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Martha F. Davis

Northeastern University School of Law

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**UPSTAIRS, DOWNSTAIRS:
SUBNATIONAL INCORPORATION OF
INTERNATIONAL HUMAN RIGHTS LAW AT THE
END OF AN ERA**

*Martha F. Davis**

INTRODUCTION

In the early 1970s, the Public Broadcasting System imported *Upstairs, Downstairs*, a long-running miniseries from Great Britain. Encompassing the years from 1903 through the end of World War I, the series was set in the elegant five-story London townhouse occupied by Lord and Lady Bellamy and their two teenage children. Lord Bellamy was active in national affairs and served as a member of Parliament. The series might have been built around the challenges confronting the nation qua nation—the economic and social turmoil at the turn of the century, the growing emancipation of women, the foreign relations between Germany and Britain—and their impact on the Bellamy family. However, instead of focusing exclusively on the upstairs family, the series gave equal time to the downstairs family, the Bellamys’ servants. Though less visible to the outside world, the downstairs family—butlers, maids, cooks, and other domestic employees—maintained highly complex and intertwined horizontal as well as (literally) vertical relationships with the Bellamys. Of course, like the Bellamys, the downstairs family also maintained complex relationships outside of the household and were themselves also influenced by current events. In the popular series, the downstairs servants and the upstairs nobles may have performed different functions within the household, but their capacities were not limited or defined by those functions.¹

The final episode of the series ended in 1930 with the Bellamys’ townhouse being sold to pay off the upstairs family’s creditors. Series fans

* Professor of Law, Co-Director, Program on Human Rights and the Global Economy, Northeastern University School of Law; Visiting Fellow, Human Rights Program, Harvard Law School (2008–2009). Thanks to Elizabeth Persinger, Bardia Esghi, Kyle Courtney, Cindy Soohoo, Cathy Albisa, Richard Ratner, and Rick Doyon for critical assistance.

1. A twenty-first-century remake of *Upstairs, Downstairs* might illustrate this point even more dramatically. A few years ago, I hired a woman to clean my home every few weeks. After I got to know her, she cheerfully informed me that she was simultaneously running a real estate business from my house, using her cell phone to conduct her business while she cleaned.

pleaded with the producer to develop just one more year of the series, taking the Bellamys and their downstairs counterparts into a new decade, but he declined.² By 1930, vertical households such as the Bellamys' were increasingly rare. Increased access to education, greater mobility between classes and, in the late 1930s, the labor needs dictated by World War II contributed to the demise of the *Upstairs, Downstairs* era.³ More availability of affordable housing also spurred the social and economic independence of servants who had once lived in the homes of their employers but could now afford their own homes. Continuing the series, the producer concluded, would have perpetuated a historical anachronism.⁴

This essay offers *Upstairs, Downstairs* as a simple metaphor for the current evolving relationship between U.S. federal and state jurisdictions when it comes to international human rights law. Though international law is typically viewed as of federal (upstairs) concern, the states and localities downstairs operate in the same world, receive the same information, react to the same influences and constituencies, and develop their own responses that are not always limited by the formal construction of local and state governments' roles within our federal system.⁵ This essay focuses on one example of this phenomenon: the growing list of state and local laws that reflect the influence of international human rights norms.⁶

Importantly, the executive and legislative branches of the federal government have often endorsed and encouraged state and local implementation of these international norms. At the same time, in two recent U.S. Supreme Court cases, *Crosby v. National Foreign Trade*

2. *Upstairs, Downstairs*, Season Five, <http://updown.org.uk/epguide/s5.htm> (last visited Oct. 21, 2008).

3. ALAN EREIRA, *THE PEOPLE'S ENGLAND* 67 (1981); ROSS MCKIBBIN, *CLASSES AND CULTURES: ENGLAND 1918–1951*, at 109 (1998). See generally Carol Dyhouse, *Family Patterns of Social Mobility Through Higher Education in England in the 1930s*, 34 J. SOC. HIST. 817 (2001).

4. *Upstairs, Downstairs*, Season Five, <http://updown.org.uk/epguide/s5.htm> (last visited Oct. 21, 2008); Posting of JudyT to Everything2, <http://everything2.com/e2node/Upstairs%252C%2520Downstairs> (May 28, 2005, 13:18:38).

