"Rogue States" Within American Borders: Remedying State Noncompliance with the International Covenant on Civil and Political Rights

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Margaret Thomas

Nearly a decade after the United States ratified the International Covenant on Civil and Political Rights, the treaty's implementation is incomplete. A complex maze of reservations, understandings, and declarations has hindered domestic implementation, as has Congress's failure to pass national implementing legislation. Almost every state in the Union has laws that violate the Covenant. For example, the treaty requires that in criminal matters, juveniles must be tried in a manner that takes account of their age. Nevertheless, California and many other states frequently treat minors as adults in such matters. Because the Senate declared the treaty to be non-self-executing, the question arises whether there is any legal remedy for state breaches of this U.S. treaty obligation.

The Supremacy Clause exclusively regulates the relationship between treaties and states. Nothing in the Supremacy Clause requires congressional implementation of a treaty in order for that treaty to supersede state law. Congress's failure to implement the treaty merely displaces the primary burden of enforcement to the states. The Senate's declaration that the Covenant shall not be self-executing in no way diminishes state courts' duty to enforce the treaty. Though the declaration may limit the federal courts' ability to recognize private rights of action based on the treaty, federal courts have demonstrated an increasing willingness to entertain claims to treaty rights asserted against the government. Both state and federal courts have the power to bring wayward state laws into compliance with the Covenant's obligation.

INTRODUCTION

Nearly a decade after the United States ratified the International Covenant on Civil and Political Rights ("the Covenant"),[1] arguably one of the most important guarantees of human rights in history, the treaty's implementation in this country is incomplete. The Senate burdened the document's ratification with a complex maze of reservations, understandings, and declarations ("RUDs") that have significantly hampered the treaty's enforcement at the federal level. Eight years after ratification, Congress has yet to enact legislation implementing the treaty nationally, and courts and state legislatures have paid scant attention to the document.

While domestic enforcement of human rights treaties like the Covenant has generally received little attention from the American legal establishment, recent events suggest that the time may be ripe for such treaties to move out of legal obscurity. On May 3, 2001, the United Nations' fifty-three-nation Economic and Social Council conducted its periodic regional elections for the Human Rights Commission. The election results excluded the United States from the commission for the first time since the United Nations' founding and thereby directed international attention to America's international human rights policies.[2] That event, in turn, set the stage for the June 2001 issuance of an opinion by the International Court of Justice ("ICJ") that pointedly criticized the United States for failing to enforce certain human rights guarantees within America's own borders.[3]

The ICJ's decision has already begun to impact the debate about America's domestic treaty implementation responsibilities. For example, in the context of a clemency decision, Oklahoma Governor Frank Keating recently considered whether to honor the ICJ's ruling in his state when he was faced with a case involving a violation of precisely the same rights at issue in the ICJ's opinion.[4] In reaching his decision to deny clemency, he

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1. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www.tufts.edu/departments/fletcher/multi/texts/BH498.txt.

2. The three seats allocated to Western countries went to France, Austria, and Sweden. *See* CNN, *U.S. Ousted from U.N. Human Rights Commission* (May 3, 2001), *at* http://www.cnn.com/2001/US/05/03/us.human/.

3. The ICJ specifically chastised the United States for executing a German citizen without affording him the rights guaranteed by the Vienna Convention. Press Release, International Court of Justice, LaGrand Case (Germany v. United States of America): The Court Finds that the United States has Breached its Obligations to Germany and to the LaGrand Brothers Under the Vienna Convention on Consular Relations (June 27, 2001), *available at* http://www.icj-cij.org/icjwww/ipresscom/ipress2001/ipresscom2001-16_20010627.htm.

4. Press Release, Governor Frank Keating, Governor Denies Clemency for Convicted Killer (July 20, 2001), *available at* http://www.governor.state.ok.us/novaldez.htm; *see also* Brooke A. Masters, *U.S. Deprived Mexican of Fair Trial, Appeal Says; Death Row Inmante Wasn't Told He Could Enlist His Country's Aid; Okla. Case Could Set Precedent*, WASHINGTON POST, Aug. 23, 2001, at A8; *Governor Denies Clemency for Killer Despite Mexico Plea*, CHI. TRIB., July 21, 2001, at 12.

had to weigh whether and how the treaty right at issue ought to be given force in his state.[5]

Keating has not been alone in considering the potential impact of human rights treaties upon domestic capital sentences. Some commentators now look to U.S. treaty obligations as a primary means of reforming capital punishment procedures.[6] As the current controversy over state laws permitting execution of mentally retarded criminals intensifies,[7] American courts may have to confront authoritative treaty interpretations holding that such executions violate basic human rights.[8]

The force of treaties like the Covenant upon domestic law is far from settled. Nevertheless, scholarly commentators appear certain that the issue of domestic enforceability of treaties is purely a federal question.[9] This view is epitomized by the scholarly controversy regarding whether principles of federalism limit the scope of treaties' domestic enforceability. Professor Curtis Bradley criticizes the use of human rights treaties by the federal government to control areas of law reserved to the states by the Tenth Amendment.[10] In contrast, Professor David Golove sets forth a historical and structural constitutional argument defending such use of federal power and asserting the need to present a "unified national front" to

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5. Letter from Governor Frank Keating to Vicente Fox (July 20, 2001), *available at* http://www.governor.state.ok.us/novaldez.htm. *See also* Press Release, Governor Keating, *supra* note 4; *Mexico to Appeal Valdez Execution*, DAILY OKLAHOMAN, July 22, 2001, at 3A.

6. *See, e.g.*, *Beyond Reason: The Death Penalty and Offenders with Mental Retardation*, 13 HUM. RTS. WATCH 1, pt. III (Mar. 2001) [hereinafter HUM. RTS. WATCH], *at* http://www.hrw.org/reports/2001/ustat/ustat0301.htm#TopOfPage.

7. *See* Eric Lichtblau, *Death Penalty Reforms Gather New Momentum*, L.A. TIMES, June 25, 2001, at A1 (citing recent controversies in Florida, Texas, Alabama, and North Carolina over such executions). Additionally, in March 2001, the U.S. Supreme Court agreed to revisit the constitutionality of such executions. McCarver v. North Carolina, 121 S. Ct. 1401 (2001) (granting certiorari). Arguments in *McCarver* will take place sometime in the 2001-02 term, but already several American diplomats have filed a brief as amici curiae urging the Justices to forbid executions of the mentally retarded based on standards of decency derived from the U.N. Human Rights Commission and a growing international consensus that isolates the United States diplomatically. Brief of Amici Curiae Diplomats Morton Abramowitz et al. in Support of Petitioner at 7-13, McCarver v. North Carolina, 121 S. Ct. 1401 (2001) (No. 00-8727). Although the *McCarver* case appears to have recently become moot, in September 2001 the Supreme Court agreed to hear another similar case raising the same issue. Atkins v. Virginia, 534 S.E.2d 312 (Va. 2000), *cert. granted*, 122 S. Ct. 24 (2001).

8. *See* HUM. RTS. WATCH, *supra* note 6.

9. *See, e.g.*, Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257 (1993) (discussing federal implementation through the executive branch); Michael H. Posner & Peter J. Spiro, *Adding Teeth to United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209 (1993) (discussing federal implementation through a proposed act of Congress); John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287 (1993) (discussing implementation through the federal judiciary).

10. Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 402 (1998).

advance our national interests.[11] Both Bradley and Golove implicitly assume that such treaties are specific, federal actions imposed upon states. They view such treaties only as potential sets of federally-made rules operating at a national level. Their arguments ignore the possibility that states themselves might choose to carry out treaty provisions using their own local implementation methods.

A second, related controversy animating recent scholarly literature turns upon whether national implementing legislation is necessary before a treaty can have domestic effect. Professor John Yoo analyzes both structural separation-of-powers issues in this area and the original intent of the Framers and contends that the federal judiciary should not enforce treaties affecting domestic areas normally reserved by the Constitution to Congress unless Congress itself passes national implementing legislation.[12] Professor Carlos Vazquez, on the other hand, argues that the Constitution mandates that all such treaties should have automatic effect with the force of law, regardless of whether Congress implements them with legislation.[13] As in the federalism controversy, this debate has overlooked the possibility that states themselves might implement the treaties independent of any congressional command, such as through legislatures, state courts, or gubernatorial orders.

Thus, although there is a wealth of academic literature addressing human rights treaty implementation at the federal level, implementation at the state level has generally either gone unnoticed or has been assumed to be a mere by-product of the federal implementation process.[14] This Comment considers the problem of domestic enforceability of treaties such as the Covenant from a broader perspective, considering implementation as a dual problem fully situated within both federal and state government systems. To better understand the enforceability problem, the Comment begins with an examination of the specific nature of the treaty obligation. It then considers the historical complexities in the U.S. ratification of the Covenant, analyzing the manner in which the Senate's reservations, understandings, and declarations purport to limit and modify that obligation.

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11. David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1078-81 (2000).

12. John C. Yoo, *Rejoinder: Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2219-20 (1999) [hereinafter Yoo, *Treaties and Public Lawmaking*]; *see also* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1960-62 (1999) [hereinafter Yoo, *Globalism and the Constitution*].

13. Carlos Manuel Vazquez, *Response: Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2156-59 (1999).

14. James Nafzinger attempted to address the relationship between states and treaties by advocating that states participate in the treaty ratification process. James A. R. Nafziger, *State Collaboration in United States Ratifieation of Human Rights Treaties*, 3 I.L.S.A. J. INT'L & COMP. L. 621, 627 (1997). Even this state-focused solution, however, takes place purely at the federal level (namely, during ratification).

With a clear picture of the final obligation the United States ratified, it then turns to the problem of domestic noncompliance by the several states.

To facilitate an in-depth analysis of domestic noncompliance, this Comment examines an example of state legislation that deviates from the Covenant's terms. The procedural mechanisms by which states prosecute minors presents an area of law well suited to such an examination because it tends to be insulated from national legislation by federalism principles.[15]

The Covenant provides concrete rules regarding criminal procedures for children. It explicitly obligates party states to ensure that "[i]n the case of juvenile persons, the [trial] procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."[16] Despite this obligation, almost every state in the Union has laws facilitating trial of juveniles in adult court.[17] In fact, the United States has experienced a recent wave of state legislation facilitating the trial of youths as adults, though the practice of treating minors as adults appears on its face to contravene the Covenant's mandate to "take account of their age." To take effect and bring the United States into compliance with the Covenant's language, almost every state would have to alter existing practices.[18]

California's Proposition 21, "The Gang Violence and Juvenile Crime Prevention Act," provides a useful example of such state disregard of the

15. Although several commentators have discussed the possibility of using the Covenant to prevent the execution of juveniles (by federal or state governments), *see, e.g.,* Connie de la Vega & Jennifer Brown, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?*, 32 U.S.F. L. REV. 735 (1998), such challenges are hindered by the Senate's explicit reservation of the right to execute "any person" as a condition of treaty ratification. *See* 138 CONG. REC. § S4781, S4783 (1992) (relating Senate debate regarding the Covenant). The exceptional nature of this blanket reservation makes such state capital punishment laws a particularly unsuitable example upon which to test the Covenant's general enforceability. On August 13, 2001, the U.S. Supreme Court confirmed its unwillingness to reexamine the application of the death penalty to minors, denying a stay in one such case. Beazley v. Johnson, 122 S. Ct. 11 (2001). The case, involving a Texas offender who was sentenced to die at just fifteen, drew international condemnation. In a strongly worded statement, representatives of the Council of Europe said that Beazley's execution "contravened international legal standards and was against the norms of civilised society." CNN, *Europe Steps in to Death Row Case* (Aug. 15, 2001), *at* http://www.cun.com/2001/WORLD/europe/08/15/beazley.europe/index.html; *see also* Council of Europe, *Council of Europe Leaders Call on Governor of Texas to Stay Execution of Napoleon Beazley* (Aug. 14, 2001), *at* http://www.coe.int/portal.asp?strScreenType=100&L=E&M=$t/1-0-0-2/01/News/200108/EMB,1,0,0,2,Beazley.stm.

16. Covenant, *supra* note 1, art. 14, para. 4, 999 U.N.T.S. at 177.

17. Arianna Huffington, *The New Callousness: California's Prop. 21 Shows that Politicians Would Rather Put Troubled Kids Behind Bars than Rehabilitate Them* (Mar. 2, 2000), *at* http://www.salon.com/politics2000/feature/2000/03/02/callousness/index.html.

18. By the 1990s, virtually every state had approved legislation permitting trial of juveniles as adults. PBS, Frontline Juvenile Justice Report, *Child or Adult? A Century Long View*, *at* http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/childadult.html (last visited Oct. 26, 2001) [hereinafter *Child or Adult*]; *see also* Jolanta Juszkiewicz, Building Blocks for Youth Initiative, *Youth Crime/Adult Time: Is Justice Served*, *at* http://www.buildingblocksforyouth.org/ycat/ycat.html.

treaty.[19] Nearly 4.5 million California voters supported Proposition 21's mandate that courts try many more juveniles as adults.[20] Voter approval of Proposition 21 places California squarely in breach of the Covenant's requirement that trial procedures take account of a juvenile's age.[21] This Comment will evaluate Proposition 21's conflict with the Covenant's procedural justice guarantees to children as a case study of treaty obligations at the state level.[22]

In California as elsewhere, the peculiar legal features of treaty implementation at the state level have been largely neglected by both judges and scholarly commentators. Concluding that laws such as California's Proposition 21 violate the Covenant's terms, this Comment considers several possible solutions to the problem of state noncompliance. It argues that state enforcement and federal enforcement of treaties each present separate, independent questions. First, at the state level, it contends the Senate's declaration of non-self-execution has no effect.[23] It argues that

19. Although this Comment focuses upon the specific mechanism and language of California's Proposition 21 as a case study, the same argument clearly extends to similar legislation in other states as well. *See infra* text accompanying notes 76-77, 80.

20. By contrast, only 2.7 million voters opposed the ballot initiative. Secretary of State Bill Jones Website, Vote 2000, State Ballot Measures: Statewide Returns, *at* http://primary2000.ss.ca.gov/returns/prop/00.htm (June 2, 2000).

