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Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellín

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I. INTRODUCTION

Subnational implementation of human rights law has been the subject of increasing interest among scholars and litigators in recent years, building on the call for independent state constitutionalism[1] and the rise of New Federalism.[2] For state constitutionalists, international human rights law provides a legitimating source for articulating state constitutional principles not captured in federal constitutional law. For human rights advocates, state courts provide an alternative and possibly friendlier forum for some of these kinds of claims. With the prominent success of some of these international and comparative arguments,[3] state

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1. This movement began with Justice William Brennan's call for state courts to "step into the breach" created by the United States Supreme Court's limited commitment to the protection of individual rights. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977). *See also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

2. *See* Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons From Coordination*, 73 MO. L. REV. 1185, 1190-92 (2008) (describing the "resurgence" of interest in federalism both in the courts and in the broader political discourse).

3. Among the most widely discussed of these decisions were the California Supreme Court's decision in *In re Marriage Cases*, which cited *inter alia* to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights in support of its holding that marriage is a basic civil right, 183 P.3d 384, 426 n.41 (Cal. 2008), and the Missouri Supreme Court's decision finding the juvenile death penalty unconstitutional, presaging the United States Supreme Court's decision in the same case. *See* Simmons v. Roper, 112 S.W.3d 397, 411 (Mo. 2003) (referencing the

court decisions applying international human rights law have become the subject of systematic study and coordinated advocacy efforts.[4]

The space for independent state action to implement international human rights law may have been limited somewhat by the Supreme Court's 2008 decision in *Medellín v. Texas*.[5] That opinion contains language suggesting that non-self-executing treaties, including ratified human rights treaties, do not even have the status of domestic law absent implementing legislation.[6] Under this view of the non-self-execution doctrine, states are under no obligation to respect or enforce even ratified treaty law until it is implemented through federal legislation. Despite the outpouring of scholarship suggesting that the Court's language should not be interpreted this broadly,[7] this view of the non-self-execution doctrine is becoming the law on the ground, at least in state courts.[8]

Convention on the Rights of the Child and "other international treaties and agreements [that] expressly prohibit the practice.").

4. The Opportunity Agenda has begun to comprehensively review state courts' opinions for their use of human rights law. THE OPPORTUNITY AGENDA, HUMAN RIGHTS IN STATE COURTS: AN OVERVIEW AND RECOMMENDATIONS FOR LEGAL ADVOCACY (2008), *available at* http://opportunityagenda.org/report_state_courts_and_human_rights_2008_edition.

5. Medellín v. Texas, 552 U.S. 491 (2008).

6. The Court stated, "What we mean by 'self-executing' is that the treaty has automatic domestic effect . . . upon ratification. Conversely, a 'non-self-executing' treaty does not by itself give rise to domestically enforceable federal law." *Medellín*, 552 U.S. at 505 n. 2. *See also id*. at 504 ("This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law").

7. Curtis Bradley, for example, acknowledges that the Court's statements could be viewed as stating that treaties "have no domestic law status at all," but contends that the decision should be interpreted to mean only that non-self-executing treaties are not judicially-enforceable. Curtis Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 541, 548-50 (2008). *See also* Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131, 164-81.

8. For example, a Florida court, citing *Medellín*, rejected a challenge based on the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], on the grounds that absent federal implementing legislation, the treaty had no domestic effect.

> The ICCPR was ratified subject to a declaration of non-execution. As such, appellant has no judicially enforceable right directly arising out of a challenge to the ICCPR as it would be interpreted by its signatory nations; his argument can attack only the breadth of United States law implementing the treaty. This case does not involve such an attack. Until the treaty is implemented through congressional action, it cannot act as a limitation on the power of the Florida Legislature to determine the appropriate penalties for violations of the law.

Graham v. State, 982 So.2d 43, 54 (Fla. Dist. Ct. App. 2008) (citations omitted), *rev'd*, 130 S.Ct. 2011 (2010). The Florida court's interpretation of the *Medellín* decision was then adopted by a court in California. *See* People v. See, No. F055800, 2009 WL 4882677 (Cal. Ct. App. Dec. 18, 2009), *review denied* Mar. 30, 2010. *See also* Parrish v. Commonwealth, 272 S.W.3d 161, 180 (Ky. 2008) ("[T]he U.S. Supreme Court has recently reiterated that to be binding on the states, treaties must be either self-executing

My purpose here is to determine what effect this reading of *Medellín* would have on the future of international state constitutionalism. To do so, I study the conditions under which state jurists have engaged with the international human rights treaties the United States has signed or ratified, in order to consider whether and how these interactions will be affected by this new understanding of the status of treaty law. I begin in Part II by briefly reviewing the different paths through which human rights treaty law could be raised in state court cases. I then turn in Part III to surveying the activity on the ground. I examine the state cases that cite these treaties in order to identify when and how state courts engage substantively with these instruments. This in turn provides insight into possible advocacy strategies for increasing state court consideration of treaty norms. Finally, in Part IV, I consider these findings to assess how the *Medellín* decision will impact the international prospects of state constitutionalism. I conclude that because state courts have been more receptive to arguments based on treaty instruments as non-binding, persuasive authority, even the broadest reading of *Medellín* will not end this type of human rights advocacy.

II. PATHS TO STATE COURT CONSIDERATION OF HUMAN RIGHTS TREATIES

Even prior to *Medellín*, state participation in treaty implementation was complicated by the doctrinal uncertainty surrounding the status of these treaties in domestic law, as well as the mixed messages that the federal government had sent to the states as to their role in implementing these instruments. As a formal matter, not all human rights treaties have equal status in United States law. There are some treaties that the United States has signed, but that have not been adopted by the Senate.[9] Then there are instruments that the United States has signed and ratified, but that have not been implemented through federal legislation.[10] Finally,

or carried out by way of legislation. The International Covenant is neither self-executing nor has it been implemented by way of domestic legislation.") (citations omitted).

9. This group includes the Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter CESCR]; the Convention on the Elimination of All Forms of Discrimination Against Women, July 17, 1980, 1249 U.N.T.S. 14 [hereinafter CEDAW]; the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; and the Convention on the Rights of Persons with Disabilities, Mar. 30, 2007, 189 U.N.T.S. 137.

