied or on observations or reports received from international and regional human rights bodies; assisting state and local commissions and other relevant state and local officials in their own efforts to collect information and report on human rights compliance at the state and local level, and analyze data to determine where compliance is strong, and where it needs improvement; organizing and holding hearings on issues of state and local concern, including state and local policy in light of the Commissions' findings and *Concluding Observations* issued by international and regional human rights bodies; engaging in educational efforts with the public and with state and local agencies to raise awareness of international human rights standards; assisting state and local commissions and other relevant officials to identify best practices in other jurisdictions for human rights compliance and implementation; and assisting in drafting recommendations and guidance encouraging, allowing or requiring governmental agencies to take international human rights standards into account in creating new policies and legislation. See Kaufman, *State and Local Commissions*, *supra* note 141, at 104–07.

would similarly be able to engage in many of the education and outreach functions described in the previous section. For example, a U.S. Commission on Civil and Human Rights could be charged with working with local human rights and human relations commissions and other relevant state and local government officials to engage in training with law enforcement, prosecutors, judges, and public defenders to inform them of their duties to implement human rights treaty obligations.

The executive branch could play a central role in building this infrastructure. First, through an executive order, the President could establish an implementing body such as an Inter-Agency Working Group, improving upon the body established by President Clinton in 1998. While a Commission would require Congressional enactment, here, too, the Executive can play a critical role in initiating its creation. The present U.S. Commission on Civil Rights originated in a 1946 Executive Order, through which President Truman established the President's Committee on Civil Rights,²⁷⁴ authorized "to inquire into and to determine whether and in what respect current law-enforcement measures and the authority and means possessed by Federal, State, and local governments may be strengthened and improved to safeguard the civil rights of the people." The Committee's final report urged the establishment of a permanent Commission on Civil Rights,²⁷⁵ which was created, first as a temporary Commission within the executive branch, by the Civil Rights Act of 1957²⁷⁶ as an investigatory and data collection body.²⁷⁷ Similarly, the President could issue an executive order establishing a presidential study group or taskforce to explore the creation of a U.S. Human Rights Commission and recommend functions for such a commission to coordinate and engage with state and local governments.

Infrastructure concerns aside, financial challenges pose perhaps the more insurmountable barrier to realizing the greater federal role suggested in this Article. Certainly, additional infrastructure and grant programs would require a significant outlay of federal resources. Yet, this money would largely go towards supporting state and local governments, and thus would ease state and local budget constraints, as well. In addition, greater subnational human rights implementation may result in fewer lawsuits and other enforcement actions, and better international standing for the United States and its subnational entities, which

²⁷⁴ Exec. Order No. 9808, 3 C.F.R. § 590 (1943-1948) (1946).

²⁷⁵ PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 154 (1947).

²⁷⁶ Pub. L. No. 85-315, § 101(a), 71 Stat. 634 (1957).

²⁷⁷ For detailed histories and critiques of the U.S. Commission on Civil Rights, see Jocelyn C. Frye et al., *The Rise and Fall of the United States Commission on Civil Rights*, 22 HARV. C.R.-C.L. L. REV. 449 (1987); LCCHR REPORT, *supra* note 270; MARY FRANCES BERRY, AND JUSTICE FOR ALL: THE UNITED STATES COMMISSION ON CIVIL RIGHTS AND THE CONTINUING STRUGGLE FOR FREEDOM IN AMERICA (2009).

could translate into greater prosperity in the long run. Thus, the short-term costs would likely be high, but potentially so, too, the long-term gains.

CONCLUSION

Concern over subnational human rights compliance within the United States permeates recommendations and observations issued by U.N. human rights treaty monitoring bodies, special rapporteurs, and independent experts, as well as members of U.S. civil society. It concerns the federal government, too, as the United States' credibility as a global leader in human rights is intertwined with its ability to ensure state and local human rights compliance. Although the Executive is precluded from compelling states to comply with international human rights treaty obligations absent Congressional authorization, the executive branch is nevertheless empowered to, and has a vital interest in, exploring other, non-coercive, measures to bring subnational governments, and by extension the United States, into treaty compliance. An examination of the concerns, interests and needs particular to federalism and human rights implementation, alongside relevant instances of cooperative federalism in other contexts, reveals several core non-coercive functions for the federal Executive in this regard. Specifically, by setting standards, collecting and disseminating information, and incentivizing compliance, the Executive, in cooperation with Congress, can better ensure state and local human rights implementation and positively impact the United States' ability to meet its human rights commitments.