21. Several state court challenges presently impede the new law's implementation in California. These challenges, however, are confined to state law and ignore relevant international obligations. The legal challenges appear to have overlooked the fact that the state's procedures for transferring minors into the adult criminal system explicitly violate the plain language of the Covenant's trial procedure requirements. *See infra* text accompanying notes 101-104.

22. The treaty obligation conflicts with popular state juvenile justice provisions throughout the country. This conflict has significant policy implications for juvenile justice reform generally. For example, if juveniles cannot be transferred to adult court because of the treaty provisions, states will likely look to other reform possibilities. Such possibilities include lowering the age boundary at which adult courts automatically acquire jurisdiction by redefining "adulthood" to begin at a younger age. A few states have already begun experimenting with this path, lowering the age boundary for all crimes to sixteen. Robert O. Dawson, *Judicial Waiver in Theory and Practice*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 45, 47 (Julian Fagan & Franklin E. Zimring eds., 2000). Since the Covenant does not itself define the age at which one must be considered a juvenile, such reforms would likely sidestep its provisions and channel vastly more young people into the adult criminal system than current transfer mechanisms, thus creating an even harsher situation than presently exists. Furthermore, other reform possibilities such as so-called "blended jurisdiction" (in which juvenile courts have the power to issue complex sentences at least as long as those of adult criminal courts) also arguably would meet the Covenant's requirements, while creating significant policy problems of their own. *See, e.g.*, Richard E. Redding & James C. Howell, *Blended Sentencing in American Juvenile Courts*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 145, 145-79 (Julian Fagan & Franklin E. Zimring eds., 2000); Franklin E. Zimring, *The Punitive Necessity of Waiver*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 207, 215 (Julian Fagan & Franklin E. Zimring eds., 2000). From a juvenile justice perspective, the selectivity of transfer mechanisms like those in Proposition 21 may arguably be among the "lesser evils" of the reform possibilities, as these mechanisms tend to be both specific and targeted while other possibilities are not. Though such particularized policy considerations are outside the scope of this Comment, they are worth mentioning as a backdrop to the broader question of the implications of the Covenant's domestic legal force.

23. Non-self-execution implies that the treaty requires implementing legislation. *See infra* text accompanying notes 48-49.

non-self-execution preserves for Congress the right to implement treaties negotiated by the President and approved by the Senate affecting an area of domestic concern that would normally fall exclusively under Congress's purview. Historical and structural analysis of the principles underlying non-self-execution supports the conclusion that it exists to regulate and balance the relationship between the foreign-affairs power of the President and Senate under Article II, and Congress's legislative power under Article I. Such separation-of-powers balancing becomes irrelevant when the treaty does not reach into an area reserved to Congress under Article I; if the treaty reaches into an area reserved to the states, non-self-execution doctrine simply is not triggered. Instead, the Supremacy Clause exclusively regulates the relationship between treaties and states, making the treaties binding on states as a matter of course. Nothing in the Supremacy Clause requires congressional implementation of a treaty before that treaty supersedes state law. The treaty automatically supersedes state law by constitutional command the moment it takes effect.

This Comment thus argues that the absence of congressional implementing legislation merely displaces the primary implementation burden from the national government to each of the states. Indeed, one can read Congress's inaction as deliberate deference to the states, permitting states to implement the treaty through their own courts and legislatures. Such local implementation of the treaty's baseline standards and procedures encourages unique enforcement solutions tailored to each state's specific situation. In the absence of proper state implementation, however, state courts have a duty to enforce such treaties as "supreme Law of the Land,"[24] regardless of the treaty's implementation status before Congress. This Comment thus concludes that the Covenant's provisions obligate state courts to strike down laws like California's Proposition 21.

Secondly, this Comment considers the enforceability of the Covenant's rights in the alternate venue of federal courts. Surveying the cases involving Covenant rights brought before federal judges in the years following ratification, this Comment concludes that in practice, federal courts appear to have implicitly drawn a distinction between private, civil rights against other citizens (which provide no federal right of action), and public rights to protection against the government (for which the courts appear willing to entertain claims).

This analysis of the dual enforcement schema of state and federal courts reveals that the Senate's declaration of non-self-execution does not disable enforcement of the rights that the Covenant confers against the government. On the contrary, the non-self-execution declaration instead creates a bifurcated enforcement framework whereby certain rights creating a private, civil cause of action are unenforceable in federal court,

24. U.S. CONST. art. VI.

whereas with few exceptions, other rights asserted against the government in a criminal context are enforceable in any venue, federal or state. This Comment thus concludes that Proposition 21, and laws like it in other states, cannot withstand the treaty's force. Both state and federal institutions can provide appropriate remedies to bring wayward state laws into compliance with the Covenant's obligation.

I
THE PROBLEM OF NONCOMPLIANCE

A. Promises Made: The International Covenant on Civil and Political Rights

In the middle of the twentieth century, World War II's tragedies produced a revolutionary international interest in the codification of human rights. This interest first manifested itself in the United Nations Charter and its requirement that U.N. members endeavor to promote human rights.[25] In 1948, the U.N. General Assembly adopted the Universal Declaration of Human Rights without a dissenting vote.[26] While the Declaration defined the rights guaranteed by nations to individuals, it stopped short of creating a binding international obligation.[27]

The final step necessary for realizing the postwar human rights vision was a global treaty that would create legal duties for signatories. In 1966, the General Assembly adopted the text of the International Covenant on Civil and Political Rights to fulfill this need.[28] Led by the United States, General Assembly members saw the Covenant as a means to strengthen the Charter's human rights ideals.[29] The Covenant went into force internationally in 1976,[30] and at least 147 nations are now parties to it.[31] Proponents have hailed the document alternately as the "modern Magua Carta" and the "international Bill of Rights."[32]

The Covenant imposes an explicit duty upon signatories to execute its provisions, providing in part, "each State Party to the present Covenant undertakes to take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recoguized in the present Covenant."[33] It contains a corollary duty of remedy and relief,

25. *See* Quigley, *supra* note 9, at 1289.

26. U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 7 (Hurst Hannum & Dana D. Fischer eds., 1993) [hereinafter U.S. RATIFICATION].

27. *See* Quigley, *supra* note 9, at 1288.

28. *See id.*

29. Michael H. Posner & Peter J. Spiro, *supra* note 9, at 1211.

30. Quigley, *supra* note 9, at 1288.

31. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL 173, U.N. Doc. ST/LEG/SCR.E/19, (2001) [hereinafter MULTILATERAL TREATIES].

32. *See* Michael H. Posner & Peter J. Spiro, *supra* note 9, at 1209, 1211.

33. Covenant, *supra* note 1, at art. 2, para. 2, 999 U.N.T.S. at 173-74.

requiring party states first to "ensure that any person whose rights [under the Covenant] . . . are violated shall have an effective remedy . . . ." and second to provide individuals a right to have such remedy "determined by competent judicial, administrative or legislative authorities . . . of the State."[34] Of special significance to the United States, article 50 specifies that the treaty's provisions "extend to all parts of federal States without any limitations or exceptions."[35]

The Covenant expressly prohibits party states from derogating any of the fundamental human rights that it recognizes, except in time of national emergency.[36] Further, the Covenant provides mechanisms to ensure that party states comply with its provisions. It specifically creates a Human Rights Committee composed of nationals of party states to act as the primary enforcement body,[37] and signatories have a duty to report to the Human Rights Committee "on the progress made in the enjoyment of [Covenant] rights."[38] Thus, although the treaty is fundamentally self-policing, a nation's accession signals a willingness to undergo international scrutiny of its domestic human rights policies.[39]

B. Promises Confused: Ratification of the Covenant's Human Rights Guarantees

The Covenant went into force in this country on September 8, 1992.[40] However, the Covenant's ratification history was tortuous. Although President Carter signed the Covenant in 1977, the Senate refused to grant its consent to ratification throughout the 1980s.[41] After allowing the treaty

34. *Id.* art. 2, para. 3(a), (b), 999 U.N.T.S. at 174.

35. *Id.* art. 50, 999 U.N.T.S. at 201.

36. *Id.* art. 4-5, 999 U.N.T.S. at 174. Emergency derogation, however, specifically excludes any contravention of the Covenant's provisions regarding the right to life; freedom of conscience, thought, and religion; the right to be free of torture; slavery; imprisonment for default on a contractual obligation; and ex post facto prosecution. *See Id.* art. 4, para. 2, 999 U.N.T.S. at 174.

37. *Id.* art. 28, 999 U.N.T.S. at 179.

38. *Id.* art. 40, para. 1, 999 U.N.T.S. at 181.

39. When a state believes another party state is not fulfilling its Covenant obligations, it may complain about such abuses by drafting a letter to the allegedly derogating state. Covenant, *supra* note 1, at art. 41, 999 U.N.T.S. at 182. Should the letter fail to resolve the situation, the Human Rights Committee will conduct a series of meetings with the complaining and accused parties to find a "friendly solution." *Id.* If such a solution is not forthcoming, the committee may appoint a special Ad Hoc Conciliation Commission as a last resort. The commission ultimately issues a public report of its findings and provides a detailed record of the matter. *Id.* art. 42, 999 U.N.T.S. at 183-84. However, this enforcement mechanism exists more in theory than practice: by the time of U.S. ratification, not a single nation had filed a complaint against another signatory in this manner. *See* Quigley, *supra* note 9, at 1294. The Covenant also provides an Optional Protocol whereby states may permit their citizens to bring grievances related to Covenant rights directly to the Human Rights Committee. However, since the United States chose not to ratify this Optional Protocol, individual Americans may not presently file complaints directly before the committee. *See id.*

40. MULTILATERAL TREATIES, *supra* note 31, at 174.

41. *See* Quigley, *supra* note 9, at 1289.

to languish for over a decade, the Senate again took up the issue in 1991, at the urging of President George H.W. Bush.[42] It ultimately consented to ratification the following year,[43] but it reserved a number of rights to the United States and expressed a series of declarations and understandings purporting to limit the Covenant's interpretation and application in this country.[44]

1. Scope of the Senate's Reservations, Understandings, and Declarations

The United States has little company in the global community in terms of the scope and severity of the RUDs it attached to the treaty.[45] First, the Senate reserved to the United States the right to treat juveniles as adults "in exceptional circumstances" despite contrary provisions of the Covenant.[46] The Senate also adopted a set of "understandings" and "declarations" setting forth purported legal interpretations of obligations, though not reserving specific rights as conditions of ratification.[47] In the most siguificant of theın, the Senate specifically proclaimed that the provisions of the Covenant guaranteeing human rights shall not be

42. *Id.* at 1289.

43. *See id.* at 1289-90.

44. *See* SEN. COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. DOC. No. 102-23, at 22-23 (2d Sess. 1992), *reprinted in* 31 I.L.M. 645.

45. *See Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Report of the United States of America*, U.N. GAOR, Hum. Rts. Comm., 53rd Sess., 1401st mtg. at 9, para. 37, U.N. Doc. No. CCPR/C/SR.1401 (1995) [hereinafter *Consideration of Reports*].

46. SEN. COMM. ON FOREIGN RELATIONS, *supra* note 44, at 22. *See also* 138 CONG. REC., *supra* note 15, at 4783. The Senate also attached four other unrelated reservations, of which two focused on capital punishment. The United States reserved the right to impose capital punishment "on any person (other than a pregnant woman)"; it further stipulated that the Covenant's provisions regarding "cruel, inhuman or degrading treatment or punishment" bound the United States only insofar as those provisions correspond to existing constitutional provisions regarding cruel and unusual punishment. *Id.* The United States also reserved the right to impose criminal penalties in force at the time the crime was committed. The only other reservation prohibited implementation of any provision that would restrict the constitutional right to free speech and association (for example, the Covenant's hate speech provisions). 138 CONG. REC., *supra* note 15, at 4783.

47. In consenting to adopt this text as binding upon the United States, it is significant that the Senate's RUD constituted an "understanding" as opposed to a "reservation." Conventionally in international law, "understandings" are statements of "interpretation, clarification or elaboration assumed to be consistent with the obligations of the treaty as submitted . . . ." Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 585-86 (1991). Understandings do not modify the treaty's legal obligation. A reservation, by contrast, is a "limitation, qualification, or contradiction of the obligations in a treaty." *Id.* However, the Senate did not reserve to the United States a right to make it non-self-executing; instead, the Senate simply announced that it understood the treaty to be non-self-executing. Thus, the Senate's RUD did not limit the United States' obligation.

self-executing.[48] This limitation suggests that the treaty requires specific implementing legislation to have domestic effect.[49]

2. *International Criticism of the United States' Approach to Covenant Implementation*

With so many limitations, the international community was quick to criticize the United States. In 1995, the United States presented its initial report to the Human Rights Committee pursuant to Covenant requirements.[50] In meeting with the committee, Mr. Harper, an American delegate, opined that the non-self-execution declaration meant that the Covenant did not create private rights enforceable in United States courts, and that "both the executive branch and the United States Senate were reluctant to use the unicameral treaty power under the Constitution to introduce direct changes in domestic law."[51] Despite this reluctance, he assured the committee that "implementation of the Covenant and the compatibility of future legislation with it . . . would be constantly reviewed."[52]

Despite these assurances, the committee strongly criticized the U.S. ratification limitations in the meeting.[53] This criticism focused upon the non-self-execution declaration. First, the committee believed that the non-self-execution declaration was contrary to the purpose of the Covenant.[54] One member voiced fear that the United States did not have a "high degree of commitment to changing domestic legislation if it conflicted with the provisions of the Covenant . . . ."[55] Second, the committee suggested that the non-self-execution declaration could only apply if domestic laws already existed to cover the provisions.[56] One member expressed concern, stating that "it was unclear how Covenant rights would actually be protected in cases where domestic law was not up to the standards set by that instrument."[57]

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48. *See* SEN. COMM. ON FOREIGN RELATIONS, *supra* note 44, at 23; 138 CONG. REC., *supra* note 15, at 4783

49. *See* Riesenfeld & Abbott, *supra* note 47, at 574. There is considerable scholarly disagreement about whether the Senate possesses the power to attach such a limitation to a treaty. Some commentators perceive the power as a corollary of the Senate's right to withhold consent. *See id.* at 618. Other commentators have sharply criticized this type of RUD by noting that it treads upon the power of interpretation reserved to the judiciary and the power of execution reserved to the President. *See id.* at 609-10.

