

SAINT

unilateral statement... made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."

RUDs are often controversial because they have the potential to undermine the integrity and impact of a treaty. The United States' extensive use of RUDs in its ratification processes has been widely criticized by UN bodies and by other UN member nations.<sup>5</sup> Domestic U.S. human rights advocates have also challenged the United States' use of RUDs, sometimes arguing that it would be better to simply not ratify a treaty rather than riddle it with RUDs.

As part of its package of RUDs, the United States has attached a so-called "federalism understanding" to each of the three ratified treaties cited above, which sets out the United States' understanding of its treaty obligations in light of the tiered federal nature of the U.S. government.<sup>6</sup> Domestic advocates have expressed concerns about whether this understanding is intended by the federal government to avoid its treaty implementation obligations, and they have frequently criticized the scope of the federalism clause.<sup>7</sup> Defenders and critics alike have suggested that the clause is designed to protect subnational prerogatives even as the federal government takes on treaty obligations through ratification.<sup>9</sup>

The federalism clause undoubtedly has the potential to undermine the cohesion of U.S. human rights obligations, as it might be construed to exempt the federal government from primary responsibility for significant areas of human rights realization. But I want to temporarily lay those concerns to one side for purposes of this Article. Instead of railing against RUDs, I seek to explore what happens if we suspend concerns about federal accountability under international human rights law and simply accept the federalism clause at face

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5. See, e.g., Kristina Ash, U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence, 35 *N.W. J. INTL HUM. RTS.* 1, 5 (2005); see also M. Cherif Bassiouni, Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate, 42 *DEPAUL L. REV.* 1169, 1177 (1993).



The CAT was opened for ratification in 1984 and now has 162 state parties, including the United States.<sup>13</sup> In ratifying the CAT in 1990, the United States adopted the following federalism understanding:

[T]he United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing Articles 10, 14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention.<sup>14</sup>

The referenced articles of the CAT address the implementation of the Convention's provisions through education efforts directed to law enforcement and other relevant personnel, and integration of the provisions into all levels of criminal law decisionmaking, measures that would require independent state and local action under the U.S. federal system.

Commenting on the CAT Federalism clause, David Stewart, a State Department official, called the understanding "convoluted."<sup>16</sup> Perhaps in reaction to this observation, the federalism clause submitted with U.S. ratification of the ICCPR in 1992, took a somewhat more streamlined approach, stating that:

[T]he United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing Articles 10, 14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention.<sup>14</sup>

Importantly, this understanding does not include limiting citations to

the government, however, more rights protective local initiatives were shielded, at least to some degree, by the treaty's terms. According to the United States, "[b]ecause the fundamental requirements of the Convention are respected and complied with at all levels of government, the United States concluded there was no need to preempt these state and local initiatives through the exercise of the constitutional treaty power."<sup>4</sup>

Two treaties submitted by the Executive branch for the Senate's consideration but never formally ratified also included proposed federalism clauses. CEDAW was approved by the Senate Foreign Relations Committee in July 2002, but it has never been submitted to the full Senate for consideration, which is necessary for final ratification.<sup>5</sup> CEDAW's proposed federalism understanding, which would be subject to additional Senate debate were the



Alone among the federalism clauses, this ~~entire~~ sole federalism provision designated as a reservations—explicitly intended to protect local derogation from the impact of federal treaty obligations. Importantly, this reservation would not only sanction derogation but would also presumptively allow more vigorous local human rights implementation in areas outside of federal purview.

This brief survey of federalism clauses indicates that the most extreme of the provisions under consideration as part of U.S. treaty ratification—the reservation attached to the CRPD<sup>33</sup> intended to insulate subnational governments that fall short of treaty standards. Other federalism clauses do not go so far, and instead, carve out particular spheres for subnational leadership on treaty compliance. All of the clauses preserve for states and localities the possibility of treaty compliance efforts that exceed federal efforts, while providing assurance that the federal government will not impede such efforts.

## II. DOMESTIC LEGAL SIGNIFICANCE OF FEDERALISM CLAUSES

Recent scholarship on RUDs has focused on their domestic enforceability, finding through exhaustive case analysis that domestic court majorities almost always recognized RUDs to be operative and enforceable when domestic treaty implementation is at issue. For example, a recent survey of case law reports that “lower courts have repeatedly upheld RUDs, stating that certain treaties or treaty provisions are self-executing, most prominently in cases involving the ICCPR.”<sup>34</sup>

Unlike the nonself-executing RUDs, federalism understandings in U.S.-ratified treaties have not been specifically interpreted in domestic litigation.<sup>35</sup> However, the U.S. Supreme Court’s decision in *Bond v. United States*<sup>36</sup> not explicitly addressing a federalism understanding, elucidates the structural limitations of federal implementation of an international treaty.<sup>37</sup>

The *Bond* facts are memorable. In brief, a woman involved in a romantic triangle tried to use a highly toxic chemical to threaten and potentially harm her romantic rival.<sup>37</sup> Among other things, she smeared the chemical on her rival’s mailbox, triggering the concern of the U.S. Postal Service and thus, the federal government.<sup>38</sup> A zealous federal prosecutor charged the woman with violating Section 229 of the Chemical Weapons Convention Implementation Act of 1998

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Rights of Persons with Disabilities before the Senate Comm. on Foreign Relations, Cong. at 42 (2012) (statement of Eve Hill, Senior Counselor to Assistant Attorney General for Civil Rights) (explaining how reservations prevent the convention from impacting domestic parental rights); BLANCHFIELD & BROWN, *supra*note 28, at 104-1.