5. See, e.g., Judith Resnik, Joshua Civan & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 711–12 (forthcoming 2008) (manuscript at 711–12, on file with the Fordham Law Review); see also Nick Robinson, *Citizens Not Subjects: U.S. Foreign Relations Law and the Decentralization of Foreign Policy*, 40 AKRON L. REV. 647, 648 (2007) (“[S]tate and local governments today have become deeply enmeshed in international affairs as globalization has decentralized foreign relations.”).

6. According to the Stanford Encyclopedia of Philosophy, “[h]uman rights are international norms that help to protect all people everywhere from severe political, legal, and social abuses. . . . These rights exist in morality and in law at the national and international levels.” James Nickel, *Human Rights*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 29, 2006), <http://plato.stanford.edu/entries/rights-human>. The principal sources of contemporary human rights are the Universal Declaration of Human Rights and the many widely accepted human rights documents and treaties that build on the Universal Declaration, such as the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights.

*Council*⁷ and *American Insurance Ass'n v. Garamendi*,⁸ and one lower court decision, *National Foreign Trade Council v. Giannoulias*,⁹ the federal courts have vigorously policed the boundaries of states' roles in international affairs, using the federal preemption doctrine to limit states' authority to adopt policies that are intended to promote human rights practices abroad.

The U.S. Supreme Court faced a somewhat different issue implicating states' compliance with human rights standards in *Medellín v. Texas*.¹⁰ There, it was the State of Texas that defied international human rights norms embodied in the Vienna Convention on Consular Relations and interpreted by the International Court of Justice (ICJ), while the federal executive branch attempted (through an official President's Memorandum) to require compliance.¹¹ The Court rejected the Administration's position.¹² Instead, the Court concluded that, like most treaties ratified by the United States, the Vienna Convention on Consular Relations is not self-executing.¹³ Therefore, in the absence of a specific congressional mandate, the State of Texas retained the discretion to ignore human rights norms, even though its position had a negative impact on U.S. foreign relations by undermining the nation's ability to promise adherence to international treaties.¹⁴

From a bird's eye perspective, the opinions in this series of cases focus on the strength of the federal foreign policy interests involved, as ultimately expressed by the Executive, as compared to the strength of the state interest in regulating the area at issue. However, looking at these cases as a power struggle between the federal and state governments loses sight of what the states challenged in these cases were actually trying to accomplish through their actions. The underlying facts and result in *Medellín*, alongside the facts and law of *Crosby*, *Giannoulias*, and particularly *Garamendi*, create an odd asymmetry in the treatment of subnational incorporation of international human rights norms. On the one hand, *Garamendi* indicates that executive action in the foreign affairs arena may be sufficient to restrict subnational governments from taking action to *promote* human rights

7. 530 U.S. 363 (2000).

8. 539 U.S. 396 (2003).

9. 523 F. Supp. 2d 731 (2007).

10. 128 S. Ct. 1346 (2008).

11. *Id.* at 1352–53.

12. *Id.* at 1373.

13. *Id.* at 1357.

14. Indeed, in the wake of the *Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 12 (Mar. 31), Mexico filed a request for interpretation of the court's prior judgment in *Avena* with the International Court of Justice, charging that the United States was attempting to avoid its obligations under the Vienna Convention. See Press Release, Int'l Court of Justice, Mexico Files a Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and Other Mexican Nationals* (*Mexico v. United States of America*) and Asks for the Urgent Indication of Provisional Measures (June 5, 2008), available at <http://www.icj-cij.org/docket/files/139/14578.pdf>.

because of possible tensions between state and federal policies that are nevertheless not in direct conflict. On the other hand, *Medellín* instructs that executive action alone is not sufficient to prevent subnational governments from *undermining* human rights norms, even when the states' positions are in direct conflict with federal foreign policy and are actually interfering with foreign relations.

There is nothing inherently wrong with asymmetry in the law.¹⁵ But symmetry generally is the starting point.¹⁶ For example, rights are generally accompanied by obligations absent some special justification. A similar balance is achieved through our federal system, where the complimentary areas of authority of federal and state sovereigns create a system of checks that results in better government on both the federal and state levels.¹⁷ The asymmetry in the treatment of subnational human rights implementation is one that not only upsets that balance between federal and state governments, but has the effect of discouraging implementation of universal human rights on the subnational level. Particularly when the human rights norms at issue are ones that have been widely adopted internationally, and even endorsed by the U.S. federal government, a departure from the norm of legal symmetry should require some heightened justification.