50. *See* MICHAEL O'FLAHERTY, HUMAN RIGHTS AND THE U.N.: PRACTICE BEFORE TREATY BODIES 44 (1996).

51. *Consideration of Reports*, *supra* note 45, at 4, para 12.

52. *Id.* at 5, para. 17. Harper's conspicuous choice of the passive voice highlights the uncertainty of just who would be responsible for such acts of review.

53. *See id.* at 8-11, para. 34-48.

54. *See id.* at 11, para. 46.

55. *Id.* at 9, para. 38.

56. *Id.*

57. *Id.* at 8, para. 34.

On April 7, 1995, the committee issued official comments on the U.S. report.[58] The committee decried the absence of information in the report about the Covenant's implementation at the local and state level.[59] It further criticized the United States for failing to adequately educate the judiciary about the Covenant's obligations.[60]

3. Possible Motivations and Assumptions Underlying the Senate's RUDs

The Human Rights Committee's criticism recognized the contradiction posed by the American RUDs: though the United States has formally acknowledged the treaty's rights and obligated itself to enforce them at home, it nevertheless used a declaration of non-self-execution to impede the treaty's force domestically. A cynic might suspect that those behind ratification wanted to claim the international prestige associated with the Covenant without providing the reciprocal domestic action required by the treaty.

There can be no question that issues of international reputation at least partially motivated the Senate's decision to consent to ratification of the Covenant. The Senate Committee on Foreign Relations explicitly drew attention to the anticipated effect of ratification abroad in its report on the Covenant, noting:

> In view of the leading role that the United States plays in the international struggle for human rights, the absence of U.S. ratification of the Covenant is conspicuous and, in the view of many, hypocritical. The Committee believes that ratification will remove doubts about the seriousness of the U.S. commitment to human rights and strengthen the impact of U.S. efforts in the human rights field.[61]

The report went on to state that ratification would enhance U.S. influence over the development of democratic values in Eastern Europe, the former Soviet Union, and countries in Africa and Asia.[62] It also anticipated that participation in the Human Rights Committee's oversight of party states would permit the United States to "play a more aggressive role in the process of enforcing compliance with the Covenant" by other nations.[63]

Although these interests undoubtedly played a significant role in motivating ratification, reducing U.S. acceptance of the Covenant to mere power politics in foreign affairs oversimplifies the contradictions posed by the RUD package. Another major force motivating ratification and the

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58. *See Comments of the Human Rights Committee*, U.N. GAOR, Hum. Rts. Comm., 53rd Sess., U.N. Doc. CCPR/C/79/Add.50 (1995).

59. *See id.* at 1.

60. *See id.* at 3.

61. SEN. COMM. ON FOREIGN RELATIONS, *supra* note 44, at 3.

62. *Id.*

63. *Id.*

RUD package appears to have been the assumption by those involved in ratification that the United States already adequately ensured almost all of the human rights guaranteed by the Covenant.[64] The Senate Foreign Relations Committee itself believed that Covenant rights were already protected in this country through the U.S. Constitution[65] and existing domestic law.[66] In addition, President Carter reportedly claimed that it was "possible to read all the requirements contained in article 14 [regarding juveniles] as consistent with United States law, policy and practice."[67]

Despite these beliefs, California's new juvenile transfer procedure shows that constitutional protections correspond only imperfectly to Covenant rights. Nothing in the U.S. Constitution protects juveniles in the manner that the Covenant does. Indeed, the Senate even prefaced its RUD pertaining to juvenile justice practices by claiming that "the policy and practice of the United States are generally in compliance with . . . the Covenant's provisions regarding treatment of juveniles in the criminal justice system."[68] The presence of the word "generally" implicitly acknowledges that some practices do not comply. Moreover, since the United States has not yet ratified the U.N. Convention on the Rights of the Child,[69] the Covenant on Civil and Political Rights is unique in the nationwide protection it offers to minors. In the few areas where the Senate Foreign Relations Committee did recognize a divergence between U.S. practice and Covenant obligations, it expressed optimism that the United

64. *Id.* at 2. ("The rights guaranteed by the Covenant are similar to those guaranteed by the U.S. Constitution and the Bill of Rights.").

65. *Id.* at 10. ("[T]he substantive provisions of the Covenant are consistent with the letter and spirit of the United States Constitution . . . ."). Similarly, when the United States presented its first mandatory report to the U.N. Human Rights Committee on the state of the Covenant's implementation, the report noted that the U.S. Constitution already guarantees the most important rights and freedoms necessary to a democratic society, and those constitutionally protected rights directly parallel the rights addressed by the Covenant. *Human Rights Committee Continues Examination of United States Report*, U.N. GAOR, Hum. Rts. Comm., 53rd Sess., 1405th mtg., at 2, U.N. Doc. HR/CT/404 (Mar. 1995), *available at* gopher://gopher.undp.org:70/00/uncurr/press_releases/HR/CT/95_03/404 [hereinafter *Human Rights Committee Continues Examination*].

66. SEN. COMM. ON FOREIGN RELATIONS, *supra* note 44, at 5. According to the committee, "[t]he overwhelming majority of the provisions in the Covenant are compatible with existing U.S. domestic law."

67. U.S. RATIFICATION, *supra* note 26, at 113. President Carter was not alone in this optimistic view of compliance. Some scholarly commentators at the time of ratification underestimated the escalating trend in U.S. practice to try minors as adults without regard to age, in direct contravention of the Covenant's requirement. *See id.* at 112 ("Paragraph 4 of Article 14 provides that, in the case of juveniles, the procedure shall be such as to take into account their age and the desirability of promoting their rehabilitation. These directives are clearly consistent with the objectives of our juvenile courts and related systems."). Such commentators seemed to be unaware of the nationwide practice of denying jurisdiction to juvenile courts in favor of mandatory trial as an adult.

68. 138 CONG. REC., *supra* note 15, at 4783.

69. *See* Paul W. Kahn, *War Powers and the Millennium*, 34 LOY. L.A. L. REV. 11, 27 n.55 (2000); *see also* Convention on the Rights of the Child, Nov. 20, 1989, 144 U.N.T.S. 123, 28 I.L.M. 1448 (1989).

States would spontaneously move toward compliance with international standards through its own legislative process, making domestic enforcement of the Covenant largely unnecessary.[70] Unfortunately, the committee's optimistic view of the future never came to pass. As the following section will demonstrate, state laws like California's Proposition 21 violate the Covenant.

C. *Promises Broken: California's Proposition 21 as an Illustration of Noncompliance with the Nation's Treaty Obligation*

Implementation and enforcement of the nation's obligations under the Covenant only become significant if the nation is actually violating the treaty's provisions. Although the Constitution does not provide the same protections as the Covenant, that fact alone does not establish noncompliance with the treaty. This Part juxtaposes the Covenant's requirements regarding the prosecution of juveniles with California's specific practices in that area to evaluate the breach in compliance. It examines the recent reforms in California in detail and concludes that these reforms violate the treaty's terms and exceed the scope of the Senate's RUDs.

1. *Covenant Provisions Regarding the Criminal Prosecution of Juveniles*

The Covenant imposes substantive obligations on party states regarding the prosecution of minors during criminal proceedings. In general, it obligates states to take account of a child's age in legal proceedings. At the pretrial level, states must separate accused juveniles from adults and adjudicate their cases as quickly as possible.[71] During trial, the Covenant requires that "[i]n the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."[72] Upon conviction, states must segregate minors from adults and afford "treatment appropriate to their age and legal status."[73] The document further promises that "[e]very child shall have . . . the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."[74]

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70. *See* SEN. COMM. ON FOREIGN RELATIONS, *supra* note 44, at 4. The committee stated:

> In areas such as these, it may be appropriate and necessary to question whether changes in U.S. law should be made to bring the United States into full compliance at the international level. However, the Committee anticipates that changes in U.S. law in these areas will occur through the normal legislative process.

Id.

71. *See* Covenant, *supra* note 1, at art. 10, para. 2(b), 999 U.N.T.S. at 176 ("Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.").

72. *Id.* art. 14, para. 4, 999 U.N.T.S. at 177.

73. *Id.* art. 10, para. 3, 999 U.N.T.S. at 176.

74. *Id.* art. 24, para. 1, 999 U.N.T.S. at 179.

2. *Practices in California Regarding the Criminal Prosecution of Minors*

Though the Human Rights Committee's enforcement mechanisms have never been brought to bear on the United States, the procedural guarantees envisioned by the Covenant for minors differ radically from current practice in California. As the following passages will illustrate, instead of moving toward compliance with the Covenant in recent years, California has moved in the opposite direction. Further, given that California's juvenile justice practices are similar to those of other states in the Union, such noncompliance is a problem of national dimension.

Although the juvenile court systems in the United States traditionally emphasized the importance of special treatment for juveniles,[75] by the 1990s virtually every state had enacted statutes permitting trial of juveniles as adults.[76] Such legislation typically included laws lowering the minimum age at which a minor can be tried as an adult, the creation of expansive lists of crimes requiring automatic prosecution in adult court, and increasing reliance upon prosecutorial discretion to determine whether to try minors as adults.[77] California's Proposition 21 included all three laws.[78]

Trying minors as adults is not new, in itself. Almost as long as there have been juvenile courts, there have been cases in which judges felt they could only serve justice by relinquishing jurisdiction over the minor to an adult criminal court.[79] Virtually every state allows juvenile court judges to waive jurisdiction over certain minors to adult criminal court.[80] Until 2000, however, judicial waiver was the only procedural avenue by which a minor could be tried as an adult in California.[81]

In California prior to the year 2000, minors could not be tried in adult court without first undergoing a hearing in juvenile court.[82] This right to a

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75. *See Child or Adult*, *supra* note 18.

76. *Id.*; *see also* Juszkiewicz, *supra* note 18.

77. Juszkiewicz, *supra* note 18.

78. *See infra* text accompanying notes 96-102.

79. For an extensive history of the development of transfer mechanisms, see David S. Tanenhaus, *The Evolution of Transfer out of the Juvenile Court*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 13, *supra* note 22, at 13-43.

80. Dawson, *supra* note 22, at 45.

81. Manduley v. Superior Court, 104 Cal. Rptr. 2d 140, 145 (Ct. App. 2001), *cert. granted*, 106 Cal. Rptr. 2d 269 (Cal. 2001) (holding that Proposition 21 violates the state constitution). The California Supreme Court has agreed to review *Manduley*'s holding regarding the constitutionality of Proposition 21. In addition to ruling on the state law question, however, the *Manduley* court also conducted a historical analysis of the treatment of juveniles in California prior to the new law, and pointed out how the new law changed court procedure. This historical and procedural analysis is not at issue in the state supreme court's pending review of the case, and thus remains instructive as a way to understand the evolution of the present circumstances.

82. *Id.* at 145. The only exception to this rule was for a very small group of sixteen- and seventeen-year-olds. The law required prosecutors to file mandatory charges directly in adult court if the minor "(1) had been declared a ward of the court for prior felonies committed after he was 14 and (2) the new charge alleged he committed one or more of a list of serious offenses.... Additionally, if a juvenile had previously been (1) convicted in adult court... or (2) found unfit

hearing in juvenile court existed irrespective of the severity of the minor's alleged crime.[83] Further, the decision-making process in the transfer hearing "began with an assessment of the age of the offender and the charged offense."[84] For instance, adolescents who were at least sixteen years old and had committed one of a specified list of violent crimes could enter the adult criminal system only after a judge found the juvenile was not fit for treatment by the juvenile court in such a hearing.[85] Thus California procedure took account of the minor's age as an intrinsic part of the hearing process.

Fitness hearings in California followed the traditional, nationwide model: judges considered the child's personal, social, and family situation, together with the severity of the crime, to conclude whether he or she belonged in the juvenile system. The specific criteria judges considered during this mandatory hearing included: (1) the degree of criminal sophistication exhibited by the minor; (2) whether the minor could be rehabilitated prior to the expiration of the juvenile court's jurisdiction; (3) the minor's previous delinquent history; (4) the success of previous attempts by the juvenile court to rehabilitate the minor; and (5) the circumstances and gravity of the alleged offense.[86]

The factors considered during the initial fitness hearing in California thus put substantial emphasis on the minor's unique situation, character,

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based on his prior delinquent history . . . ." *Id.* at 145 n.2. Thus, once a juvenile was found unfit and convicted in adult court, future charges could be filed against him directly in adult court again without a fresh hearing in juvenile court.

83. *Id.* at 145.

84. *Id.* at 144.

85. *Id.* at 144-45. For the most severe crimes, this method of transfer following a judicial hearing could encompass even some fourteen- and fifteen-year-olds. *See* CONTINUING EDUCATION OF THE BAR, CALIFORNIA CRIMINAL LAW PROCEDURE AND PRACTICE 1030 (5th ed. 2000) [hereinafter CEB].

86. *See* CAL. WELF. & INST. CODE § 707(a) (Deering 2000). The factors used in fitness hearings in California track those that the U.S. Supreme Court approved in 1966 in *Kent v. United States*. 383 U.S. 541, 553-67 (1966). The controversy in *Kent* involved a minor whose attorney moved for the juvenile court to grant him access to the minor's Social Service file relating to his probation period. The file's contents were vital to the minor's defense against transfer to adult court, since the juvenile court would consider them in determining the outcome of a fitness hearing. *Id.* at 545-46. The judge refused to rule on the motion or to hold a fitness hearing. He simply waived jurisdiction over the youth, transferring him summarily to the adult system. *Id.* at 546. In the order, the judge made no findings and recited no specific reason for the waiver. *Id.* Since the statute provided for a hearing, the Supreme Court found the judge's conduct sufficiently egregious to warrant vacating the adult court's conviction of the minor and remanded the case for a de novo review of the juvenile's fitness for the juvenile system. *Id.* at 564.