10. This group includes the International Convention on the Elimination on all Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD]; and the ICCPR.

there are treaties that have been signed, ratified, and implemented through federal legislation.[11]

As the "supreme Law of the Land,"[12] ratified international human rights treaties would seem to have a stronger case for domestic enforceability in state courts than the instruments that have not yet been approved by the Senate. Nonetheless, a variety of procedural barriers make this story far more complicated. The international human rights treaties that have been ratified were adopted with provisions rendering them non-self-executing, which has been interpreted to mean that they cannot supply the cause of action in federal court.[13] Scholars have argued, however, that even if these treaties do not supply the cause of action, they must be considered and enforced once a cause of action is established through another channel.[14]

For example, "[a] right of action is not necessary to invoke a treaty as a defense. . . . Thus, a defendant being prosecuted or sued under a state or prior federal law that is inconsistent with a treaty is entitled to invoke the treaty in court to nullify the state or federal law without having to show that the treaty confers a private right of action."[15] Additionally, rights protected by a non-self-executing treaty may arguably be raised via another statute "that provide[s] a cause of action for the vindication of federal rights."[16] For example, "42 U.S.C. § 1983 provides an action against anyone who, under color of state law, deprives a person of rights guaranteed by federal law, which would include

11. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 18 U.S.C. §§ 2340-2340(B), 1456 U.N.T.S. 85.

12. U.S. CONST. art. VI, § 1, cl. 2.

13. There is a long-standing academic debate over the legality of these reservations. *See, e.g.*, Domingues v. State, 961 P.2d 1279, 1280-82 (Nev. 1998) (both majority and dissent consider the legality of the reservation to the ICCPR); William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?* 21 BROOK. J. INT'L. L. 277, 318-19 (1995). Nonetheless, most courts seem to have accepted their validity.

14. *See, e.g.*, Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 370-71 (2006) ("Even if a treaty is deemed non-self-executing, the United States and its constituent states are still bound by it. As such, a court considering the legality of government action must take such treaty obligations into account. Even on the federal level, the non-self-executing nature of a treaty simply precludes private enforcement action and use of the treaty to secure jurisdiction. It does not bar judicial consideration and enforcement of the treaty's terms once a cause of action and jurisdiction is secured on some other basis." (citations omitted)).

15. Carlos Manuel Vasquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1143 (1992) (citing Kolovrat v. Oregon, 366 U.S. 187, 197 (1961); Patsone v. Pennsylvania, 232 U.S. 138, 145 (1914)).

16. William M. Carter, Jr., *Treaties as Law and the Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation*, 69 MD. L. REV. 344, 346 (2010).

ratified treaties."[17] The habeas corpus statute also permits relief to be granted in cases where custody is determined to be "in violation of the Constitution or laws or *treaties* of the United States."[18] These types of arguments have been met with mixed success in state courts.[19]

Perhaps because of the complexities inherent in "hard" law applications of international human rights treaties even prior to *Medellín*, most scholars in the area have focused on possible "soft" law uses of these treaties by state courts, and particularly on their use in state constitutional interpretation.[20] For example, Professor Martha Davis has suggested that international human rights treaty law may be particularly pertinent in helping state jurists to contextualize and understand the positive rights embodied in state constitutions "that have no federal analogues but that are similar to international human rights law and to provisions of modern constitutions around the world."[21] This use of

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17. *Id.* at 346 n. 8.

18. 28 U.S.C. § 2254(a) (2006) (emphasis added).

19. In the criminal context, some courts have been willing to consider challenges to particular penalties based on the ICCPR and CERD, although none have concluded that these treaties prevent the imposition of a constitutional punishment. *See, e.g.*, *infra* n. 25 and accompanying text. Other courts simply state that because these treaties are non-self-executing, they may not be raised by a private party (even in her own defense). *See infra* note 26. I have not been able to locate many examples where courts have been asked to indirectly enforce these rights on behalf of a private party outside the criminal context, and in the cases that do exist, the treaty argument is usually somewhat farfetched. *See, e.g.*, *Application of Griffiths*, 294 A.2d 281, 289-90 (Conn. 1972) (rejecting bar applicant's argument that CEDAW principles are violated by state rule preventing non-U.S. citizens from becoming members of the CT bar), *rev'd on other grounds*, 413 U.S. 717 (1973). The *Medellín* decision may have cleared up the confusion around self-execution by finding that non-self-executing treaties have *no* domestic effect absent implementing legislation. This would appear to close the door on treaty enforcement in state courts *via* an alternative cause of action. Moreover, it would also remove the obligation (and mandate) for state level enforcement of treaty guarantees through the executive and legislative branches. *See generally* Johanna Kalb, *The Persistence of Dualism in Human Rights Treaty Implementation, forthcoming* YALE L. & POL'Y REV. (forthcoming 2011). In other words, following *Medellín*, there is arguably no difference from the state perspective between ratified and unratified treaties.

20. *See generally* Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Points of Entry*, 115 YALE L.J. 1564, 1627-29 (2006); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 275-76 (2001).

21. Davis, *supra* note 14, at 360. International citation by state courts also avoids some of the criticisms that have been leveled at federal courts engaged in the practice. First, state court engagement with these instruments tends to be related to issues of individual rights, many of which were historically controlled by the states. Therefore, the risk that a state court's decision would interfere with the executive's prerogative in international law and foreign affairs is relatively slim. *See id.* at 377. Second, state constitutions (either in their original form or through amendments) may reference principles that emerge from the international human rights instruments making the norms they embody part of the state's founding tradition, and thus, potentially, a more legitimate

international human rights treaties as persuasive evidence of applicable norms and standards has caught the attention of advocates in a variety of subject matter areas.

III. INTERNATIONAL HUMAN RIGHTS TREATIES IN STATE COURTS

Despite the interest of scholars and practitioners in state court consideration of international and transnational law claims, the available data suggests that, at least as measured by *volume* of cases, state court engagement with human rights treaties is still minimal. A search performed in the AllStates database[22] on Westlaw in June 2010 found only 187 opinions in which any of these eight treaties were cited.[23] Although this method is inexact,[24] it gives a general sense of the limited pool of opinions citing international human rights treaty law. The small sample makes it hard to draw any definitive conclusions about state court behavior; however, a few potentially useful observations are possible.

First, even prior to the Supreme Court's decision in *Medellín*, there appears to be some uncertainty among state judges and justices about what level of authority the ratified treaties should be given in judicial decision-making. Some state courts view the treaty law as binding, but consistent with federal and state constitutional law such that any action lawful under domestic law is automatically consistent with international

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source for constitutional interpretation. *Id.* at 379-80. Third, "the relative populism of state constitutions weakens accusations of countermajoritarianism in the state context." *Id.* at 382. Finally, state judges may be more adept than federal judges at applying foreign sources, given how frequently they draw upon the comparative experience of the other American states. Thus, they are less open to the charge of "cherry-picking" only the comparators that support their desired outcome. *Id.* at 382-83.

22. Coverage in the ALLSTATES database begins in 1658. It includes the decisions of the highest courts of all the states that were part of the union prior to 1948, the year in which the UDHR—the oldest instrument studied here—was adopted. It also includes decisions from at least some of the lower courts of all the states and the District of Columbia, but the times at which coverage of these courts begins varies greatly.