This essay examines the legal asymmetry underscored and clarified in *Garamendi* and *Medellín*, and argues that it is a relic of the *Upstairs, Downstairs* era of federal-state relations, when only the federal government was expected to have a public face in the international arena.¹⁸ To some extent, this attitude was dictated by international law itself, which formally focuses on nation-states.¹⁹ Perhaps in an earlier era, with limited information flow to the states and less global expertise residing in state governments, such complete federal dominance in the area had more justification. Yet, as with the *Upstairs, Downstairs* metaphor, the notion that servants, or subnational governments, had no independent horizontal relationships was always a myth. The idea of a nation speaking with "one voice" on all things foreign, while a critical component of jurisprudence in this area, was never strictly true. Subnational activity on the international

15. However, asymmetry is in tension with the human ideal and therefore much-studied. See, e.g., CHRIS MCMANUS, *RIGHT HAND, LEFT HAND: THE ORIGINS OF ASYMMETRY IN BRAINS, BODIES, ATOMS AND CULTURES* 353 (2002).

16. For a thorough review of the ways in which symmetry is used in legal rhetoric and reasoning, see Karen Petroski, *The Rhetoric of Symmetry*, 41 VAL. U. L. REV. 1165 (2007).

17. See, e.g., THE FEDERALIST NO. 51, at 365–70 (James Madison) (Henry B. Dawson ed., 1865); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1490 & n.14 (1994); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988).

18. See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936); GEORGE SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* 30–36 (1919).

19. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, ch. 1, introductory note (1987).

stage goes back centuries, to the earliest days of the United States.²⁰ Today, international legal institutions increasingly address subnational actors that are more and more active in the global arena.²¹

Bringing U.S. law into line with these realities requires another look at the doctrine of federal preemption in those instances where subnational governments act to promote widely accepted human rights norms. This adjustment does not require a constitutional amendment or overruling of Supreme Court precedent. As Judith Resnik has noted, through careful opinions, the courts have continued to reserve some space for states and localities to implement human rights norms.²² An affirmative statement expressing the scope of subnational authority would clarify the law, rather than change it.

This essay proceeds as follows. First, it reviews state and local human rights legislation enacted by subnational governments in recent years. Importantly, a review of these laws reveals that few, if any, are exclusively inward-looking or exclusively outward-looking. Most reflect the current complexity of subnational relationships, combining local concerns with a keen awareness of the international context in which subnational actions take place. Second, this essay examines recent case law on federal preemption of subnational human rights initiatives, comparing the approach in these cases with the Supreme Court's recent ruling in *Medellín*, which

20. Subnational governments have been engaged in internationally focused activities throughout U.S. history. One early example is South Carolina's support for the British in the Franco-British War, in which the federal government had proclaimed U.S. neutrality. See Martha F. Davis, *Thinking Globally, Acting Locally: States, Municipalities, and International Human Rights*, in 2 BRINGING HUMAN RIGHTS HOME: FROM CIVIL RIGHTS TO HUMAN RIGHTS 127, 128 (Cynthia Soohoo et al. eds., 2008).

21. See generally Terrence Guay, *Local Government and Global Politics: The Implications of Massachusetts' "Burma Law,"* 115 POL. SCI. Q. 353, 371–72 (2000); Resnik et al., *supra* note 5. Indeed, the concluding observations and recommendations issued by the United Nations Committee on the Elimination of Racial Discrimination addressed subnational governments in a number of places. For example, in paragraph 9 the Committee noted "with satisfaction" the California Housing Element Law of 1969 as a model statute, and in paragraph 13, noted "with concern" the "lack of appropriate and effective mechanisms to ensure a co-ordinated approach towards the implementation of the Convention at the federal, state and local levels." U.N. Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination*, ¶¶ 9, 13, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008). Among the reports offered to the Committee during its review process were local critiques of Milwaukee, Chicago, New York City, and Minnesota's compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). See U.S. HUMAN RIGHTS NETWORK, ICERD SHADOW REPORT 2008 §§ 24–26, 28 (2008), available at http://www.ushrnetwork.org/cerd_shadow_2008.