Although the *Kent* Court found that the Constitution does not require fitness hearings for juveniles facing transfer to adult court, it held that if a state guarantees such a hearing by statute, then the transfer process must adhere to "the basic requirements of due process and fairness." *Id.* at 553. Further, where the statute promised meaningful review, the minor had a right to a full investigation and accounting of reasons. *Id.* at 561. The Court attached an appendix of factors used in the District of Columbia to evaluate whether to transfer minors out of juvenile court. *Id.* at 566-67. A majority of state legislatures responded by incorporating these factors directly into their transfer laws. Tanenhaus, *supra* note 79, at 32.

age, and amenability to rehabilitation. By requiring consideration of these factors, the hearings on their face satisfied the Covenant's command regarding juvenile trial procedures. However, this situation changed radically in 2000 as two new provisions took effect in the state.[87]

a. First Steps away from Taking Account of Juveniles' Age: California's Expansion of Automatic Transfer to Adult Court

On January 1, 2000, Senate Bill 334 took effect in California and dramatically altered the means by which juveniles could become subject to adult criminal procedure and penalties. If a youth is at least sixteen years old, has a prior felony record, and commits a specified violent offense, then the legislation requires that the youth be tried as an adult.[88] Thus, the transfer mechanism is automatic and does not involve a fitness hearing: the prosecutor files charges directly in adult criminal court, bypassing the juvenile system altogether.[89] As a safety valve to protect minors, the legislation creates a new "reverse remand" procedure whereby the defendant is entitled to a postconviction hearing in adult court if, and only if, the court convicts him or her of a lesser charge for which the mandatory, direct-filing in adult court would not have been available.[90] In other words, if convicted of something less than SB 334's enumerated list of violent offenses, the minor has a right to a hearing to consider remanding the case back to the juvenile court's jurisdiction.[91] However, cases involving multiple charges against the juvenile illustrate that this "reverse remand" right is narrow: conviction of only one charge subject to SB 334's mandatory adult prosecution eliminates the right to a postconviction hearing regarding the other charges.[92] Further, if the transfer to adult court is outside SB 334's ambit and made pursuant to a fitness hearing for a nonenumerated crime, there is also no such right.[93]

87. California was largely behind the curve of the rest of the nation with these changes. One recent nationwide study suggests that in a six-month statistical sample period in 1998, eighty-five percent of determinations whether to charge a juvenile as an adult were not made by judges. Juszkiewicz, *supra* note 18. The data suggest that long before Proposition 21 passed in California, judicial waiver hearings in the rest of the country in juvenile court had already become a relatively rare luxury for minors facing trial in the adult criminal system. *But cf.* Dawson, *supra* note 22, at 46 (citing a 1995 estimate by the U.S. General Accounting Office finding that more minors were transferred to adult court following judicial waiver than by other transfer methods, but noting the estimate excluded key data and may be outdated).

88. CEB, *supra* note 85, at 1031.

89. *Id.*

90. *Id.* at 1031-32.

91. *Id.*

92. *Id.*

93. *See id.* at 1031.

b. Second Steps away from Taking Account of Juveniles' Age: Proposition 21's Procedural Upheaval

In early 2000, the voters of California passed Proposition 21, "The Gang Violence and Juvenile Crime Prevention Act."[94] The law went into effect on March 8, 2000,[95] significantly redefining transfer procedure, just three months after SB 334's changes. The Proposition's main legacy was a new, three-tiered system of juvenile transfer: (1) mandatory transfer for the most serious offenses, (2) optional transfer at the prosecutor's discretion for a long list of moderately serious offenses, and (3) traditional judicial waiver through fitness proceedings for everything else. In the first tier, the new law mandated automatic, direct filing of charges in adult court for anyone fourteen years or older accused of so-called "one-strike" violent sex offenses or first-degree murder with one or more special circumstances.[96]

This new three-tiered system drastically altered existing court procedures. The first tier of Proposition 21 expanded SB 334's "mandatory direct file" method to include fourteen-and fifteen-year-olds. In the second tier, Proposition 21 created a new transfer procedure previously untried in California, although at least fifteen other states already had similar laws.[97] This new procedure gave prosecutors the discretion to file directly in adult court for defendants at least sixteen years of age accused of a wide range of

94. As Governor Wilson's pet initiative, Proposition 21's campaign benefited from massive corporate sponsorship at a time when many thought Wilson was a viable presidential contender. *See* Huffington, *supra* note 17. Voters responded to the cash-infused advertising blitz, approving the ballot measure by a wide margin. However, there is evidence to suggest voters misperceived the new law's ability to reduce crime. Other states using similar procedures to transfer minors to adult court have shown no appreciable increase in deterrence and crime prevention. In fact, one study suggests that available empirical evidence shows that "recidivism rates are much higher among juveniles transferred to [adult] criminal court than among those retained in the juvenile justice system." Redding & Howell, *supra* note 22, at 150. A second study by the Office of the Surgeon General, released January 17, 2001, concluded that the notion that "[g]etting tough with juvenile offenders by trying them in adult criminal courts reduces the likelihood they will commit more crimes" is simply "a myth." OFFICE OF THE SURGEON GENERAL, YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL, *available at* http://www.surgeongeneral.gov/library/youthviolence/summary.htm. The Surgeon General's study focused on the scope of youth violence, its causes and how to prevent it. *Id.*

95. *See* CEB, *supra* note 85, at 1031.

96. To charge the minor directly in adult court for murder, the prosecutor must allege one of the twenty-two possible enhancements enumerated in California Penal Code § 190.2(a) (for example, a prior murder conviction, use of a destructive device such as a bomb, killing a police officer, lying in wait, and extreme depravity). CAL. WELF. & INST. CODE § 602(b) (Deering Supp. 2001). Similarly, to charge the minor for a "one-strike" sexual offense in adult court, the prosecutor must also allege the crime was committed under one of the circumstances listed in Penal Code § 667.61, including inter alia having a past conviction of a similar offense, engaging in a specified element (kidnapping, burglary, use of a dangerous weapon, tying the victim), or administering a controlled substance during the alleged offense. CAL. WELF. & INST. CODE § 602(b) (Deering Supp. 2001). If such a circumstance is alleged, the list of sex crimes for which a minor can be tried in adult court includes rape, forcible sex offenses, forcible lewd and lascivious conduct with a child, and similar acts. *Id.*

97. Dawson, *supra* note 22, at 49.

offenses.[98] In the third transfer tier, judicial waiver hearings remained available to juveniles who were either (a) accused of offenses which fall outside those enumerated in tiers one and two, or (b) too young to meet the requirements of tiers one or two.[99] However, depending on the offense, Proposition 21 sometimes imposed a presumption of unfitness that favored waiver to adult court or a presumption of fitness that favored retention of juvenile jurisdiction.[100]

Although the first tier (mandatory, direct filing of charges in adult court) and the third tier (nonenumerated offenses still under the old system of juvenile fitness hearings) appear stable in their application, the second tier of Proposition 21 has become a moving target in light of recent court challenges. For instance, scarcely a year after the new law took effect, the California Court of Appeal for the Fourth District held in *Manduley v. Superior Court* that Proposition 21 violated state constitutional separation-of-powers doctrine by vesting prosecutors with the discretion to file charges in adult court.[101] Thus, the ruling struck down the provision of Proposition 21 enabling prosecutors to file charges in adult court as a matter of discretion. The ruling, however, did not affect tier one of the Proposition, which requires mandatory transfer to adult court for the most serious offenses.[102]

The impact that the *Manduley* decision will have on the state is difficult to predict. Four months after the ruling, California's Fifth District Court of Appeal issued a contradictory opinion, disagreeing sharply with the *Manduley* majority.[103] In *Bravo v. Superior Court*, the Fifth District upheld Proposition 21 on the very grounds that the *Manduley* court had used to overrule it.[104] The California Supreme Court has already agreed to settle this split in the districts by reviewing the Proposition.[105]

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98. *See* CEB, *supra* note 85, at 1031.

99. *Id.*

100. *See id.*

101. 104 Cal. Rptr. 2d 140, 142 (Cal. Ct. App. 2001), *cert. granted*, 106 Cal. Rptr. 2d 269 (Cal. 2001). In *Manduley*, a juvenile defendant challenged the prosecution's use of Proposition 21's discretionary transfer provision. By charging the youth in adult court, the prosecution was able to ensure a much longer sentence. The state constitution, however, vests discretion over sentencing exclusively in the judicial branch. The court found that selection of the forum in which the youth was tried was an impermissible exercise of discretion over sentencing by the prosecutor, and hence, by the executive branch. Since transfer decisions directly affect sentencing options and duration, only judges may make them. *Id.* at 142, 146-52.

102. *Id.* at 152.

103. Bravo v. Super. Ct., 108 Cal. Rptr. 2d 514 (Cal. Ct. App. 2001) (holding Proposition 21 does not violate state constitutional provisions).

104. *Id.* at 517-23.

105. *See* Alex Roth, *Youth-Crime Law Goes to High Court*, SAN DIEGO UNION-TRIBUNE, June 28, 2001, at B4. *See also* Shannon Lafferty, *The Jury's Still Out on Juvie Crime Measure*, THE RECORDER, April 27, 2001.

Nevertheless, even a ruling by the state supreme court may not be the final word in this highly contentious matter. In a strongly worded dissent, Judge Nares warned,

> The people of this state are constitutionally permitted to completely eliminate availability of the juvenile system for certain juveniles .... [If] the people are not allowed to delegate such limited discretion to prosecutors, the people of this state may well decide that their only recourse is to include all serious and violent crimes in the mandatory direct file system or eliminate the juvenile system as a *whole*.[106]

California voters thus might respond to the judicial branch's gutting of Proposition 21 with an even harsher initiative if the courts rely solely on state legal grounds to strike down the law. This situation illustrates the potentially significant impact of the Covenant on state law: namely, it could limit state voters' ability to pass juvenile justice reform laws by pre-empting such laws via the Supremacy Clause. However, before considering whether the Covenant is enforceable by the state judiciary, it is first necessary to consider whether Proposition 21 in fact constitutes a violation of the Covenant.

3. *Proposition 21's Provisions and the Scope of the Senate's "Exceptional Circumstances" Reservation*

The Senate addressed juvenile justice practices in the United States in its fifth reservation to the treaty ("fifth reservation"). It prefaced the reservation by claiming "the policy and practice of the United States are generally in compliance with ... the Covenant's provisions regarding treatment of juveniles in the criminal justice system."[107] It next reserved to the United States the right "in exceptional circumstances, to treat juveniles as adults, notwithstanding [the relevant provisions of the Covenant]."[108] The reservation also permits housing juveniles with adults in prison in "exceptional circumstances."[109] Thus, in order for the treaty to have any effect whatsoever on California's Proposition 21, the state law must exceed the scope of the Senate's reservation.[110] In other words, the state must transfer juveniles to adult court in cases beyond the contemplated "exceptional circumstances."

The text of the reservation provides no guidance as to what constitutes an "exceptional circumstance" meriting treatment of a juvenile as an adult in contravention of the Covenant obligation. One might be tempted to infer

106. *Manduley*, 104 Cal. Rptr. 2d at 158 (Nares, J., dissenting).
107. 138 CONG. REC., *supra* note 15, at 4783.
108. *Id.*
109. *Id.*
110. For an explanation on why reservations are binding, see *supra* note 47.

that because the reservation defines such contravention of the juvenile's rights as a departure from general practice, it must, by definition, be "exceptional." This sort of bootstrapping would enable the United States glibly to disregard its Covenant obligations with respect to minors in criminal proceedings at will. Such a reading, however, neither conforms to the Covenant's language nor to its ratification history.

First, the observation regarding U.S. practice "generally" complying is not connected by any word suggesting that this observation itself justifies the reservation. In fact, the reservation begins with the word "nevertheless," defined as synonymous with "however."[111] This suggests a statement in opposition to that which precedes it. The "general" compliance stands in opposition to the "exceptional circumstance," and thus cannot textually serve to delimit the scope of such circumstances. Something more is required.

The ratification history in the Senate hints that "exceptional circumstances" may perhaps be defined by the juvenile's criminal history and the nature of the offense. When the Bush administration proposed reservation language pertaining to the housing of juveniles with adults, it stated that "there are instances in which juveniles are not separated from adults, for example because of the juvenile's criminal history or the nature of the offense."[112] Elsewhere in the proposal, the administration reiterated these same examples, stating that "it is important that flexibility remain to address exceptional circumstances in which trial or incarceration of juveniles as adults is appropriate: for example, trial of certain juveniles as adults based on their criminal histories or the nature of their offenses . . . ."[113] Although the Senate never adopted this language, these proposals do provide a clue to the Bush Administration's view of the meaning of "exceptional circumstances." Unfortunately, the Senate provided no guidance of its own during the ratification debates to convey the intended meaning or scope of this language. Given the complete absence of standards to govern "exceptionality" in this context, the Senate appears to have left the door open for individual state courts to interpret the phrase in ways consistent with their own penal codes.