23. The citations break down is as follows: the ICCPR was cited 118 times; the CAT was cited 24 times; the CRC was cited sixteen times; the Genocide Convention was cited four times; CEDAW was cited four times; the ICESCR was cited three times; the CERD was cited sixteen times; and the CRPD was cited once.

24. This snapshot may not represent a complete picture of state court citation of these treaties because some of the decisions may not be published or available on Westlaw. *See supra* note 23. This search also fails to catch instances in which courts referred to the treaties differently, like, for example, referencing the International Covenant on Civil and Political Rights as the International Convention on Civil and Political Rights, or as the United Nations Covenant on Civil and Political Rights. *See State v. Robert H.*, 393 A.2d 1387, 1389 (N.H. 1978), *overruled in part by In re Craig T.*, 800 A.2d 819 (N.H. 2002). Finally, these are not all discrete cases. In some instances, the treaty was referred to in the opinions of multiple courts addressing the same case and some cases reference more than one treaty. Nonetheless, even without a precise count, it is clear that the pool is extremely small.

law.[25] Others simply reject entirely the notion that treaty-based claims can be raised by private parties.[26] The complexities go beyond the self-execution debate, however, as state courts attempt to understand their own particular relationship with these treaties. Justice Houston drew attention to this problem in a concurring opinion in *Ex parte Pressley*,[27] a case in which the court was asked to invalidate the death sentence of a juvenile offender based on the ICCPR.[28] The majority relied upon a ratification reservation which reserved for "[t]he United States" the ability to impose capital punishment on any person other than a pregnant woman "subject to its constitutional constraints."[29] Justice Houston, in concurrence, noted that "the United States" was referred to as single entity and he thus expressed his concern that the reservation was applicable only to the federal government.[30] Nonetheless, he reluctantly joined the majority's conclusion, noting that the U.S. Supreme Court had denied a petition for certiorari in a similar case from the Nevada Supreme Court, which split 3-2 in rejecting the juvenile defendant's claim that his execution violated the ICCPR.[31]

Uncertainty with how international human rights law claims should be treated in state courts may partially explain the somewhat odd pattern in which they appear. Although one might expect citations to ratified treaties (as the law of the land) to be far more frequent than the unratified treaties, the pattern is actually more complex. The ratified treaties are cited more often than the unratified treaties; however, the Universal Declaration on Human Rights, which is a non-binding aspirational statement of shared principles, is cited both more frequently than any of

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25. *See, e.g.*, *People v. Alfaro*, 163 P.3d 118, 157 (Cal. 2008) ("International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements") (internal quotation marks and citations omitted); *State v. Yates*, 168 P.3d 359, 401 (Wash. 2007) ("Yates has not explained why the treaty's clauses should be read more broadly than the Eighth Amendment") (citations omitted).

26. *See Abdullah v. Warden-Cheshire*, No. CV010457822, 2009 WL 1140526, at * 6 (Conn. Super. Ct. Mar. 26, 2009); *Kaenel v. Maricopa Bd. of Supervisors*, No. 1 CA-CV 08-0043, 2008 WL 4814283 (Ariz. Ct. App. Oct. 23, 2008).

27. *Ex parte* Pressley, 770 So. 2d 143 (Ala. 2000).

28. *Id.* at 147-48, 150-51.

29. *Id.* at 148.

30. Federalism is alive and well. The United States Constitution binds me as a Supreme Court Justice of the Supreme Court of Alabama to abide by the ICCPR, Article 6(5), and not to impose the sentence of death on Pressley for the crimes committed when he was 16 years of age. I am not persuaded that the Senate's reservation, if not invalid for other reasons, frees me as a state justice, as opposed to a federal justice or judge, from the treaty's restriction against the imposition of a sentence of death for a crime committed by a person below the age of 18 years.

Id. at 150-51 (Houston, J. concurring).

31. *Id*. at 151 (citing *Domingues v. Nevada*, 961 P.2d 1279 (Nev. 1998)).

the ratified treaties with the exception of the ICCPR and more often than any of the signed but as yet unratified treaties.[32] Moreover, as discussed below,[33] persuasive citations to the UDHR have arguably had more direct impact on the outcomes of the cases in which they were raised than references to the ratified treaties.

Some of the cases suggest actual confusion among jurists (or perhaps among the parties appearing before them) about the status of these instruments in domestic law. In *In re Julie Anne*,[34] an Ohio court held that parents were restrained from smoking in front of minor child.[35] The court noted that under the United Nations Convention on the Rights of the Child (CRC), courts of law, state legislatures, and administrative agencies have a duty as a matter of human rights law to reduce children's compelled exposure to tobacco smoke.[36] But the court mistakenly suggested that the CRC had been ratified by the U.S.[37] In other instances, state courts' ambiguity about the treaty's status may be purposeful. In a 2007 case by the Supreme Court of Hawai'i, the court relied on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to reach its holding that the state constitutional right to privacy does not prevent the criminalization of prostitution.[38] The court noted that the consensus in the international community is that prostitution has negative consequences, and that the U.S. has agreed to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."[39] The court did not explain, however, that the U.S. has failed to ratify CEDAW, despite noting that several other countries have ratified it and referencing a link to the UN Division on the Advancement of Women that explains the status of the treaty in each state.[40] Thus, it seems plausible that the court wished to downplay the treaty's formal status.

To the extent that the human rights treaties do appear in state court jurisprudence, they are only rarely used as scholars have suggested as a source for non-binding but persuasive authority in state constitutional or statutory interpretation. The frequency with which these treaties are

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32. The UDHR had been cited 52 times in available state court decisions as of June 2010.

33. *See infra* note 67 and accompanying text.

34. *In re* Julie Anne, 780 N.E.2d 635 (Ohio Com. Pl. 2002).

35. *Id.* at 659.

36. *Id.* at 652.

37. *Id.* ("The 1989 United Nations Convention on the Rights of the Child, ratified by almost 200 countries including the United States. . . .").

38. *See* State v. Romano, 155 P.3d 1102, 1115 (Haw. 2007).

39. *Id.* at 1114 n.14 (quoting Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 19 I.L.M. 33 (1980)).

40. *Roman*, 155 P.3d at 1114.

cited appears to have increased over the years,[41] but the change has predominately resulted from an increase in the parties' reliance on these instruments as binding authority that prohibits the imposition of a particular type of criminal sanction.[42] Although the parties have often been quite creative in their framing of these arguments, courts around the country have generally been dismissive of the claim that they are bound by even the ratified instruments, although the reasons for their rejection of these sources have varied.