22. Resnik et al., *supra* note 5, at 780–83; see, e.g., *Medellín v. Texas*, 128 S. Ct. 1346, 1374 (2008) (Stevens, J., concurring) (noting that "sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation" by complying with international treaty standards). Notably, while Justice John Paul Stevens's concurrence was not necessary to the majority, the majority opinion did not take issue with Justice Stevens's gloss on the Court's opinion. See *id.* at 1358–59 & n.5.

recognizes limitations on the executive branch's ability to impose human rights standards on states. Reviewing these doctrines immediately after cataloging subnational human rights efforts provides a strong reality check, making clear that the judicial doctrine of preemption is a blunt instrument that may undermine important local human rights efforts even where there are no actual conflicts with federal approaches or imminent foreign policy concerns. Indeed, *Crosby* and *Garamendi* rest on the questionable assumption that the judiciary can distinguish between subnational acts that are purely local and those with implications for foreign affairs. Finally, this essay concludes that the decision in *Medellín*—which defers to state criminal procedure rules in the absence of overriding federal legislation, even if the state's approach undermines human rights norms—points the way to a more balanced approach to the issue of subnational human rights implementation. This essay argues that, as a counterweight to the *Medellín* approach, subnational governments should also be allowed to *promote* accepted human rights norms absent specific federal legislative or executive action to the contrary, and it proposes touchstones for the implementation of such an approach.

I. SUBNATIONAL HUMAN RIGHTS INITIATIVES

As awareness of human rights standards and norms grows within the United States, states and localities have increasingly taken formal action to promote human rights.²³ In doing so, they draw on a rich body of codified human rights law, including human rights declarations like the Universal Declaration of Human Rights and human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR), as well as interpretations of these instruments issued by human rights bodies such as the United Nations Human Rights Committee.²⁴ Many of these formal human rights documents have been embraced by the United States.²⁵ Even those instruments that are not ratified by the United States often reflect American participation and influence.²⁶ Indeed, the human rights concepts that subnational governments embrace are not at all foreign—they can be

23. See Davis, *supra* note 20, at 134–43.

24. See MASS. GEN. LAWS ch. 3, § 66(3) (2004). The Massachusetts law cites the Beijing Platform for Action, which incorporates the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the United Nations Charter, among other U.N. documents. *Id.*; see also Davis, *supra* note 20, at 145–46 (discussing Universal Declaration of Human Rights); *id.* at 146–47 (describing efforts to implement ICCPR in San Francisco).

25. See OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (2004) [hereinafter Status of Ratifications], available at <http://unhchr.ch/pdf/report.pdf>.

26. For example, the United States actively participated in the drafting of CEDAW. See, e.g., LARS ADAM REHOF, GUIDE TO THE TRAVAUX PRÉPARATOIRES OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 37, 46, 53 (1993). However, the United States has never ratified the treaty. See Status of Ratifications, *supra* note 25.

traced back to the origins of the United States.²⁷ In more recent times, a series of formal legal instruments of human rights were developed in the wake of World War II, in a concerted international effort to avoid a repeat of the atrocities and human rights abuses of Nazi Germany.²⁸

Given the origins of the modern human rights movement, much has been written about the moral weight of human rights.²⁹ Human rights are often characterized as a version of natural law, which is tightly bound to moral theory about the worth of individuals.³⁰ While the unadulterated “goodness” of human rights is certainly contested,³¹ it is fair to say that a subnational government (or a national government, for that matter) that enacts human rights legislation can claim a moral high ground.

Adoption of human rights norms may also be a component of good government. In addition to the moral force of human rights norms, there is considerable literature quantifying the positive effects of human rights on the well-being of individuals. For example, data indicates that human rights compliance leads to health benefits for individuals;³² that recognition of human rights standards can lead to more stable and lasting conflict resolution;³³ and that human rights norms are intimately linked to good governance.³⁴ As discussed in greater detail below, the U.S. categorical

27. See generally Paul Gordon Lauren, *A Human Rights Lens on U.S. History: Human Rights at Home and Human Rights Abroad*, in 1 BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 1 (Cynthia Soohoo et al. eds., 2008).

28. Elizabeth Borgwardt, *FDR's Four Freedoms and Wartime Transformations in America's Discourse of Rights*, in 1 BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES, *supra* note 27, at 31, 40–44; Ram Manikkalingam, *Promoting Peace and Protecting Rights: How Are Human Rights Good and Bad for Resolving Conflict?*, 5 ESSEX HUM. RTS. REV. 1, 12 (2008).

29. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), pmbl., U.N. Doc. A/810 (Dec. 10, 1948) (recognizing that “the inherent dignity and . . . the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 198 (1977) (positing human dignity and political equality as the two most basic rights). See generally Jon Mahoney, *Liberalism and the Moral Basis for Human Rights*, 27 LAW & PHIL. 151 (2008); Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground?*, 54 EMORY L.J. 97 (2005).

30. Lauren, *supra* note 27, at 3. See generally Ralph McInerny, *Natural Law and Human Rights*, 36 AM. J. JURIS. 1 (1991).

31. See, e.g., Deborah M. Weissman, *The Human Rights Dilemma: Rethinking the Humanitarian Project*, 35 COLUM. HUM. RTS. L. REV. 259, 261–62 (2004) (noting the use of human rights standards to justify military intervention and economic coercion).

32. See Scott Burris, Bebe Loff & Zita Lazzarinni, *Are Human Rights Good for Your Health?*, 358 LANCET 1901, 1901 (2001) (noting empirical evidence of links between human rights and health); Scott Burris, *Introduction: Merging Law, Human Rights and Social Epidemiology*, 30 J. L. MED. & ETHICS 498, 507 (2002) (noting links between law, disease, and prevention).

33. See Sally Engle Merry, *Conflict Resolution vs Human Rights*, ANTHROPOLOGY NEWS, Oct. 2007, at 16, 16.

34. See, e.g., Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting Within the Council, the European Parliament and the

federal system is set up to reserve significant areas of policy regulation to states and localities—particularly in exercise of state police power and in areas touching on families, criminal law, and social welfare.³⁵ A subnational government taking action to implement human rights norms in these areas in particular would be acting consistently with principles of federalism. Such a government could credibly argue that its acts constitute good public policy, as well as acts of positive moral force.

As a first cut, the state actions to promote human rights might be divided between those that focus internally and those that focus externally. This essay calls the internally focused laws “incorporation” laws, because they incorporate international human rights standards into local laws that govern local, domestic practices. The externally focused subnational human rights laws are called “association” laws, because through these laws, subnational governments primarily intend to associate their policies with worldwide efforts to promote human rights in other places, bringing their collective power to bear to end human rights abuses abroad. However, as explained further below, the descriptive force of this rough dichotomy is ultimately limited. Subnational governments, responding to the admonition to “bring human rights home,” increasingly frame laws that do not distinguish between foreign and local effects, but simply promote compliance with universal human rights regardless of national borders. These laws both “incorporate” human rights norms into domestic standards, and serve to “associate” local governments with international efforts to end human rights abuses. By straddling these categories, the laws also expose the difficulties involved in administering the foreign-local distinctions on which current federal preemption doctrine in this area rests.

A. Subnational “Incorporation” of Human Rights

Many state and local laws incorporate international human rights law concepts directly as substantive domestic legal standards. One example is the reference to human dignity in the Montana Constitution.³⁶ Adopted in 1972, this state constitutional provision was inspired by a similar provision in the Constitution of Puerto Rico, which reflects the Universal Declaration of Human Rights.³⁷ Other examples of human rights incorporation abound:

Commission on European Union Development Policy: “The European Consensus,” Council Development Policy Statement (EU) 14820/05 of 22 Nov. 2005 (emphasizing relationship between good governance, democracy and respect for human rights); Gudmundur Alfredsson, *The Usefulness of Human Rights for Democracy and Good Governance*, in HUMAN RIGHTS AND GOOD GOVERNANCE 19, 25–27 (Hans-Otto Sano & Gudmundur Alfredsson eds., 2002).

35. See Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 362, 373, 392, 395, 406 (2006).

36. MONT. CONST. art. II, § 4 (“The dignity of the human being is inviolable.”).

37. See Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 20–27 (2004); Heinz Klug, *The Dignity Clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way*

in 1998 San Francisco adopted the standards of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as its municipal law;³⁸ several states and municipalities have administratively adopted the substance of the United Nations Standard Minimum Rules for the Treatment of Prisoners as baselines for their own prison systems;³⁹ Massachusetts has statutorily charged its Commission on the Status of Women with implementing the Platform for Action on women's rights issued at the United Nations' Fourth World Conference on Women held in Beijing in 1995;⁴⁰ and in 2000, California adopted the human rights standards for consular notification on behalf of foreign nationals charged with criminal violations of U.S. law contained in the Vienna Convention on Consular Relations.⁴¹

Most visible subnational incorporation of international human rights law has been accomplished through legislative or bureaucratic actions. But some incorporation has been achieved through judicial action. In particular, a number of state courts and individual state court judges have recognized the importance of examining domestic actions through the lens of international human rights standards. For example, in litigation challenging the State of Missouri's death penalty for minors, the state supreme court, striking down the state law, noted the international rejection of this practice as a human rights violation.⁴² The state court's decision was later upheld

to an Expanded Interpretation, 64 MONT. L. REV. 133, 134–35 (2003); Sara A. Rodriguez, *The Impotence of Being Earnest: Status of the United Nations Standard Minimum Rules for Treatment of Prisoners in Europe and the United States*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 61, 111 n.320 (2007).