If a juvenile's criminal history and the severity of the juvenile's offense delineate the boundary between exceptional and unexceptional circumstances, it is still unclear where to draw the line. For instance, in the case of Proposition 21, it is not clear under the Covenant reservation how much criminal history a minor must have before she may be transferred out of the juvenile system, or how severe a crime must be to constitute an "exceptional circumstance." Proposition 21 created a laundry list of crimes

111. *See* AM. HERITAGE DICTIONARY 839 (2d college ed. 1985).
112. SEN. COMM. ON FOREIGN RELATIONS, *supra* note 44, at 7.
113. *Id.* at 13.

that qualified for either mandatory or discretionary filing of charges in adult court for youths fourteen and older. The list did not merely include extremely violent conduct, such as murder, assault with a deadly weapon, rape, and kidnapping; it also included crimes such as unarmed robbery, drug sale,[114] and burglary.[115] In addition, it permitted transfer to adult criminal court at the prosecutor's discretion for fourteen- and fifteen-year-olds whenever the minor had prior felony juvenile convictions, used a firearm, or was subject to a list of other special circumstances, including broadly defined gang affiliation.[116]

Arguably, these transfer provisions exceed the scope of the "exceptional circumstances" reserved by the Senate. Though one might contend that some of the enumerated crimes might, indeed, be exceptional, it seems unreasonable to claim that they all are. The inclusion of some nonviolent offenses, and the reliance upon nonviolent prior felonies as a circumstance sufficient to trigger transfer, certainly appears to exceed the scope of the U.S. reservation. Though there is no clear, bright-line rule to define just how "exceptional" the child's circumstances must be to qualify under the reservation, wholesale classification of thousands of youthful offenders would render the reservation almost meaningless in its overinclusiveness.[117]

Ironically, some of the language in Proposition 21 itself provides support for a narrow definition of "exceptional circumstances" in the context of California law. The first tier of Proposition 21 established a schema for mandatory trial of minors in adult court where the youth is charged with first-degree murder enhanced with "special circumstances." This type of crime clearly seems to be of the sort President Bush referred to during the ratification process. Such crimes fall at the extreme side of the spectrum in the California penal scheme; indeed, the crime can be so outrageous that it is punishable by death. In addition, the language of the reservation echoes the penal code ("special circumstances") so closely that in the absence of other compelling interpretive authority, there is little room to argue a discrepancy. Other states may have different language in their penal codes regarding these sorts of "special circumstances." State variation in this context highlights the manner in which the Senate reservation can be adapted to fit a state's particularized framework. This example illustrates such a fit

114. CAL. WELF. & INST. CODE § 707(b)-(d) (Deering Supp. 2001).

115. *See id.*; *see also* CAL. PENAL. CODE § 1203.09 (Deering Supp. 2001).

116. CAL. WELF. & INST. CODE § 707(d)(2) (Deering Supp. 2001). This discretionary transfer, however, is very much in flux and may not have survived the *Manduley* ruling in the Court of Appeals. *See supra* text accompanying notes 101-106.

117. The Senate clearly did not intend to include all juvenile offenders under the reservation's ambit (thus the requirement of exceptionality). If exceptionality could expand to include nonviolent, minor offenses, it could then theoretically expand to encompass any crime at all—effectively emptying the reservation of all meaning. Any logical reading thus must begin by recognizing that the exceptionality provision must provide a meaningful, objective limit.

appropriate to California. Other states naturally would have to construe "exceptional circumstances" in light of their own penal codes. Without guidance from the Senate, a patchwork of fifty state-specific interpretations of the reservation can bring states into compliance using local structures and interpretive models.

Given the above, it seems that some of the felonies enumerated in Proposition 21 appear to fall outside the fifth reservation's boundary, whereas "special circumstance" murder clearly falls within it. However, it is unclear whether some of the enumerated violent crimes that fall short of special circumstance murder are encompassed by the reservation. Without any more guidance from the Senate, there is no reason to assume that the reservation necessarily extends much beyond "special circumstance" murder in California, though the possibility of defining it certainly remains open to reasonable state interpretation. However, for individual judges to make such determinations, they must have authority to rule on the treaty provisions.

By exceeding the scope of the Senate's "exceptional circumstance" reservation, transfer provisions like those in Proposition 21 and similar laws in other states put the United States in breach of its Covenant obligation. The next Part of this Comment explores potential solutions to this problem, considering both state and federal enforcement avenues.

II

STATE AND FEDERAL IMPLEMENTATION AND ENFORCEMENT AS ALTERNATIVE SOLUTIONS TO NONCOMPLIANCE

Given that the Covenant affords rights that are secured nowhere else in American law, the question of the treaty's enforceability looms large. To suggest that states like California are enacting laws that violate the Covenant's human rights provisions and that there is no remedy to the situation would imply that the United States' ratification of the treaty was a mere ruse and that there was never any real obligation undertaken.[118] A more reasonable view of the Senate's motives requires a reading of the

118. U.S. conduct subsequent to ratification contradicts this view. For instance, six years after the Covenant went into effect, President Clinton issued an executive order requiring the agencies of the executive branch to implement the Covenant and other human rights treaty obligations "that fall within [their] areas of responsibility...." Exec. Order No. 13107, 3 C.F.R. 13,107 (1998), *available at* http://www.access.gpo.gov/nara/cfr/waisidx_99/exec_99.html. However, this order had virtually no practical effect upon violative state laws. Without congressional legislation to create a specific legal framework to implement the rights, the executive agencies have had little incentive to enforce them. Furthermore, violative state laws are generally outside the purview of those agencies. Implicitly recognizing this, the executive order merely instituted an Interagency Working Group to develop "proposals and mechanisms for improving the monitoring of the actions by the various States... for their conformity with [the Covenant]." *Id.* This Working Group served a purely advisory capacity and lacked any authority to correct the state laws found to breach the treaty. *See als, infra* text accompanying notes 227-232.

RUDs that enables some remedy to bring noncomplying laws into accord with the international obligation. Such a reading would both respect the RUDs and still give force to the treaty.

Any force that the treaty might have derives from the President's foreign-affairs power under Article II of the Constitution. This Comment thus begins the enforcement analysis by considering the interplay between that foreign-affairs power and federalism concerns when that power intrudes on areas of law otherwise reserved to the states. It argues that federalism principles pose no obstacle to the treaty-making power and that the federal government has full constitutional authority to bind states in such areas using a treaty. Thus, the fact that juvenile justice decisions are normally made locally by state governments does not limit the President's ability to ratify a treaty like the Covenant.

In Part II.B, the Comment considers the capacity of both state and federal judiciaries to enforce the treaty in the absence of national implementing legislation. At the state level, the Comment turns to the impact on treaty enforcement of the Senate's declaration of non-self-execution. It considers examples of erroneous state court decisions holding that non-self-executing treaties have no effect whatsoever upon state laws and argues that state courts must enforce non-self-executing treaties under the Supremacy Clause. Finally, this Comment considers the separate problem of enforcement in federal courts, surveying the Covenant's implications on habeas petitions, as well as other controversies.

A. The Interaction Between Federalism Concerns and Treaty Obligations

Treaty enforcement in American courts presents special difficulties, particularly when the treaty conflicts with the will of a state legislature or the vast majority of voters in a given state. Because the Covenant's provisions affect issues of state law, they raise federalism and Tenth Amendment concerns.

1. Federalism Concerns and the Limits of the Federal Government's Treaty-Making Power

Criminal law has long been regarded as an area reserved by the Tenth Amendment to the states.[119] As a threshold matter, one must ask whether the Covenant's intrusion on an area of law reserved to the states invalidates the treaty entirely. Some scholars argue that the federal government has no right to impinge upon state criminal laws with its treaty-making power.[120]

119. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) ("Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'") (citing Brecht v. Abrahamson, 507 U.S. 619, 635 (1993) (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982))).

120. *See generally* Bradley, *supra* note 10.

Nothing in the Constitution, however, suggests this proposition is true: the Constitution vests in the President, with the advice and consent of the Senate, the power "to make Treaties."[121] It does not limit that power only to the making of treaties which do not affect rights reserved to the states. Such a limitation would make it nearly impossible to conduct the nation's foreign affairs because treaties frequently affect areas of state concern.

Longstanding Supreme Court doctrine holds that there is virtually no limit to the use of the treaty-making power to affect matters otherwise outside the federal government's purview. In 1920, the Court held that a treaty may make binding law in areas otherwise reserved to the several states.[122] As long as the treaty is valid and constitutional, the foreign-affairs power trumps local legislation.[123] Under this precedent and its progeny,[124] there can be no Tenth Amendment dispute about the extent of the federal government's foreign-affairs power, for treaty-making is immune from federalism limitations.[125]

2. *Federalism RUDs' Minimal Impact upon the Nation's Obligation to Enforce the Covenant*

Although the Constitution permits the federal government to make treaties that bind the States, the Senate adopted a special RUD pertaining to the roles of federal and state governments in the implementation of the Covenant. The Senate's RUD stipulates that the federal government will only implement the Covenant "to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments . . . ."[126]

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121. U.S. CONST. art. II, § 2, cl. 2.

122. *See* Missouri v. Holland, 252 U.S. 416, 434-35 (1920).

123. *See id.*

124. *See, e.g.*, United States v. Curtiss Wright Export Corp., 299 U.S. 304 (1936). However, some commentators claim the force of *Missouri v. Holland* has weakened in the intervening years. *See, e.g.*, Bradley, *supra* note 10, at 391 ("For a variety of reasons . . . the distinction between domestic and foreign affairs has been eroding in recent years, and this trend is likely to continue. As a result, there will be an increasing need to reexamine the differential treatment of federal foreign affairs powers."). This claim is based primarily on a policy argument, rather than on superseding precedent. The Supreme Court has given no indication that it intends to soften its position. In fact, Bradley himself admits that his position would require explicitly overruling *Missouri v. Holland*. *See id.* at 394-95.

125. 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). Damrosch contends:

> By virtue of both the authoritative decision of the Supreme Court in *Missouri v. Holland* and the rejection of . . . attempts to reverse that decision . . . our constitutional law is clear: the treaty-makers may make supreme law binding on the states as to any subject, and notions of states' rights should not be asserted as impediments to the full implementation of treaty obligations.

Id. But cf. Bradley, *supra* note 10, at 394-95, 460 (arguing that upholding the principle of federalism requires doing away with the current distinction between foreign affairs and domestic affairs powers, but conceding that this approach "would involve overruling some of the reasoning in *Holland*").

126. 138 CONG. REC., *supra* note 15, at 4783.

The Bush administration proposed this "federalism RUD" in order to "[clarify] the degree to which the federal government is obliged to ensure compliance with the Covenant by state and local entities."[127] It thus seems likely that the federalism RUD arose out of a deliberate executive effort to defer to states' local legislation and judicial jurisdiction.[128] Instead of implementing the treaty fully and homogeneously throughout the nation, by adopting the administration's proposal the Senate explicitly granted states flexibility in deciding for themselves how best to achieve the Covenant's mandate.

Moreover, the U.S. report to the Human Rights Committee promised that the federalism RUD "was not a reservation and did not modify or limit the United States' obligations under the Covenant."[129] Thus, since the Covenant obligates party states to enforce the promised rights, the federalism RUD does nothing to diminish that obligation. The view that the federalism RUD does nothing to diminish the United States' obligations under the Covenant is supported by the past experience of another party state that included a federalism RUD with its ratification of the Covenant. In 1980, Australia made a reservation in relation to its own federal system.[130] It withdrew the reservation four years later,[131] however, after the Netherlands issued a statement of concern about it.[132] The statement indicated that such a reservation would only be acceptable "if it does not impair the obligation to implement the Covenant in all the component parts of the State."[133] This objection stemmed from the Covenant's requirement that the obligation "shall extend to all parts of federal States without any limitations or exceptions,"[134] and the corresponding belief that "federal reservations are contrary to . . . the object and purpose of the Covenant."[135] The Bush administration was aware of the international controversy over Australia's reservation, and expressly chose to avoid purporting to modify or limit the United States' obligation in this regard because such a reservation might be internationally "contentious."[136] Reading the Senate's "federalism RUD" together with the absence of congressional implementing legislation, one

127. SEN. COMM. ON FOREIGN RELATIONS, *supra* note 44 at 9.

128. In fact, the Bush administration explained that the federalism RUD "signal[s] . . . that the Federal Government will remove any Federal inhibition to the States' abilities to meet their obligations." SEN. COMM. ON FOREIGN RELATIONS, *supra* note 44, at 19.

129. *Human Rights Committee Continues Examination*, *supra* note 65, at 2.

130. LIESBETH LIJNZAAD, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY AND RUIN? 200 (1995).

131. *Id.*

132. *Id.* at 224. The Covenant's enforcement mechanism contains a provision whereby party states may voice their concerns about treaty compliance by other party states. Covenant, *supra* note 1, at art. 41, 999 U.N.T.S. at 182.

133. LIJNZAAD, *supra* note 130, at 224.

134. Covenant, *supra* note 1, at art. 50, 999 U.N.T.S. at 185.

135. LIJNZAAD, *supra* note 130, at 194.

136. SEN. COMM. ON FOREIGN RELATIONS, *supra* note 44, at 19.

can reasonably conclude that rather than choosing deliberately to ignore the treaty it had just ratified, the Senate was instead displacing the burden of treaty enforcement onto the states, providing them with an opportunity to devise their own unique implementation schema.

3. *Possible Limits to Congress's Power to Implement the Covenant*

Senator Helms attached a proviso to the Senate's approval at the end of the Covenant's ratification session that may have deterred congressional action. The proviso was a purely domestic statement that was not transmitted to the United Nations: "Nothing in this Covenant requires or authorizes legislation, or other action . . . prohibited by the Constitution of the United States as interpreted by the United States."[137] Combined with the federalism understanding, this proviso arguably worked to deter federal implementing legislation.[138] Thus, without state or federal judicial intervention, and without passage of relevant state legislation, the guarantee of many of the Covenant's rights evaporated as a practical matter.[139]

Despite its practical effects, it is significant that Helms's proviso was not transmitted to the United Nations. The Netherlands' public response to Australia's attempted reservation suggests one possible reason the Senate chose not to transmit the Helms proviso to the U.N. along with the rest of the ratification RUDs. Not telling the world of this intent foreclosed criticism in the international spotlight. However, it also foreclosed any claim to the proviso's validity under international law.[140]

Neither principles of federalism nor the Helms proviso pose any obstacle to enforcement of Covenant rights. Well-established constitutional precedent confirms that treaties such as this can reach into areas of law otherwise reserved to the states despite possible limits to congressional power in those areas. The next Part explores both state and federal enforcement possibilities, and the impact of non-self-execution upon each of them.

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137. 138 CONG. REC., *supra* note 15, at 4784.

138. A question thus arises whether the federal government can even pass national implementing legislation for the rights promised in a treaty. Unlike the foreign-affairs power, the power to pass domestic legislation has clear limits because the Constitution only vests Congress with authority to pass legislation in a narrow, enumerated set of circumstances. LIJNZAAD, *supra* note 130, at 224. If those promised rights are outside Congress's sphere of authority and intrude into matters reserved to local governance, Congress may have no constitutional authority to implement them.