Viewed with a wide lens, therefore, the practice of international state constitutionalism still appears to be limited. Nonetheless, a more detailed examination of the cases suggests they have had an impact that is significant and disproportionate to their numbers. Whether accepted or rejected by the courts, treaty-based arguments offer openings for embedding these instruments into the domestic rights discourse in ways that appear to have tangible results. Despite their relative infrequency, these cases both individually and collectively appear to have been quite meaningful. Therefore, it is worth continuing to develop a more nuanced understanding of the practice.[43]

A. International Treaty Law as Persuasive

There is a small but significant group of opinions in which state courts have used international human rights treaties in the informative but non-binding way that most scholars have envisioned. The most prominent are those decided by state appellate and high courts on controversial or challenging issues of state constitutional interpretation. These include the previously-referenced California Supreme Court's decision on same-sex marriage which cited to the ICCPR,[44] the Missouri Supreme Court's reliance on the CRC to strike down the juvenile death penalty,[45] and the Oregon Supreme Court's references to the UDHR, the ICCPR, and the European Convention to interpret a state constitutional provision governing the treatment of the incarcerated.[46] However, it is not just the most high-profile and politically charged cases where international human rights law has been valuable. In a custody hearing

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41. Of the 187 citations, all but 25 have occurred since January 1, 2000. This trend may also be attributable to the increasing electronic accessibility of state court opinions.

42. Usually, these challenges occur in the criminal context and most are to the imposition of the death penalty or the sentencing of a juvenile to life without the possibility of parole. Citations to the ICCPR make up over half of the pool and the vast majority of these occur in criminal cases.

43. The Opportunity Agenda helpfully provides a state-by-state review of the use of international human rights law in state courts. *See supra* note 4.

44. *See In re* Marriage Cases, 43 Cal. 4th 747, 819 n. 41 (Cal. 2008).

45. *See* Simmons v. Roper, 112 S.W.3d 397, 411 (Mo. 2003).

46. Sterling v. Cupp, 625 P.2d 123, 132 n. 21 (Or. 1981).

in a New York family court in 2008, the court referenced the principles of the CRC in interpreting the Family Court Act to require age appropriate consultation with the child at a permanency hearing.[47] The court relied on the CRC provision as evidence of a widespread norm toward permitting the participation of a child in proceedings that affect him and thus interpreted the statute consistently with the treaty.[48] In another New York case, the court engaged in a lengthy discussion of the United States' obligations under both the ICCPR and the CRPD[49] in reading a New York guardianship statute to require "periodic review to prevent the abuses which may otherwise flow from the state's grant of power over a person with disabilities."[50] Thus, international human rights law may prove a useful tool in rights advocacy at all levels.

Although tracking the treaty's path into the court's analysis is difficult, two identifiable sources are apparent from the study. First, these "soft law" uses of treaty law seem to occur most frequently when the writing judge or justice is one who adopts a strong vision of independent state constitutionalism. Second, and perhaps quite obviously, this methodology succeeds when it has previously been successful in other state or federal courts.

1. Receptive Judges

Identifying the role that a judge or justice plays in the case analysis is challenging, especially given that for many state court decisions, the parties' briefings are not electronically available. Nonetheless, there are some correlations that can be drawn based on an external understanding of the jurist's philosophy or judging. There are a handful of state judges who have written about the use of international and comparative sources and, not coincidentally, some of them have authored opinions that employ these strategies.[51] For example, retired Chief Justice Margaret H.

47. *See In re* Pedro M., 864 N.Y.S.2d 869, 871 n.8, (N.Y. Fam. Ct. 2008).

48. *Id.* Similarly, in *Batista v. Batista*, No. FA 92 0059661, 1992 WL 156171, at *6-7 (Conn. Super. Jun. 18, 1992), a Connecticut court considered the persuasive value of the CRC in determining how to weigh the preferences of the child in a custody suit. The Court expressed "great concern and embarrassment that the United States of America is not a signator to that Convention." *Id.*

49. *See In re* Mark C.H., 906 N.Y.S.2d 419, 433-44 (N.Y. County Sur. Ct. 2010). The court acknowledged and addressed the distinction in status between the ratified ICCPR and the signed, but not yet ratified, CPRD. *See id.* The court explained, however, that as a signatory to CPRD, the United States is required by the Vienna Convention "to refrain from acts which would defeat [the Disability Convention's] object and purpose. . . ." *Id.* at 433 (first alteration in original).

50. *Id.*

51. *See, e.g.*, Thomas R. Phillips, *State Supreme Courts: Local Courts in a Global World*, 38 TEX. INT'L L.J. 557 (2003) (authored by then-Chief Justice of the Supreme Court of Texas); Shirley S. Abrahamson & Michael J. Fischer, *All the World's a*

Marshall of the Massachusetts Supreme Judicial Court has argued that state court judges "are uniquely positioned to take advantage of the significant potential of comparative constitutional law" because of their expertise in drawing on the comparative experience of other American jurisdictions, their continued work "in the open tradition of the common law," and their role as interpreters of "'positive liberty' clauses" that have parallels in the new constitutions of other democracies.[52] Not coincidentally, she employed this approach in *Goodridge v. Department of Public Health*,[53] in determining what remedy was due to appellants who successfully challenged the constitutionality of Massachusetts' marriage licensing requirements.[54]

Although similar parallels have been hard to find with respect to the use of human rights treaties, this group of "receptive" jurists can arguably be defined more broadly to include the vocal judicial advocates of independent state constitutionalism, including, for example, retired Justice Hans Linde of the Oregon Supreme Court, and Senior Justice Ellen Ash Peters of the Connecticut Supreme Court. Both justices have argued that state jurists should take into account their own unique history, culture, and legal tradition when interpreting the state constitution, and both have looked to international human rights law as a way to begin to articulate unique state constitutional standards.[55]

In *Sterling v. Cupp*,[56] Justice Linde wrote for a divided Supreme Court that the Oregon Constitution bars cross-gender patdowns of

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Courtroom: Judging in the New Millennium, 26 HOFSTRA L. REV. 273, 276 (1997) (authored by Chief Justice of the Wisconsin Supreme Court and former law clerk to Justice Abrahamson respectively).

52. The Honorable Margaret H. Marshall, *"Wise Parents Do Not Hesitate to Learn From Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1641-43 (2004).

53. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

54. *See id.* at 969 (concurring with the remedy used by the Court of Appeals for Ontario to confront the problem as "entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle in light of evolving constitutional standards").

55. *See* Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980); Ellen A. Peters, *Getting Away From the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1545 (1997) ("State courts succeed by drawing on their own heritage, their own constitutions, their own common law, and their own statutes to craft and apply a broad range of jurisprudential principles that often differ substantially from those that govern the federal courts. State courts might, of course, more completely satisfy these serious responsibilities if their work had the benefit of sustained academic input."). *See also* Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065 (1998). These groups are in some cases overlapping. *See* Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 955 (1982).