33. Chung, *supra*note 31 at 176.

34. *Id.* at 188-96, n.74 (citing cases).

35. *Id.* at 182-92.

36. 134 S. Ct. 2077, 2081 (2014).

37. *Id.* at 2085.

38. *Id.*





arguing that it impinged on traditional areas of state control.<sup>49</sup> The U.S. government countered that the domestic statute implemented the terms of an international treaty on migratory birds entered into by Great Britain (acting for Canada) and the United States.<sup>50</sup> Citing the strength of the Constitution's Supremacy Clause and its designation of treaties as "the Supreme law of the land," the U.S. Supreme Court upheld Congress's authority to enact the federal implementing statute in the face of Missouri's challenge.<sup>51</sup>

Missouri v. Holland has been both criticized and praised for its broad view of federal power vis-à-vis states.<sup>52</sup> Bond certainly takes a narrower view of federal power. Yet by reading an implicit federalism understanding into the Chemical Weapons Convention, the Supreme Court was able to preserve Missouri v. Holland while avoiding the admittedly absurd result of prosecuting an isolated personal vendetta as chemical warfare of international dimensions.<sup>53</sup>

That is not to say that Missouri v. Holland could not be factually and legally distinguished from United States v. Bond. Even had the migratory bird treaty included an explicit federalism clause (much less an implicit one), the analysis would not have been the same as that in

III. PRACTICAL IMPLICATIONS FOR HUMAN RIGHTS CITIES AND SANCTUARY  
JURISDICTIONS

In furtherance of U.S. obligations under ratified human rights treaties, some local governments have adopted policies that explic

United States. Addressing the issue of homelessness is one example. National Law Center on Homelessness and Poverty has detailed the many ways in which local criminal sanctions imposed for loitering, camping, and other incidents common to lack of housing amount to criminalization of homelessness in violation of many provisions of the ICCPR to which the United States is a party.<sup>60</sup> The international community has confirmed that such measures violate international human rights norms.<sup>61</sup> But since the particular regulatory measures involved—e.g., zoning ordinances, local criminal laws—are primarily the province of subnational regulation in our federal system, meeting these national human rights obligations requires local participation and even leadership.<sup>62</sup>

At times, the United States has used international mechanisms as a means to show its support for such local initiatives. For example, in 2014, the U.S. government invited Salt Lake City Mayor Ralph Becker to attend the UN Human Rights Committee's review of United States compliance with its obligations under the ICCPR. Mayor Becker testified to the international body regarding Salt Lake City's progressive approach to resolving chronic homelessness of veterans.<sup>64</sup>

60. See generally NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 11 (2014), [https://www.nlchp.org/documents/No\\_Safe\\_Place](https://www.nlchp.org/documents/No_Safe_Place) [<https://perma.cc/6VAV-YT>].

61. See, e.g., NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, CRUEL, INHUMAN, AND DEGRADING: HOMELESSNESS IN THE UNITED STATES UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (2013), [https://www.nlchp.org/documents/Cruel\\_Inhuman\\_and\\_Degrading](https://www.nlchp.org/documents/Cruel_Inhuman_and_Degrading) [<https://perma.cc/V5HQ-KBJ>].

62. See, e.g., Leilani Farha (Special Rapporteur), Rep. of the Special Rapporteur on adequate housing



even though they have stopped short of ratification.<sup>70</sup>

detaining immigrants without a warrant<sup>76</sup>In part, the pressure arises from the

In adopting sanctuary policies, subnational governments are acting in spheres that are reserved to them under principles of domestic federalism, i.e., police power, education, and community social services.<sup>82</sup> Further, the principles underlying local sanctuary policies are consistent with international human rights obligations accepted by the United States through its formal treaty ratification, such as the right to security, the right to equal treatment, and the right to fair and equal procedures.<sup>84</sup> These rights, protected by the ICCPR, the CERD, and the CAT, extend to all residents of a territory, regardless of citizenship.<sup>85</sup> While national level immigration restrictions are per se valid as core exercises of national sovereignty, that does not mean that undocumented individuals present within a jurisdiction forego all rights.<sup>86</sup> Importantly, many of the rights held by undocumented residents are the province of local governments, which recognize and uphold them in part through their sanctuary policies.<sup>87</sup>

Jordan Paust has argued that the federalism clauses serve to protect and