38. Stacy Laira Lozner, *Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative*, 104 COLUM. L. REV. 768, 768 (2004).

39. See, e.g., Daniel L. Skoler, *World Implementation of the United Nations Standard Minimum Rules for Treatment of Prisoners*, 10 J. INT'L L. & ECON. 453, 462 (1975); see also *Lareau v. Manson*, 507 F. Supp. 1177, 1187 n.9 (D. Conn. 1980) (noting Connecticut's adoption of the United Nations Standard Minimum Rules for the Treatment of Prisoners).

40. MASS. GEN. LAWS ch. 3, § 66(3) (1999).

41. In January 2000, the State of California enacted legislation requiring that "every peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country," and that

law enforcement agencies shall ensure that policy or procedure and training manuals incorporate language based upon provisions of the [Vienna Convention] that set forth requirements for handling the arrest and booking or detention for more than two hours of a foreign national pursuant to this section prior to December 31, 2000.

CAL. PENAL CODE § 834c (West 2008); see also Janet Koven Levit, *Sanchez-Llamas v. Oregon: The Glass Is Half Full*, 11 LEWIS & CLARK L. REV. 29, 43 (2007). North Carolina has also implemented consular notifications standards applicable to instances of involuntary commitment of noncitizens that reflect the Vienna Convention. See N.C. GEN. STAT. § 122C-344 (2007).

42. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 402 (Mo. 2003) (en banc).

by the Supreme Court, which also cited the international consensus on the issue.⁴³

Individual judges have also taken this approach. For example, when an Oklahoma court remanded a prisoner's case to determine whether he was prejudiced by violations of his rights under the Vienna Convention on Consular Relations, a concurring judge opined that the state had an independent international obligation to provide such rights.⁴⁴ Similarly, in *Moore v. Ganim*, a concurring justice in the Supreme Court of Connecticut noted the relevance of international human rights law in construing the state's constitution.⁴⁵

On the one hand, such legislative, executive, and judicial incorporation of international human rights standards into domestic law is unremarkable. Lawmakers and legal decision makers have always cast a wide net when searching for new policy ideas and approaches, or evaluating jurisprudential directions.⁴⁶ Resnik has written eloquently about the "multiple ports" through which international human rights can enter domestic law, including state and local law.⁴⁷ As she notes, influences come from many sources, from the federal government to other states to policy think tanks to other countries.⁴⁸

On the other hand, subnational incorporation of human rights standards may be intentionally subversive. While inspiration may come from many sources, deliberate subnational adoption of international human rights standards is not always a neutral activity vis-à-vis the federal government. Even in the act of subnational incorporation, an activity that seems purely local in nature, subnational governments may in fact be making an outward-looking statement to both the federal government and to the global community.⁴⁹ When San Francisco incorporated CEDAW into its

43. *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005).

44. *Torres v. Oklahoma*, No. PCD-04-442, 2004 WL 3711623, at *2–3 (Okla. Crim. App. May 13, 2004) (Chapel, J., concurring). The Governor of Oklahoma carried out this obligation by commuting the death sentence of defendant Osbaldo Torres, a Mexican national whose consular rights had been denied during his state criminal proceedings. See *Medellín v. Texas*, 128 S. Ct. 1346, 1375 n. 4 (2008) (Stevens, J., concurring); Janet Koven Levit, *A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 TULSA J. COMP. & INT'L L. 163, 172 (2004).

45. *Moore v. Ganim*, 660 A.2d 742, 780 (Conn. 1995) (Peters, J., concurring).

46. See Davis, *supra* note 35, at 371 n. 52 (describing state legislators' research on international housing issues to aid drafting of New York State Constitution in 1938). For a recent snapshot of judicial influences, see generally Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

47. See generally Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31 (2007) [hereinafter Resnik, *Horizontal Federalism*]; Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006) [hereinafter Resnik, *Law's Migration*].