56. Sterling v. Cupp, 625 P.2d 123 (Or. 1981).

prisoners' sexually intimate bodily areas, except in cases where a patdown was necessitated by the immediate circumstances.[57] In reaching this holding, Linde noted that the Oregon Constitution has five provisions regarding the treatment of prisoners that have no federal counterpart,[58] including a provision "confin[ing] 'rigorous' treatment of prisoners within constitutional bounds of necessity."[59] In determining that unnecessary cross-gender patdown searches violated this guarantee, Justice Linde drew on a variety of sources including the standards adopted by the Federal Bureau of Prisons, the American Bar Association, and the American Correctional Association. Linde also noted that "the same principles [that animate these standards] have been a worldwide concern recognized by the United Nations and other multinational bodies," and then cited the relevant provisions of the UDHR and the ICCPR.[60] The international human rights instruments function in this decision not as binding authority,[61] but as persuasive evidence of a shared concept of dignity.

Similarly in *Moore v. Ganim*,[62] a case challenging the constitutionality of a Connecticut statute that limited the general assistance benefits that employable persons could receive to no more than nine months in a year,[63] Justice Ellen Ash Peters, writing in concurrence, relied on the UDHR to argue for finding a governmental obligation under the Connecticut Constitution to provide for minimal subsistence.[64] She tied the provision of welfare to "contemporary notions about democracy and universal suffrage,"[65] as articulated in UDHR article 25(1), which declares that:[E]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[66]

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57. *See id.* at 136-37.

58. *See id.* at 127-28 (stating that the United States Constitution "does not go beyond bills of attainder and 'cruel and unusual punishments'" while "[s]tate constitutions, by contrast, often contain clauses expressly directed toward guaranteeing humane treatment of those prosecuted for crime").

59. *Id*. at 128 (citing OR. CONST. art. I, § 13).

60. *Id.* at 131; *see id.* at 131-32 n.21 (citing the UDHR and ICCPR).

61. The ICCPR was not ratified until 1992. *See supra* note 10 and accompanying text.

62. Moore v. Ganim, 660 A.2d 742 (Conn. 1995).

63. *See id;* CONN. GEN. STAT. § 17-273b (1993).

64. *See Ganim*, 660 A.2d at 780-81.

65. *Id*. at 780.

66. *Id*. at 780 (*citing* Universal Declaration of Human Rights, U.N. Doc. A/811 (1948)).

Although Justice Peters recognized that the UDHR does not bind the United States, she nonetheless asserted that "the wide international agreement on at least the hortatory goals identified in the human rights documents strongly supports the plaintiff's claim." [67]

Thus, individual judges may play a significant role in incorporating international and comparative sources into state jurisprudence. Those who are more likely to do so appear to also favor robust state constitutionalism and therefore are looking for supporting sources to help articulate the state's constitutional vision.

2. Modeling the Behavior of Other Courts

A second way that the soft law approach appears in state court cases is when the court is modeling the practice adopted by other courts in a particular type of case. The clearest example of this path comes in the death penalty context. In *Roper v. Simmons*,[68] the Supreme Court

67. *Ganim,* 660 A.2d at 781. Interestingly, there are more examples of state court reliance on the non-binding UDHR to incorporate human rights norms in state constitutional and statutory interpretation than reliance on either the ratified or unratified human rights treaties. *See, e.g.,* Am. Nat'l Life Ins. Co. v. Fair Employment & Hous. Comm., 32 Cal. 3d 603, 608 n.4 (Cal. 1982) (noting the similar language found in both Art. I, section 8 of the California Constitution and Art. 2 of the UDHR); City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 130 n.2 (Cal. 1980) (identifying numerous provisions within the UDHR as support for the right to privacy in one's home); Bixby v. Pierno, 4 Cal. 3d 130, 143 n.9, 145 n.12 (Cal. 1971) (citing to the UDHR when discussing California courts' protection of the right to practice one's trade or profession from "the massive apparatus of government."); Boehm v. Superior Court, 178 Cal. App. 3d 494, 502 (Cal. Ct. App. 1986) (citing the UDHR as support for its conclusion that it would be "inhumane and shocking to the conscience" to deny low income residents of Merced County, California an appropriate allowance for each of the basic necessities of life, including minimum medical assistance); *In re* Barbara White, 97 Cal. App. 3d 141 (Cal. Ct. App. 1979) (striking down a condition of probation that placed limits on the right of petitioner to travel in certain parts of the city as violating the U.S. and California Constitutions and noting that the fundamental right to travel is protected in the UDHR); Sheridan Road Baptist Church v. Dept. of Educ., 396 N.W.2d 373, 408 (Mich. 1986) (Riley, J. dissenting) (arguing that the UDHR supports parental autonomy in directing the education of children); Wilson v. Hacker, 101 N.Y.S.2d 461, 472 (N.Y. Sup. Ct. 1950) (invoking the UDHR as demonstrative of a commitment towards the elimination of gender discrimination); Beck v. Mfrs. Hanover Trust Co., 125 Misc. 2d 771, 775 n.5 (N.Y. Sup. Ct. 1984) (referring to the UDHR when acknowledging that certain human rights violations violate accepted standards of international law); Jamur Prod. Corp. v. Quill, 51 Misc. 2d 501, 509-510 (N.Y. Sup. Ct. 1966) (recognizing the UDHR as a valuable authority when evaluating whether certain conduct should be deemed actionable); Eggert v. Seattle, 505 P.2d 801, 802 (Wash. 1973) (relying on the UDHR as supplemental authority in striking down a Seattle ordinance that imposed a one year durational residency requirement upon applicants for civil service positions because the legislation restricted one's freedom of movement). This may be due to the longer history of the UDHR or to the fact that reference to this instrument avoids the complicated question of its level of binding authority.