On the other hand, since implementation is necessary to carry out an obligation under an enumerated federal power, the Necessary and Proper Clause may authorize congressional action in this area, despite the federalism RUD. The foreign-affairs power is clearly a power "vested by this Constitution in the Government of the United States" and implementation of the treaty provisions thus would be "necessary and proper for carrying [it] into Execution." U.S. CONST. art. I, § 8, cl. 18.

139. Given the possibility of using the Necessary and Proper Clause to invoke federal authority to pass implementing legislation, it is unclear what Helms intended. Perhaps the proviso was a warning to Helms's colleagues not to submit any bills attempting to give force to the Covenant's rights.

140. *See* Quigley, *supra* note 9, at 1307.

B. *Paths to Judicial Enforcement of the Covenant in the Absence of Implementing Legislation*

Judicial authority to enforce treaty provisions turns upon whether treaty rights are justiciable given the absence of implementing legislation. This question requires a close look at self-execution doctrine at both the state and federal levels, and the crucial differences between those levels.

1. Enforcement of Non-Self-Executing Treaties by State Courts

Upon ratification, the Covenant ostensibly became "the supreme Law of the Land" with respect to the several states.[141] There is considerable scholarly disagreement, however, about the specific effect of a non-self-executing treaty that lacks implementing legislation. Disagreements abound as to whether non-self-execution means a treaty has no domestic effect at all, limited domestic effect in certain areas, or no relevance at all for the question of domestic effect.

Professor Carlos Vazquez claims the treaty automatically has the status of national, federal law, no matter what the Senate intended with its RUDs. Making primarily a textual argument, Professor Vazquez argues, "The Supremacy Clause provides that 'all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.' No interpretation is necessary to conclude that this clause purports to give 'all' treaties the status of domestic law."[142] He contends that an interpretation of non-self-execution which required implementing legislation before a treaty could be given force under the Supremacy Clause would "have the unfortunate effect of reading the reference to treaties entirely out of [that clause]."[143] By relying on the Supremacy Clause, Professor Vasquez argues implicitly for national implementation of treaties.

While the text of the Supremacy Clause directs its command exclusively to the relationship between federal law and state law, putting federal laws and treaties above state laws, nothing in the clause supports an argument for enforceability of treaties solely at the national level.[144] Professor John Yoo marshals historical evidence from the Framing period to support the view that the Supremacy Clause regulates only the relationship between state law and federal law, rather than regulating the relationship between treaties and federal courts. Professor Yoo cites Albert Gallatin's speech during the 1796 Jay Treaty debates, which argued that the Supremacy

141. U.S. CONST. art. VI.

142. Vazquez, *supra* note 13, at 2169.

143. *Id.* at 2171.

144. *See* Yoo, *Treaties and Public Lawmaking*, *supra* note 12, at 2249-50 ("While the Clause does declare the supremacy of federal law over state law, it does not alter the existing relationships between different types of federal law and their methods of enforcement.").

Clause "only compares all the acts of the Federal government with the acts of the individual States, and declares that either of the first, whether under the name of Constitution, law, or Treaty, shall be paramount to and supersede the Constitution and laws of the individual States."[145]

Professor Yoo's reading of the Constitution's text and structure, when combined with his historical analysis, leads him to conclude that non-self-executing treaties lack federal force entirely.[146] He makes an argument that focuses on the Constitution's structure: looking at the allocation of power between the executive's power to make treaties and the legislature's power to enact domestic legislation, he concludes non-self-execution affects the balance of power implicit in the Constitution's structure.[147] Giving force to treaties has an effect almost indiscernible from domestic lawmaking. But since there is almost no limit to the scope of the treaty-making power,[148] such domestic power exists nowhere else in the Constitution. Professor Yoo notes that making such treaties self-executing would vest potentially limitless legislative power in the executive branch through its treaty-making power, contravening Article I's exclusive vesting of limited legislative power in Congress.[149] He concludes that non-self-execution doctrine prevents the executive from usurping Congress's exclusive Article I power to enact domestic legislation.[150] Like Professor Vazquez, Professor Yoo focuses exclusively upon the treaty's potential national effects. His argument does not touch upon treaties that regulate domestic matters outside Congress's legislative matters, such as matters left to the states. His analysis thus implicitly leaves the door open for a non-federal implementation possibility. Giving treaties effect at the state level would avert the structural separation-of-powers problems he discusses.

This distinction between treaties treading upon "Article I areas" and treaties affecting areas reserved to the states becomes particularly significant when combined with the Supremacy Clause. The clause subordinates state law to the laws and treaties of the federal government.[151] Self-execution is irrelevant to this subordinate relationship: regardless of the position one takes in the scholarly debate about the treaty's force at the federal level, the treaty supersedes state law as a purely constitutional mat-

145. *Id.* at 2250 (citing 5 ANNALS OF CONGRESS 468 (1796) (speech of Albert Gallatin)).

146. *See* Yoo, *Globalism and the Constitution*, *supra* note 12 (making a historical argument to support this conclusion); Yoo, *Treaties and Public Lawmaking*, *supra* note 12 (making a textual and structural argument to support this conclusion).

147. Yoo, *Treaties and Public Lawmaking*, *supra* note 12, at 2223.

148. *See supra* text accompanying notes 122-125.

149. Yoo, *Treaties as Public Lawmaking*, *supra* note 12, at 2236-39.

150. *Id.*

151. *Id.* at 2249-50.

ter.[152] It is only at the state level that Professor Vazquez's reliance on the Supremacy Clause has genuine force.[153]

Historical evidence from the Framing also supports this conclusion regarding the applicability of non-self-execution doctrine exclusively to national treaty implementation, rather than to state implementation. Professor Yoo explains, "When treaties encroached on areas within Congressional authority . . . the Framers believed that the House would have a role, not by formally consenting to the treaty, but through its powers over legislation and budget in implementing the treaty."[154] According to Professor Yoo, negotiation of the Jay Treaty with Great Britain in 1795 presented a fulcrum for debate over treaty self-execution in the nascent republic.[155] The debate, however, focused upon implementation at the national level, and the treaty's intrusion upon Congress's enumerated Article I powers.[156] A few decades later, when non-self-execution doctrine first came before the Supreme Court in *Foster v. Neilson*,[157] Chief Justice Marshall used the same rationale when he ruled that for non-self-executing treaties to have domestic effect, they must be "carried into execution by the sovereign power of the respective parties to the instrument."[158] Professor Yoo explains, "Marshall's approach codified the rule of non-self-execution that had originated in the Framing debates and had further developed during the fight over the Jay Treaty."[159] In relying on the "sovereign power" to execute a treaty in order to give it effect, Marshall was pointing to the national government. As with other sources, he was only considering the non-self-execution controversy in terms of a national implementation scheme. These sources suggest that the non-self-execution doctrine's roots lie fully in the controversy over the treaty-making power and Congress's Article I power to legislate.[160] The historical evidence thus supports the textual and structural analysis: nothing in non-self-execution necessarily speaks to implementation by states locally when the treaty does not impact

152. Professor Yoo, however, notes that Madison believed that the Supremacy Clause does not "address whether and how state executives and legislatures must give effect to treaties . . . ." *Id.* at 2250.

153. For example, reading "state law" into his argument for "domestic law" would lend the result: "concluding that the Constitution gives treaties, once made, 'automatic' effect [over state law] requires only a reading of the Supremacy Clause, which declares 'all' treaties to be the 'supreme Law of the Land.'" Vazquez, *supra* note 13, at 2156-57 ("over state law" inserted for "as domestic law"). The change brings his argument into harmony with the Supremacy Clause's comparison of state and federal law, and solves Professor Yoo's criticism, bringing both of their arguments into relative accord on this point.

154. Yoo, *Treaties and Public Lawmaking*, *supra* note 12, at 2223.

155. *See* Yoo, *Globalism and the Constitution*, *supra* note 12, at 1280-84.

156. *Id.* at 2083-84.

157. 27 U.S. 253, 314 (1829).

158. *Id.* at 314.

159. Yoo, *Globalism and the Constitution*, *supra* note 12, at 2091.

160. *See id.* at 2092.

Congress's legislative power. The absence of federal implementing legislation pursuant to Congress's Article I powers thus has no effect upon whether a treaty supersedes state laws under Article VI.

Thus, instead of negating the Covenant's force, non-self-execution merely transfers its force from the federal government to the states. Indeed, the treaty ratification debates imply that the Bush Administration and the Senate intended to give states the opportunity to implement the treaty in their own distinct ways. The flexibility afforded by the Senate's deference to states presents California with an opportunity to correct violative provisions through normal legislative or executive channels. However, in the absence of implementation activity by the other two branches, state court judges must strike down laws that diverge from the treaty's mandates. The state judiciary provides a final, necessary stop-gap between the Covenant and state laws which violate it.

2. *Historical Misinterpretation of Federal Self-Execution Doctrine in California*

Unfortunately, although the Constitution requires states to give force to the human rights treaty provisions in the Covenant, state courts sometimes erroneously interpret federal non-self-execution doctrine to short-circuit the Supremacy Clause. This confusion has a long pedigree in California courts. In previous decades, the California Supreme Court twice took up the issue of non-self-execution as it relates to enforcing human rights agreements. In both cases, however, the court looked at international accords that differed significantly from the Covenant, both in specificity and ratification history. One case involved mere U.N. General Assembly resolutions never adopted by the United States;[161] the other involved the U.N. Charter, a treaty with vague, general international aims.[162] The court in each case chose not to enforce the international documents and relied on federal non-self-execution doctrine to justify its decision.[163] For example, in choosing to disregard U.N. General Assembly resolutions frowning upon the imposition of the death penalty, the court declared that "a treaty . . . has no effect upon domestic law unless it either is implemented by Congress or is self-executing."[164] Such language, however, had no place in the opinion: there was simply no treaty before the court, self-executing or otherwise. The court not only misconstrued the federal nature of self-execution doctrine, but also its relevance to a nontreaty.

161. People v. Ghent, 739 P.2d 1250, 1276 (Cal. 1987) (upholding a death penalty law despite defendant's claim that the law violated international law).

162. Fujii v. California, 242 P.2d 617, 619 (Cal. 1952).

163. *Ghent*, 739 P.2d at 1275-76; *Fujii*, 242 P.2d at 619.

164. *Ghent*, 739 P.2d at 1276.

The *Ghent* court's error stemmed from its reliance upon an earlier court's analysis of the applicability of the U.N. Charter to California law in *Fujii v. California*. In that case, the state's Supreme Court considered the effect of that international document upon California's Alien Land Law.[165] The Alien Land Law prohibited real estate ownership by aliens unless they were either eligible for citizenship or there was a treaty between their country of origin and the United States authorizing such ownership.[166] However, Mr. Fujii, a native of Japan, did not meet either of these conditions. When he nevertheless acquired real estate, a lower court ordered that his property escheat to the state of California.[167] On appeal, he argued that the U.N. Charter superseded California's Alien Land Law because it "pledg[ed] the member nations to promote the observance of human rights and fundamental freedoms without distinction as to race."[168] In considering Mr. Fujii's argument, the court committed two grave errors in its analysis of non-self-execution doctrine. First, although the court did not dispute that the Charter is a treaty binding judges in every state, it asserted that "[a] treaty . . . does not automatically supersede local laws which are inconsistent with it unless the treaty provisions are self-executing."[169] The court thus ruled that in the absence of implementing legislation, the Charter's force at the state level turned solely on the issue of non-self-execution.[170] Thus, because the court found that the Charter was non-self-executing, it held that the Charter had no force at the state level. The *Fujii* court's misreading of the Supremacy Clause has haunted California's courts for decades.[171]

In determining criteria for analyzing whether the treaty was self-executing, the court committed its second error. Although self-execution is fundamentally a question inappropriate for state courts, the court looked at the nature and purpose of the treaty to decide whether to enforce it. The Charter merely set forth the purpose of the United Nations.[172] Primarily expressive in nature, it simply declared that the United Nations "shall promote" various human rights goals and international cooperation.[173] It created no specific internal legal obligations for signatories other than a duty to cooperate with the new international organization.[174] The California Supreme Court interpreted this lack of specificity as evidence of the treaty framers' intent to make the document non-self-executing.[175]

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165. *Fujii*, 242 P.2d at 619.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 620.
170. *Id.* at 620-23.
171. *See, e.g.*, *Ghent*, 739 P.2d at 1276.
172. *Id.*
173. *Fujii*, 242 P.2d at 621.
174. *Id.*
175. *Id.* at 621-22.

This approach is devoid of constitutional authority. The California Supreme Court put itself in the position of selecting which federal treaties it would consider "supreme Law of the Land." It blatantly ignored the explicit command in Article VI regarding "all Treaties made, or which shall be made, under the Authority of the United States . . . ."[176] For the words "all Treaties," the California Supreme Court effectively seemed to have inserted "whichever treaties individual states decide are self-executing, based on criteria states choose." This approach in California implicitly held that individual state courts can use self-execution as a means of sorting out which federal treaties the state will obey.

In divining non-self-execution from the purported intent of the treaty framers, the *Fujii* court also seemed to suggest that it was appropriate for states to make such determinations themselves, opening the door for conflicting determinations of self-execution in different states. Such a bizarre path could lead to hypothetical situations in which New York's courts might interpret the framer's intent for a given treaty to be such that the document is self-executing and thus worthy of enforcement, while California's courts interpret it to be non-self-executing and thus unenforceable. Such peculiar state power regarding treaty enforcement conjures the historical specter of the Articles of Confederation, in which individual states simply chose for themselves whether the nation's treaties would supersede their own laws.[177] The Framers adopted the Supremacy Clause precisely to remedy such an unmanageable, chaotic situation.[178] The California Supreme Court's flawed approach thus runs contrary both to the Constitution's plain text and its federal structure.