68. Roper v. Simmons, 543 U.S. 551 (2005).

controversially considered international treaty law and comparative law sources in reaching its conclusion that the Eighth Amendment bars the imposition of the death penalty on juveniles.[69] In so doing, the Supreme Court was actually following the lead of the Missouri courts, which had relied on these same sources in making their original determination.[70]

Since that decision, litigants have raised treaty law norms in other Eighth Amendment claims and, following the Supreme Court's lead, some state courts have been willing to consider these sources. For example, in *People v. Pratcher*,[71] a California appellate court considered a challenge by a juvenile defendant to the constitutionality of a 50-year sentence.[72] Citing *Roper*, Pratcher argued that there is an international consensus against sentencing minors to life imprisonment.[73] The court considered the international sources, with particular emphasis on the Convention on the Rights of the Child, but determined that the lack of legislative or judicial consensus in the United States against lengthy sentences for juveniles was dispositive.[74] Although the defendant's claim was ultimately rejected, the court did adopt the Supreme Court's method of considering the treaty's guarantees and its level of acceptance in the international community as a potentially persuasive argument.[75]

States also model other state courts' treatment of these instruments, even without federal mediation. For example, in *Bott v. DeLand*,[76] the Utah Supreme Court held that a prisoner may recover damages under the Utah Constitution if the prisoner can show either deliberate indifference or unnecessary abuse.[77] In determining the meaning of "unnecessary abuse," the court looked to and relied upon Justice Linde's decision in *Sterling v. Cupp*.[78] The court noted the grounding of the Oregon court's

69. *Id.*

70. State *ex. rel.* Simmons v. Roper, 112 S.W.3d 397, 411 (Mo. 2003). Before examining this type of evidence, the court noted that the practice had been applied by the United States Supreme Court in Atkins v. Virginia, 536 U.S. 304 (2002). *See Simmons*, 112 S.W. 3d at 405.

71. People v. Pratcher, No. A117112, 2009 WL 2332183 (Cal. Ct. App. Jul. 30, 2009).

72. *Id.*

73. *Id.* at *49-50.

74. *Id.*

75. *See id.* This is not to suggest that all state courts have adopted this trend. In a case decided by the same court a couple of months earlier, the court rejected the international treaty claims simply by noting that the CRC has not been ratified and "is also not binding on us." *See* People v. Dyleski, No. A115725, 2009 WL 1114077 at *36 (Cal. Ct. App. Apr. 27, 2009).

76. Bott v. DeLand, 922 P.2d 732 (Utah 1996), *abrogated on other grounds by* Spackman *ex. rel.* Spackman v. Bd. of Educ. of Box Elder County Sch. Dist.,16 P.3d 533 (Ut. 2000).

77. *Bott*, 922 P.2d at 737-40.

78. *Id.* at 740-41.

decision in the "internationally accepted standards of humane treatment as articulated in the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, and the Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1995."[79]

These two types of opinions represent a small subset of the already small pool of state court decisions referencing international human rights treaties. Despite their rarity, these decisions are powerful because of the norms they establish and the way in which these norms are then transmitted vertically and horizontally among state and federal courts. The conditions under which these decisions have occurred suggest a strategy for maximizing the occurrence of this phenomenon. Given that individual jurists appear to play a key role in incorporating these instruments into state court decisions, more attention should perhaps be paid to identifying them. The judicial philosophies of the U.S. Supreme Court are well-known—and the particular leanings of the federal circuits are certainly considered by advocates seeking a friendly forum for particular rights-related claims. These cases suggest that similar attention should be paid to understanding state courts, despite the additional complexity of doing so. Given that the jurists who have used international or comparative human rights law tend to also seem (at least in some cases) to be advocates of independent state constitutionalism, states with established primacy or interstitial methods of state constitutional interpretation[80] will likely include some judges or justices who are receptive to these types of claims. Additionally, there may be personal or professional characteristics shared by those judges and justices that predict a greater openness or comfort with these types of claims.[81] Even a single jurist, such as Justice Peters in *Moore*, may be responsive to treaty-based arguments and find ways to incorporate these norms into the conversation. And once the arguments are present in one state's jurisprudence, they may then become more persuasive to other courts at the state and federal level.

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79. *Id.*

80. The primacy approach, as outlined by then-Professor Linde, requires courts to consider state constitutional claims before reaching claims under the federal constitution. *See* Robert Williams, 77 MISS. L.J. 225, 239 (2007) (citing Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 135 (1970)). The interstitial approach to state constitutional interpretation reverses the order. The state constitutional issue is examined only if the federal claim fails. *See* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1171-72 (1985).

81. For example, both Justice Linde and Chief Justice Marshall were born and spent significant parts of their youth outside of the United States. Thanks to fellow Symposium author Bob Williams for this insight.

B. *International Human Rights Treaty Law as Binding*

In the remaining opinions, which constitute the large majority of the sample, the treaties appear in the decisions because they have been raised by the parties as binding law to be applied in the court, generally in the context of the death penalty. Although most of these challenges have failed, at least to the extent that the courts have consistently rejected arguments that capital punishment is prohibited by these treaties, they have contributed to a deeper and more localized dialogue about these rights and their meaning, which in some instances has changed the operative norms.

1. Coordinated Litigation Strategies

By far the most common scenario in which binding claims based on the ratified international human treaties are introduced in state courts is in challenges to the practice of capital punishment and life without parole. Again, any relationship between the individual cases is difficult to identify from the opinions themselves, but an external view suggests that they are part of a coordinated litigation strategy.

> Around the mid-1990s . . . a transnational network of human rights activists, NGOs, and defense lawyers began a campaign to bring national criminal justice systems into conformity with the abolition of the death penalty in the ICCPR. In countries where capital punishment persisted—most notably the United States—the network of these "norm entrepreneurs" worked to limit the application of the death penalty through novel arguments rooted in emerging international and foreign practices.[82]

In this context, it seems plausible to characterize the increase in frequency of these claims in state court opinions as resulting in part from coordinated and concerted effort. The notable appearance of human rights law in Supreme Court opinions striking down some applications of the death penalty has likely led advocates to raise treaty-based claims in more cases, if only for preservation in the event of future changes in the law.[83] Significantly, however, the successful treaty-based arguments were not based on their use as binding authority.

Despite the failure of these arguments to effect direct change in particular cases, coordinated campaigns raising claims based on

82. Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law*, 34 GA. J. INT'L & COMP. L. 393, 413 (2006).

83. The North Carolina courts have explicitly referred to these claims in a section of the opinion on "preservation issues." *See, e.g.*, State v. Allen, 626 S.E.2d 271, 287 (N.C. 2006).

international treaty law may help to build awareness of and engagement with these instruments among both jurists and litigants, even if the claims are unsuccessful. Moreover, the awareness they create may result in adoption of the right or the norm outside of the courts. This has happened in the death penalty context. Despite formal rejection of the argument that international treaty law requires the abolition of the death penalty, reliance on capital punishment has decreased in the United States, assisted in some instances by decisions of the United States Supreme Court limiting the contexts in which it is permissible.[84] A similar phenomenon occurred in litigation surrounding U.S. compliance with the Vienna Convention on Consular Relations, Professor Janet Koven Levit explains that by the time the United States Supreme Court rejected the possibility of a judicial remedy for violations of the right to consular notification, the "core goal of Vienna Convention litigation, compliance, had been met."[85] In other words, despite the fact that courts have generally rejected the possibility of mandating a remedy for VCCR violations, the ongoing vertical and horizontal dialogue on these instruments has resulted in an increase in state and local compliance with the treaty's notification requirement. Therefore, even rejected treaty claims may, in certain circumstances, ultimately have rights-enhancing effects.