The California Supreme Court may soon have an opportunity to correct the error of the *Fujii* court. Proposition 21's violation of the Covenant presents the court with a fresh chance to consider the state's obligation under the Supremacy Clause. The court can dispose of its past misplaced reliance on the intent of the treaty framers, the treaty specificity, and any other purported relics of *Fujii's* self-execution reasoning. Instead, the court

176. U.S. CONST. art VI.

177. *See* Yoo, *Globalism and the Constitution*, *supra* note 12, at 2019-20. This historical specter is by no means entirely hypothetical or confined to the issue of state non-self-execution decisions. It has recently arisen in another context in which a state decided for itself whether to give effect to a particular treaty: in July 2001, Oklahoma's governor, Frank Keating, had to decide whether to give effect to certain Vienna Convention rights in a capital punishment case in which the governor admitted a treaty breach had occurred. *See supra* text accompanying notes 4-5. While making his decision as to whether the state would enforce the rights mandated by the treaty, Keating engaged in direct negotiations with Mexico's President, Vincente Fox, over the matter. *See* Letter from Governor Keating to Vincente Fox, *supra* note 5. He thus put Oklahoma in the historically awkward position of independently negotiating with a foreign head-of-state over a federal treaty's enforceability and implementation.

178. Yoo, *Globalism and the Constitution*, *supra* note 12, at 2026-31 (discussing the genesis of the Supremacy Clause in the Virginia and New Jersey Plans at the Constitutional Convention).

should obey Article VI's explicit command and enforce the treaty over conflicting state laws like Proposition 21.

Though states cannot ignore the Covenant's mandate under the Supremacy Clause, nothing in that clause necessarily speaks to the federal judiciary; rather, it speaks to state judiciaries when confronted with superseding federal law.[179] This situation potentially creates a schism between state and federal courts. The Covenant thus could have force in one court system, while possibly being nonjusticiable in the other.

3. Limitations on Enforcement of Covenant Rights by Federal Courts

Though the federal judiciary has a role to play in upholding Covenant rights, as a practical matter, it will rarely hear challenges to state laws violating the Covenant. Challenges to laws like Proposition 21 will most likely take place in state courts for the simple reason that the juveniles are charged there. Habeas corpus petitions present the significant exception to this situation and are a special difficulty for federal courts.[180]

The U.S. Supreme Court has ruled that defendants lose the right to raise a defense based on a treaty provision in a habeas corpus petition before a federal court if they fail first to develop the factual basis of the treaty defense in state court.[181] In *Breard v. Greene*, a defendant sentenced to death in state court exhausted all appeals.[182] Five years after his conviction, he filed a motion for habeas relief in U.S. district court, arguing for the first time that his arrest violated a provision of the Vienna Convention.[183] As a foreign national, this treaty obligated arresting authorities to advise him that he had the right to contact the Paragnayan Consulate.[184] The Supreme Court held that Mr. Breard procedurally defaulted on his claim to the treaty right by failing to raise it earlier in state court.[185] The Court noted that after the treaty was ratified by the United States, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"),[186] which mandated that petitions for habeas relief alleging violations of treaties of the United States will "not be afforded an evidentiary hearing if [the petitioner] 'has failed to develop the factual basis of the claim in State court proceedings.'"[187] Under the Court's long-standing "last-in-time"

179. *See supra* text accompanying notes 144-145.

180. A writ of habeus corpus permits a prisoner to challenge a state conviction in federal court on constitutional grounds. The purpose is not to reevaluate guilt or innocence, but rather the legality of imprisonment. BLACK'S LAW DICTIONARY 491 (6th ed. 1991); *see also* U.S. CONST. art. 1, § 9; 28 U.S.C.A. § 2241.

181. *See* Breard v. Greene, 523 U.S. 371 (1998).

182. *Id.* at 373.

183. *Id.*

184. *Id.*

185. *Id.* at 375.

186. 28 U.S.C. §§ 2254(a), (e)(2) (1998).

187. *Breard*, 523 U.S. at 376 (citing 28 U.S.C. §§ 2254(a), (e)(2) (Supp. 1998)).

doctrine,[188] this later congressional act nullified the treaty to the extent that it conflicted with the treaty.[189] Thus, the Court found Mr. Breard had no claim to the treaty right.[190]

The AEDPA, fortified with the holding in *Breard v. Green,* has significant ramifications for the exercise of Covenant rights by state criminal defendants seeking postconviction habeas relief in federal court. It becomes critically important to develop the factual basis of those rights early in a defendant's movement through the state justice system before the defendant reaches federal court. The rights cannot be invoked in a habeas petition if they have not been asserted in earlier proceedings. No matter what position one takes on the problem of federal non-self-execution, the doors to federal courts are indisputably barred to criminal defendants who bring their Covenant rights before federal courts too late.

Though habeas corpus petitions represent the most likely means of bringing to federal court a challenge of a state law based on a Covenant right, federal courts have already entertained claims based on the treaty in other contexts. The next Part of this Comment will survey the practical effect of Covenant rights in federal courts outside of the AEDPA/*Breard* limitation upon habeas petitions. Congress has granted federal district courts original jurisdiction over "all civil actions arising under . . . treaties of the United States."[191] Federal courts have already heard several civil claims based on Covenant rights. Furthermore, one U.S. district court has recently recognized a plaintiff's right to sue a police department for civil damages for breaching a Vienna Convention treaty right, finding that the breach was a violation of the plaintiff's civil rights, actionable under 42 U.S.C. § 1983.[192] This holding suggests that federal courts may have a role in remedying violations of treaty rights that goes far beyond the habeas context.[193]

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188. This doctrine refers to a rule dating back to 1888 that requires that "if a treaty and a federal statute conflict, 'the one last in date will control the other.'" *Id.* at 376. *See also* Vazquez, *supra* note 13, at 2189; Bradley, *supra* note 10, at 457; John C. Yoo, *Politics as Law? The Anti-Ballistic Missile Treaty, The Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851, 912 (2001).

189. *Breard*, 523 U.S. at 376.

190. The International Court of Justice recently disagreed with the U.S. Supreme Court's interpretation of the treaty obligation under such circumstances. *See* International Court of Justice, *supra* note 3. Although the ICJ never reviewed the *Breard* case directly, in June 2001 it issued a ruling in *Germany v. United States*, a case with an almost identical fact pattern. The case involved precisely the same Vienna Convention rights at issue in *Breard*, and the ICJ ruled unequivocally that the United States violated the treaty under such circumstances. *Id.*

191. 28 U.S.C.A. § 1331.

192. Standt v. City of New York, 153 F. Supp. 2d 417, 427-31 (S.D.N.Y. 2001).

193. Deval Patrick, who served as Assistant Attorney General to the Justice Department's Civil Rights Division, represented to the Human Rights committee in 1995 that his department was "concerned" about possible discriminatory effects of Proposition 187 in California. His remarks, in the context of a review of Covenant implementation in the United States, seemed to imply that the Justice Department had not ruled out using the Covenant to challenge such state laws in federal court. *See Human Rights Committee Continues Examination*, *supra* note 65, at 9.

It is thus conceivable that a plaintiff might ask a federal court to enjoin enforcement of a state law violating the Covenant. The Eleventh Amendment to the U.S. Constitution, however, has important implications for such cases because it limits federal jurisdiction over suits by individuals against states.[194] Since 1908, however, the Supreme Court has held that the Eleventh Amendment does not bar private suits against state officials for prospective enforcement of a federal right, in cases where such suits seek to enjoin enforcement of a preempted or otherwise constitutionally invalid state law.[195] In 1997, in a fractured plurality opinion reconsidering the modern contours of the *Ex parte Young* exception to state sovereign immunity, only Justice Kennedy and Chief Justice Rehnquist advocated reconceptualizing the doctrine to limit private suits against states in federal court only to cases where there is no available state forum to adjudicate the dispute.[196] Three concurring justices led by Justice O'Connor, however, joined the four dissenting justices in strongly endorsing the continued vitality of the traditional understanding of the *Ex Parte Young* decision, rejecting the proposed narrowing offered by Justice Kennedy.[197] Under O'Connor's view, which is controlling on this point, a private suit against state officials is permissible in federal court if "a plaintiff alleges an *ongoing* violation of *federal* law, and where the relief sought is *prospective* rather than *retrospective*."[198]

The Supremacy Clause makes it clear that the corpus of federal law encompasses the nation's treaties; treaties, like any other federal law, preempt any conflicting state law. O'Connor's langnage in the *Coeur d'Alene* decision left a narrow door open for private suits against state officials in order to enjoin enforcement of state laws that are an "ongoing violation" of a federal treaty obligation. The Court appears willing to concede that such suits continue to be an exception to states' otherwise sweeping sovereign immunity from private suit in federal court.[199] This principle arguably

194. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). In 1996, the U.S. Supreme Court interpreted this limit very broadly to give states sweeping immunity from suit in federal court in many instances. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

195. Ex parte Young, 209 U.S. 123, 159-60, 167-68 (1908).

196. *See* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 270-78 (1997).

197. *See id.* at 288, 291-94 (O'Connor, J., concurring). *See also id.* at 298-301 (Souter, J., dissenting).

198. *Id.* at 294 (O'Connor, J., concurring) (emphasis in original).

199. Similarly, in the *Seminole Tribe* decision in 1996, the Court noted that federal jurisdiction exists over "a suit against state officials when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.'" *Seminole Tribe*, 517 U.S. at 73 (quoting Green v. Mansour, 474 U.S. 977 (1985)). It is important to note how narrowly drawn this exception to the Eleventh Amendment's immunity from suit is. The Court has acknowledged only a right to seek "prospective injunctive relief," not any other sort of remedy. *Id.*

provides a basis for challenging state laws that violate the Covenant by suing state officials in federal court.

Non-self-execution doctrine, however, is an important limit on the scope of such suits in federal venues. In ruling on the enforceability of such treaty rights, the federal courts appear to have developed an implicit two-tiered enforcement structure, making the rights justiciable when asserted by a citizen defensively as protection from the government, but non-self-executing (and thus nonjusticiable before federal courts) when asserted by a citizen in a private cause of action in civil litigation.

a. Current Status of Covenant Rights Before Federal Courts

The U.S. Supreme Court has never ruled on the domestic enforceability of the Covenant in federal courts. In one of the few cases to address the matter after ratification, the Court decided the case on other grounds. In a footnote, the Court refused to rule on the Covenant's validity in the case.[200]

In the absence of a clear ruling from the Supreme Court, lower courts have not shied away from adjudicating claims of violations of Covenant rights. Since ratification, the Ninth Circuit considered at least three cases involving Covenant rights and decided each case on its merits. In 1996, a plaintiff claimed that restrictions on travel to Cuba violated Covenant rights.[201] The panel of judges decided the matter in part by interpreting the Covenant in relation to the challenged statute.[202] Although it found that the challenge to the statute failed based on its interpretation of the Covenant's meaning, the court never suggested that non-self-execution prevented it from adjudicating Covenant rights for a citizen.[203] Two years later in a suit alleging arbitrary arrest, the plaintiff based the claim in part on the Covenant's prohibition on arbitrary arrest and detention.[204] The court's opinion cited the Covenant's text at length, then found the detention was not arbitrary within the meaning of the international obligation.[205] Finally, in early 2000, the Ninth Circuit considered an immigrant's challenge to a deportation detention by the Immigration and Naturalization Service. In striking down the government's policy of indefinite detention, the court expressly

200. United States v. Balsys, 524 U.S. 666, 695 n.16 (1998) (finding the appellant made no claim under the Covenant and the treaty's enforceability was thus not before the Court). In this case, a resident alien was suspected of having once been a participant in Nazi war crimes. He refused to answer questions pursuant to a subpoena, asserting a Fifth Amendment privilege based on his fear of prosecution in Israel, Lithuania, or Germany. *Id.* at 670. Since those countries were signatories to the Covenant, and the Covenant recognizes a right similar to the U.S. Fifth Amendment, treaty enforcement could have come into play. *Id.* at 695 n.16. Balsys failed to raise such a claim, relieving the Court of the need to decide the treaty's domestic impact. *Id.*

201. Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1443 (9th Cir. 1996).

202. *Id.* at 1441-42.

203. *Id.*

204. Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998).

205. *Id.*

relied upon on article nine of the Covenant.[206] The Ninth Circuit consistently treated the Covenant rights as theoretically enforceable in these cases: each opinion turned on the case's facts and legal arguments rather than justiciability of Covenant rights.

The Eleventh Circuit recently went a step further. In *United States v. Duarte-Acero*,[207] it considered whether, under the Covenant, a Colombian national's incarceration in Colombia barred his subsequent incarceration in the United States for the same offense, namely the abduction and attempted murder of an American Drug Enforcement Agency agent in Colombia.[208] The court noted in a footnote that the Senate declaration upon ratification purported to make the rights in question non-self-executing.[209] Nevertheless, it interpreted the specific Covenant provisions goveruing the claimed rights in the case.[210] It held that "[t]he clear language of [the Covenant] manifests that its provisions are to govern the relationship between an individual and his state . . . ."[211] Ultimately, and "most importantly perhaps,"[212] the court looked to the U.N. Human Rights Committee as a source of interpretative authority of the treaty's language because it is "the body charged under [the Covenant] with monitoring its implementation . . . ."[213] In the absence of a compelling reason to depart from the committee's statement on the matter, the court upheld the committee's view, finding that the Covenant does not bar prosecution in U.S. courts despite an earlier conviction for the same offense in courts of another party state.[214]

Thus, the Eleventh Circuit implicitly agreed with the Ninth Circuit that it had authority to hear and decide a claim based on a Covenant right, despite the Senate's non-self-execution RUD. More importantly, however, the Eleventh Circuit went a step further by looking to the Covenant's own enforcement mechanism as a source of interpretive authority; it cited the Human Rights Committee and acknowledged that body's role in overseeing treaty implementation. The non-self-execution RUD seems to have been no deterrent to judicial implementation of the treaty based on the principles handed down from the Human Rights Committee. The case is

206. Ma v. Reno, 208 F.3d 815, 830 (9th Cir. 2000). Though the Supreme Court reviewed the Ninth Circuit's decision recently, it considered a separate question in the case. In a consolidated ruling governing both Ma's case and a similar challenge by another immigrant in the Fifth Circuit, the Court found that the INS policy of indefinite detention was impermissible. It reached the decision on statutory interpretation grounds, thus avoiding the question of the Covenant's enforceability. Zadvydas v. Davis, 121 S. Ct. 2491 (2001).

207. 208 F.3d 1282 (11th Cir. 2000).

208. *Id.* at 1283-84.

209. *Id.* at 1284 n.8.

210. *Id.* at 1285-89.

211. *Id.* at 1286.

212. *Id.* at 1287.

213. *Id.*

214. *Id.* at 1287-88.

significant because it shows a court's nascent effort to venture outside U.S. precedent, ratification history, and the intent of the treaty framers to derive domestic enforcement principles directly from the international body charged with overseeing the treaty.

The Tenth Circuit stands alone in entirely rejecting the Covenant as a source of binding legal authority. In an unpublished order and judgment, it decided that the Covenant's "provisions call upon governments to take certain action and are not addressed to the judicial branch of our government. They do not, by their terms, confer rights upon individual citizens . . . ."[215] In that case, a prisoner filed a claim pro se, alleging that prison authorities in Colorado violated his rights under the Covenant and various other treaties.[216] The court tersely dismissed his suit without oral argument, in part for lack of standing to bring a private claim under the Covenant.[217] The court did not consider self-execution doctrine, any of the Covenant's actual language, or the structure of its obligation. However, it is possible that the lack of counsel to assist with claims based on complex treaty law led to an erroneous result. Indeed, this idea finds support in the circuit's own limitation of the order: "This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel."[218]

Until the Supreme Court resolves the circuit split, the stream of precedent coming from the Ninth and Eleventh Circuits seems to represent an emerging majority view. This view demonstrates a clear willinguess to consider the Covenant's domestic iinpact, interpret its provisions, and adjudicate citizens' rights under the treaty in cases in which those rights are asserted to protect the citizens from government conduct forbidden under the treaty. Such rights are not the only ones the treaty creates, however. Under the treaty's terms, it also protects citizens from each other. The treaty thus purports to bind private citizens, in addition to binding the ratifying nation's government.[219] In the very rare cases in which citizens have used civil litigation to call on federal courts to enforce Covenant rights against infringement by other citizens, federal courts have balked. Under

215. Kyler v. Montezuma County, No. 99-1052, 2000 U.S. App. LEXIS 1145, at *4 (10th Cir. Jan. 28, 2000).

216. *Id.* at *2-4.

217. *Id.* at *4.

218. *Id.* at *1.

219. Examples include the Covenant's prohibition on hate speech, Covenant, *supra* note 1, at art. 20, para. 2, 999 U.N.T.S. at 178, its guarantee of protection of children by family and society, *Id.* art. 24, para. 1, 999 U.N.T.S. at 179, and its affirmation of the right of minority groups to "enjoy their own culture . . . religion . . . [or] language." *Id.* art. 27, 999 U.N.T.S. at 179. The preamble requires that "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant . . . ." *Id.* at Preamble, 999 U.N.T.S. at 173.

such circumstances, in the primary example decided thus far, the court found the rights nonjusticiable because the treaty is non-self-executing.[220]

b. Two-Tiered Federal Enforcement of Covenant Rights

Though relatively few cases have addressed the Covenant since its ratification in 1995, the emerging pattern of federal opinions suggests that where the claimed rights are rights protecting individuals from the state, they are justiciable; where the treaty rights are asserted defensively to protect individuals from behavior prohibited by the treaty, the courts can evaluate the claim under the Covenant and render a decision based on the case's facts, but where the claim involves Covenant rights between private parties in civil litigation, the absence of legislation implementing those rights renders courts helpless to provide a remedy.

The new federal approach to the Covenant further complicates the treaty's already complex judicial enforcement structure. As discussed above, the Supremacy Clause requires enforcement of the treaty at the state level in its entirety; at the federal level, however, these recent cases suggest the enforcement doctrine depends on what type of Covenant right is being asserted, and in what context. Thus, while state courts must universally enforce the treaty without regard to non-self-execution, the federal courts are coalescing around an approach that solves the non-self-execution problem by dividing Covenant rights into two classes. Federal courts enforce those Covenant rights asserted to protect citizens from government action forbidden by the treaty, thereby treating the rights as inherently justiciable despite the absence of implementing legislation. Other rights involving private, civil claims, however, receive no enforcement in the absence of such implementing legislation. Non-self-execution thus seems to affect only Covenant rights that serve as a basis for a private cause of action in federal court.

Although federal courts have not yet explicitly articulated this rule in relation to the Covenant, its application is apparent from this emerging pattern of decisions. This rule is not a novel innovation. Some scholars have argued that non-self-execution means nothing more than that the treaty creates no private right to sue; such an understanding of non-self-execution in no way precludes the treaty from being invoked defensively against the government.[221]

This interpretation of non-self-execution is historically controversial. An alternate interpretation of the doctrine holds that such treaties have no

220. *See, e.g.*, White v. Paulsen, 997 F. Supp. 1380 (E.D. Wash. 1998) (holding that the Covenant did not create a private cause of action for "crimes against humanity" against various corporations allegedly conducting involuntary radiation experiments).

221. *See* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 151-52 (1999).

force as domestic law at all.[222] Because the Covenant's own terms require that signatories provide individuals whose rights are violated with a remedy before "competent judicial, administrative or legislative authorities"[223] and "enforce such remedies when granted,"[224] any definition of non-self-execution that denies the treaty force as federal, domestic law conflicts with the treaty's purpose, structure, and accepted obligation. An attempt to read the non-self-execution declaration as making all of the treaty's rights and obligations unenforceable in American courts would lead to the conclusion that the United States chose to "ratify" the treaty by "breaching" the treaty: undertaking an obligation to provide an effective judicial remedy while at the same time making such a remedy effectively impossible in U.S. courts. The manifestly absurd results of such a broad reading of the declaration argue for its implausibility. By contrast the narrow definition of non-self-execution as a limit only upon private causes of action renders a more logical result: pursuant to ratification, federal courts can enforce Covenant rights when asserted defensively to prevent the government from breaching the treaty obligation it undertook.

The Covenant's history subsequent to ratification also supports reading non-self-execution as applicable only to private causes of action.[225] The treaty requires the United States to report to the U.N. Human Rights Committee on the status of the treaty rights domestically, and U.S. government submitted its initial report in 1995.[226] The report assured the Human Rights Committee that "the [non-self-execution] declaration did not limit the international obligations of the United States under the Covenant. The Covenant did not, by itself, create private rights directly enforceable in United States courts."[227] At a meeting on March 31, 1995, the committee considered the report. Conrad K. Harper, a member of the U.S. delegation serving as Legal Advisor to the U.S. State Department, spoke to the committee of "litigants invok[ing] the Covenant,"[228] noting that while "the Covenant could not provide a cause of action, courts could refer to the Covenant and take guidance from it."[229] Most importantly, "[w]hat it could do, and did, was to establish and enforce uniform

222. *Id.* at 147-48 (suggesting that the Supreme Court historically has appeared to adopt this position). *But see id.* at 152-68 (reviewing conflicting positions adopted by some past presidents during treaty ratification, including the Bush administration, which sometimes adopted the "private cause of action" definition of non-self-execution).

223. Covenant, *supra* note 1, at art. 2. para. 3(b), 999 U.N.T.S. at 174.

224. *Id.* art. 2, para. 3(c), 999 U.N.T.S. at 174.

225. Historically, the conduct of treaty parties has sometimes played an important role in courts' interpretation of intent in analyzing the document. *See* Riesenfeld & Abbot, *supra* note 47, at 616.

226. *See* O'FLAHERTY, *supra* note 50, at 44.

227. *Human Rights Committee Continues Examination*, *supra* note 65, at 2. *See also Consideration of Reports*, *supra* note 45, at 4.

228. *Human Rights Committee Continues Examination*, *supra* note 65, at 4.

229. *Id.* at 5.

standards for the respect of civil and political rights.... That could include direct invalidation of any offending laws at the state level."[230]

These representations by the U.S. delegation pleased some of the committee members.[231] The committee's official comments about the report explain, "The Committee takes note of the position expressed by the delegation that, notwithstanding the non-self-executing declaration of the United States, courts of the United States are not prevented from seeking guidance from the Covenant in interpreting United States law."[232] These representations to the Human Rights Committee closely track the approach to non-self-execution the federal courts seem to have adopted with respect to the Covenant. Although no federal court has cited these representations, the pattern of holdings suggest that courts have adopted a two-tiered system of enforcement that mirrors the manner in which the U.S. delegation described the non-self-execution declaration's scope: namely, in the absence of implementing legislation, it only prevents litigants from using the treaty as a basis for a private cause of action. It does not affect the courts' ability to enforce the treaty in other situations, such as relying on the Covenant rights defensively in a criminal prosecution. Federal judges thus have the power to enforce the Covenant in all criminal matters they hear. However, except in the narrow category of habeas cases in which the Covenant right was not asserted timely in state court, federal courts are unlikely to encounter cases involving challenges to state laws like Proposition 21. Thus, state judiciaries, which hear cases involving juvenile transfer to adult court on a daily basis, provide the most obvious means for bringing "rogue states" like California into compliance with the treaty. Juveniles prosecuted as adults have legal standing to challenge the adult court's jurisdiction, based on the Covenant's guarantee that they be treated with regard to their age.

CONCLUSION

By ratifying the Covenant, the United States made a promise to enforce the treaty's rights domestically. Although the Senate blurred the terms of that promise with a tangle of RUDs, a close reading of the ratification documents reveals that the contours of the original promise remain intact. When state laws like California's Proposition 21 violate the treaty's terms with respect to government behavior, both state and federal courts have a duty to enforce the treaty.

Despite the Senate's federalism RUD, both the treaty's own terms and the text of the Supremacy Clause require that its provisions apply without

230. *Id.*

231. *Human Rights Committee Continues Examination, supra* note 65, at 8.

232. *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant. Comments of the Human Rights Committee*, UN Doc. CCPR/C/79/AD.50 (April 7, 1995) at 3, para. 11.

exception to all fifty states. Although human rights treaties necessarily reach into areas normally controlled at a state level, a long stream of Supreme Court precedent supports such use of the national treaty power. Federalism provides no refuge for state interests in the area of foreign affairs. Juvenile justice laws are no exception to this general rule.

Similarly, just as the federalism RUD fails to shield states from the treaty's effect, the Constitution's text, structure, and history make it clear that the Senate's non-self-execution RUD fails as well. Non-self-execution has conceptual coherence only when applied to treaty enforcement at the federal level. At the state level, even non-self-executing treaties must have effect under the Supremacy Clause. State courts thus have a constitutional duty to enforce such treaties above their own laws, even in the absence of implementing legislation.

In California, the example of Proposition 21's preemption may raise legitimate concerns that the treaty power is antimajoritarian. Application of the Covenant in this case will supersede the clear will of 4.5 million voters. Such an argument could apply to virtually any preemption of popular state laws under the Supremacy Clause. The Constitution's structure, however, vests a democratic element in the treaty power through the Senate: California's Senators, like those of other states, had an opportunity to consider the Covenant in 1993 and consider withholding their consent to ratification. Although the treaty now trumps local democracy, it can do so only because it was initially adopted pursuant to the Constitution's national, democratic safeguard on the treaty power.

In light of this situation, California's Supreme Court should embrace its constitutional duty to uphold the treaty. It should recognize that the non-self-execution RUD does not speak to state courts, but instead only commands federal courts to limit the treaty's use as a basis for a private cause of action. In reviewing Proposition 21, the California court now faces a glaring discrepancy between the state's practice of trying juveniles as adults, and the Covenant's requirement that juvenile trials take account of the minors' age. The court's path ought to be clear: despite a history of misconstruing its role in enforcing human rights treaties, it should now correct its error by giving force to the Covenant and acknowledging the impact of Article VI upon state law.

California's situation is not unique. Throughout the country, other state courts are similarly obligated to enforce the Covenant when faced with conflicting state law. Such conflicts may emerge regarding any of the Covenant's provisions; in addition to providing express rights to criminal defendants, the Covenant also addresses other areas of law. Examples include guarantees of protection of privacy,[233] labor rights,[234] marriage

233. Covenant, *supra* note 1, at art. 17, 999 U.N.T.S. at 177.

234. *Id.* art. 22, para. 1, 999 U.N.T.S. at 178.

rights and family law,[235] and cultural rights of ethnic minorities.[236] Any existing state laws in these areas that do not conform to the Covenant's terms would be vulnerable to preemption. The treaty's impact upon state judiciaries is thus potentially enormous.

Although this Comment has focused upon the role of courts to enforce the treaty's terms at the state level, there are several other methods to bring "rogue states" into compliance with the Covenant. In light of states' widespread disregard for the treaty's obligations, so long as Congress continues to defer to the states in this area, state legislatures could fully execute the Covenant by whatever means they deem appropriate. In California, voter repeal of Proposition 21 also remains theoretically possible, though unlikely given the measure's recent popularity. Even if any of these implementation possibilities were to come to pass, legislative methods like these are slow. The urgency of the situation merits faster intervention: each of the thousands of children transferred to adult court each year represents an additional potentially aggrieved party. Courts thus present the best hope for bringing California and other states into compliance with U.S. obligations under the Covenant, at least until elected representatives take an interest in the treaty.

Unfortunately, lack of judicial awareness of this international obligation presents a tremendous practical hurdle in California, as in every other state. The Human Rights Committee harshly criticized the United States for failing to educate the legal establishment about treaty rights. It chided, "The judiciary must be made aware of the evolving legal standards coming out of the application of the Covenant."[237] This problem is likely to worsen as the Covenant's ratification recedes into the dustbin of history. The United States' second periodic report updating the Human Rights Committee on this country's progress will undoubtedly have little good news on this front.[238]

235. *Id.* art. 23-24, 999 U.N.T.S. at 179.

236. *Id.* art. 27, 999 U.N.T.S. at 179.

237. *Human Rights Committee Continues Consideration of United States' Initial Report*, U.N. GAOR, Hum. Rts. Comm., 53rd Sess., 1402nd mtg. at 1, U.N. Doc. HR/CT/401 (1995), *available at* gopher://gopher.undp.org:70/00/uncurr/press_releases/HR/CT/95_03/401.

238. The report is presently overdue. It was due to the Human Rights Committee on July 9, 1998. O'FLAHERTY, *supra* note 50, at 44.