2. Interbranch Debates

A second way that binding claims have been raised is through inter-branch dialogue at the state level. In other words, the court is asked to consider the legality of another branch's interaction with the treaty. In California, the legislature passed legislation defining a term in the state constitution in accordance with CERD in order to permit some forms of preferential treatment based on race.[86] This legislative action prompted

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84. *See* Margaret E. McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 759-60 (2006) ("While the United States in the exercise of its foreign affairs powers has become more sophisticated in its use of reservations, understandings and declarations to limits its obligations under the central human rights regimes . . . and has become more confident in its rejection of other multilateral regimes . . . practice within U.S. courts has moved closer to the international standards in the one area where it has steadfastly rejected international influence: the death penalty.") (citiations omitted).

85. *See* Janet Koven Levit, *Does Medellín Matter?,* 77 FORDHAM L. REV. 617, 630 (2008). Levit interviewed a variety of actors in the city of Tulsa, Oklahoma, as a way of demonstrating how the "bottom up" story of the Vienna Convention differs from the "top down" account of Supreme Court and International Court of Justice decisions. *Id.*

86. CERD specifically permits the use of "special measures securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection," which may conflict with the limitations the Supreme Court has placed on the use of affirmative action programs.

numerous legal challenges, and in *C & C Construction v. Sacramento Municipal Utility District*,[87] a California appeals court determined that the legislature had unconstitutionally infringed on the power of the courts to interpret the constitution.[88] Professor J. Owens Smith, who was responsible for the research and drafting of the legislation, said in the aftermath of the decision that the state court erred in failing to accord the appropriate weight to the ratified treaty.[89] "The state constitution should be subordinate to the human rights treaty," he said.[90] "The CERD definition, the Supreme Law of the Land, should have trumped the state law."[91]

A few years later, this argument got its day in court. In *Coral Construction, Inc. v. City of San Francisco*,[92] the appellate court was asked to strike down a San Francisco business ordinance that required race- and gender-conscious remedies in the awarding of city contracts as a means of ameliorating the effects of past discrimination.[93] The court again concluded that the California legislature's enactment of Section 8315 amounted to a legislative attempt to amend the state constitution without following the proper procedures for amendment.[94] The City contended that C&C was wrongly decided because:

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87. C & C Const., Inc. v. Sacramento Mun. Utility Dist., Cal. Rptr. 3d 715 (Cal. Dist. Ct. App. 2004).

88. The Court explained that "Assembly Bill No. 703 amounted to an attempt by the Legislature and the Governor to amend the California Constitution without complying with the procedures for amendment. This attempt was manifestly beyond their constitutional authority." *Id.* at 726. The California Supreme Court declined to review the case. The relationship between CERD and the provision in question, and the state's obligations with respect to CERD, were raised for the first time on appeal and thus summarily dismissed. *Id.* at 726-27. The court did note, however, that CERD permits "special measures" only to ensure certain racial or ethnic groups or individuals "equal enjoyment or exercise of human rights and fundamental freedoms. . . ." *Id.* (citing CERD art. 1 § 4). The court determined that the decision to ban affirmative action programs by referendum meant that the California citizenry had determined that "special measures are not only unnecessary to ensure human rights and fundamental freedoms in California, but inimical to those principles." *Id.* at 727. Therefore, the court concluded that the special measures authorized by CERD "are not permitted in California, even under the Convention." *Id.*

89. Martha Davis, *Thinking Globally, Acting Locally: States, Municipalities, and International Human Rights*, *in* BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 127, 142-43 (Soohoo, Albisa & Davis, eds. 2008).

90. Kalb, *supra* note 19.

91. *Id.* at 143.

92. Coral Constr., Inc. v. City of San Francisco, 57 Cal. Rptr. 3d 781 (Dist. Ct. App.-1st 2007).

93. *Id.* at 783.

94. *Id.* at 792. Prior to the legislative enactment, the Supreme Court had adopted the dictionary meaning of the term "discriminate" in the Constitution. *See* Hi-Voltage Wire Works, Inc. v. City of San Jose, 24 Cal. 4th 537, 559-60 (2000).

> the Legislature's power to enact Section 8315 does not arise under state law. Rather, in this instance, the California Legislature was acting pursuant to an express federal duty placed upon it by the United States Senate to execute a United States treaty within its jurisdiction. Because the Legislature's power to act derived from federal rather than state law, it was superior to Proposition 209 and validly exercised without the need for a constitutional amendment.[95]

The court rejected this argument as violative of separation of powers and federalism, reasoning that the "Legislature's duty to respond to a federal treaty does not come fortified with federal superpowers enabling it to bypass the judicial and amendatory processes."[96] The court then considered the city's alternative argument, that Section 8315 was preempted by the Race Convention's definition of discrimination.[97] The court agreed that that this would be true if the laws conflicted, but the court concluded that the CERD does not require the use of race-based affirmative action programs.[98]

Although the outcome in this case was ultimately disappointing for affirmative action proponents, this case is arguably still a success for domestic enforcement of international human rights. State level incorporation of the treaty's norm occurred legislatively and was then challenged in the courts. The court *accepted* the binding authority of the treaty, but rejected the proponents' interpretation of what the instrument required.

These two categories of cases may be lost post-*Medellín*, although these claims should continue to be raised at least until the Court weighs in again on the problem of non-self-execution. This course of action may have little immediate impact on the outcome of cases in which treaty law is raised as binding authority. This study suggests that courts have not generally been receptive to these claims. Nonetheless, the loss of even the minimal attention that is currently given to these claims as they are raised repeatedly in different courts impoverishes the conversation about these rights and may slow the progress toward their acceptance through other channels. Additionally, *Medellín* could eliminate the possibility of the latter type of case in which courts consider the treaty implementation efforts of other branches. While

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95. *Coral Constr., Inc*., 57 Cal. Rptr. 3d at 792 (internal quotation marks omitted).

96. *Id.*

97. *Id.*

98. *Id.* at 792-93. Specifically, the court noted that the CERD Committee "views the Race Convention as *requiring* adoption of race-based remedies in the face of persistent inequities while the State Department interprets the companion provisions as calling for a permissive approach." *Id.* at 793. The court concluded, however, that deference was due to the State Department as the Executive agency responsible for the negotiation and enforcement of the treaty. *Id.*

under an earlier understanding of the doctrine, states and localities had the (unenforceable) obligation and mandate to implement ratified treaties, this space for sub-national innovation disappears if these instruments have no meaning in domestic law absent federal legislation.[99]

IV. HUMAN RIGHTS TREATIES AND STATE CONSTITUTIONALISM

From this study it appears that state courts, with notable exceptions, have been somewhat slow to answer the call to engage with international human rights treaty law. In some ways, the absence here parallels the failure of independent state constitutionalism more generally.[100] Indeed, some of the barriers are likely similar. At the technical level, state courts face considerably larger case loads and may be more vulnerable to the political consequences of accepting treaty-based claims.[101] Their ability to consider these claims may also be limited by their own lack of expertise with these materials, and by the failure of the parties to make arguments based on international or comparative sources.

To the extent that these explanations are valid,[102] many of these barriers are already in the process of being overcome.[103] Increasingly, there are educational opportunities for state court judges to learn to handle international claims. For example, international materials are becoming more accessible in legal education. More law clerks (and future judges) will be exposed in law school to basic international law principles and will have the opportunity to apply these principles in a human rights clinic. Additionally, interest has grown among American lawyers in the area of international human rights law. "Like judges, they are meeting with their global counterparts and being exposed to new ideas. . . . Legal organizations like the ACLU and the ABA now have conferences on international law and international human rights, such as the ACLU Human Rights at Home: International Law in U.S. Courts

99. The California example is the only one I have been able to locate where this kind of dialogue occurred. I have argued elsewhere, however, that under the pre-*Medellín* understanding of the law, the federalism understanding presents a powerful opening for international states and localities to experiment with implementing ratified treaty law without fear of preemption. *See generally* Johanna Kalb, *The Persistence of Dualism in Human Rights Treaty Implementation* 30 YALE L. & POL'Y REV. (forthcoming 2012).

100. *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH L. REV. 761 (1992).

101. *See* Penny J. White, *Legal, Political, and Ethical Hurdles to Applying International Human Rights Law in the State Courts of the United States (and Arguments for Scaling Them)*, 71 U. CIN. L. REV. 937, 958-61 (2003).

102. *See* Gardner, *supra* note 100, at 810-12.

103. *See* Martha Davis, *Public Rights, Global Perspectives, and Common Law*, 36 FORDHAM URB. L. J. 653 (2009).

Conference."[104] Thus, to the extent that the explanation is logistical, it is likely that we will see an increase in the use of these sources as the consideration of these instruments becomes easier.[105]

Alternatively, it is possible that there is a more fundamental tension between the project of state constitutionalism and that of international human rights law that is blocking broader engagement with these instruments at the state level. The normative justification for independent state constitutionalism—that is, one that goes beyond the instrumental value of incorporating at the state level policies that cannot be implemented nationally—is that state constitutions do and should reflect the variations in the polity. In this view, a "state constitution is a fit place for the people of a state to record their moral values, their definition of justice, their hopes for a common good. A state constitution defines a way of life."[106] James Gardner has argued that this model does not reflect the reality of the United States' modern political community and that this "type of robust state constitutionalism . . . could pose a serious threat to the nationwide stability and sense of community that nationalism constitutionalism provides."[107] These critiques are equally applicable to the use of international human rights law in the project of state constitutionalism in that they undermine the legitimacy of state-level innovation. Moreover, the use of international human rights law to advance this project presents an additional challenge given the tension between the universal principles these instruments embody and the promotion of distinct and distinctive state constitutions.

My purpose here is not to resolve either the pragmatic or normative challenges to international state constitutionalism. Rather, my focus has been on what the limited existing state court jurisprudence reveals about the instrumental possibilities of international state constitutionalism as an advocacy strategy. In that vein, this study suggests that even if these structural barriers are not resolved, advocates may beneficially engage state courts with these issues with meaningful results and offers some strategic guidance as to where these efforts are most likely to be successful. Somewhat counter-intuitively, it appears that most direct impact of this kind of treaty law is likely to come from its least direct applications. As an authoritative (but not binding) source of widely shared norms, these instruments are persuasive to judges developing new understandings of state constitutional law. Conversely, the arguments

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104. Elizabeth M. Schneider, *Transnational Law as a Domestic Resource: Thoughts on the Case of Women's Rights*, 38 NEW ENG. L. REV. 689, 699 (2004).

105. *See* Davis, *supra* note 103, at 681.

106. A.E. Dick Howard, *The Renaissance of State Constitutional Law*, 1 EMERGING ISSUES ST. CONST. L. 12, 14 (1988).

107. Gardner, *supra* note 100, at 818.

based on these treaties as a binding source of law have been less successful in the courts, but have contributed to the adoption of the norms via other channels.

Given these findings, the *Medellín* decision need not be fatal to the prospects of international constitutionalism. The experience reflected in this study suggests that advocates should continue to raise alternative soft law uses for international human rights treaties in state courts.[108] Despite the fact that many of the norms embodied in the UDHR are found in the ICCPR and in CERD, two treaties that the United States has ratified,[109] arguments based on their persuasive value (as well as the persuasive value of the UDHR) seem to have gained more traction with state courts.[110] It is possible that the ambiguity surrounding the domestic enforceability of these treaties, which will only be enhanced by *Medellín*, causes hesitance among state court judges to wade into a complex and confusing debate. And given that ratified treaties at least arguably have the status of federal law and must be applied consistently, state courts may be reluctant to move forward on binding treaty-based claims absent federal leadership. Thus, somewhat counterintuitively, this study suggests that state courts may be more receptive to soft law claims based on treaty law, whether ratified or unratified. This is certainly not to say that nothing is lost if the facial reading of *Medellín* is ultimately upheld, but it may mean that at least this valuable type of human rights advocacy can proceed relatively unhindered.

108. This generally appears to be happening, except in some parts of the death penalty practice. Increasingly, however, my review of the cases suggests that advocates seem to be making alternative arguments—that the human rights instruments are both binding and persuasive authority.

109. As Professor Tara Melish notes, there is "wide overlap in the rights protected in distinct human rights treaties. CEDAW, CRC, and ICESCR subject matters are thus regularly taken up through ICCPR, CERD, CAT, and [International Labor Organization] convention supervisory procedures." Tara Melish, *From Paradox to Subsidiarity: The United States and Human Rights*, 34 YALE J. INT'L L. 389, 397 n. 34 (2009). Thus, were advocates looking to make binding arguments based on ratified treaties, they could arguably do so under the existing legal regime. The fact that they in many cases do not suggests an understanding of the nuances I have identified here.

110. The clearest example of this is in the death penalty context with the Supreme Court's acceptance of the persuasive authority of these treaties in *Roper* and *Atkins*. Nonetheless, this phenomenon is pervasive. In the Opportunity Agenda's 2008 report on international law in state courts, all but one of the fourteen state court decisions that they consider to be "highlights" of the practice involve the persuasive, non-binding citation of authority. *See* OPPORTUNITY AGENDA, *supra* note 4, at 6-7 (listing cases).