48. See Resnik, *Law's Migration*, *supra* note 47, at 1576; Resnik et al., *supra* note 5, at 784.

49. Robinson, *supra* note 5, at 689, 691–92.

municipal law, the city's mayor, Willie Brown, expressed his hope that this local action would have some national effect, perhaps spurring the federal government to inch towards ratification and implementation of the Women's Rights Convention.⁵⁰ Indeed, following San Francisco's implementation of CEDAW, the city's municipal efforts have gained international prominence; San Francisco's participation in global conferences and its appearance in reports on CEDAW implementation certainly underscores the U.S. government's failure to ratify the treaty.⁵¹

Taking the broadest view, then, even these seemingly benign, inwardly focused instances of domestic incorporation of human rights norms might be seen as impinging on federal foreign affairs prerogatives that have been expressed through inaction. San Francisco's incorporation of CEDAW might be seen as interfering with the federal government's deliberate inaction on CEDAW; the federal failure to ratify CEDAW has international implications that might be influenced if more subnational governments acted as San Francisco has, communicating the internal dissent on the issue to a global audience. Likewise, California's adoption of the Vienna Convention on Consular Relations standards could be seen as thumbing the state's nose at Congress's decision to not enact legislation implementing the treaty on the national level; again, the federal government's inaction may itself be a statement of its foreign policy, and California's action may undermine the intended foreign impact of the federal inaction.

Nevertheless, to date, these subnational incorporation efforts, generally effectuated through democratic processes at the local level, have not been challenged as impinging on federal foreign affairs authority. As Resnik notes, the challengers to subnational human rights laws have thus far been entities that perceive an economic reason to challenge the law, and most "incorporation" laws do not impose immediate or obvious financial burdens on any specific group, but simply adopt passive normative standards.⁵²

B. *Subnational "Association" with International Human Rights Efforts*

Many subnational human rights efforts involve adoption of domestic law, but also deliberately and intentionally associate the subnational government with a global effort to end human rights abuses in a particular locality or region. The state and local South African divestment initiatives of decades past are a good example. Like the "incorporation" laws discussed above, these provisions incorporated substantive human rights standards. However, they also focused on exploiting the external impact of these standards through the financial mechanisms available to local governments.

50. Davis, *supra* note 20, at 135–36.

51. See S.F. COMM'N ON THE STATUS OF WOMEN, PROGRESS REPORT #5 (2001), http://www.sfgov.org/site/cosw_page.asp?id=10870; UNITED NATIONS DEV. FUND FOR WOMEN, BRINGING EQUALITY HOME: IMPLEMENTING THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (Ilana Landsberg-Lewis ed., 1998).

52. See Resnik, *Horizontal Federalism*, *supra* note 47, at 78.

During the 1980s, thirty-seven states, thirty-two counties, and 105 cities in the United States enacted either divestment or procurement legislation to limit their own investment and procurement from companies doing business with South Africa's apartheid regime.⁵³ Under these laws, local governments were required to divest public holdings of stocks in firms that did business with South Africa, or to restrict procurement opportunities when the bidder for a government contract did business with South Africa. The cumulative effect of such local laws was an important factor in the demise of the apartheid regime in 2001.⁵⁴

The success of the South African divestment campaign has led other human rights campaigns to adopt similar strategies. Beginning in the 1990s, many municipalities and several states enacted selective purchasing laws directed against Burma, joining an international effort to restore democracy to that country.⁵⁵ Likewise, a vibrant student movement is urging divestment from Sudan, which has engaged in a series of massive genocidal campaigns and human rights abuses in that region.⁵⁶ In March 2006, the University of California Regents voted to divest not only primary holdings but also indirect holdings in companies doing business with Sudan.⁵⁷ Other campuses, both public and private, are following suit.⁵⁸ Further, more than two dozen states have enacted laws to limit their state pension funds' investment in Sudan.⁵⁹

Divestment activities are not the only subnational initiatives that fall into the "association" category. Many states and localities have adopted resolutions calling for the federal ratification of CEDAW or the Convention on the Rights of the Child (CRC).⁶⁰ These formal subnational statements focus their effects outward, both seeking greater federal attention to

53. See Robinson, *supra* note 5, at 698–99.

54. See Davis, *supra* note 20, at 130.

55. See Peter Fitzgerald, *Massachusetts, Burma and the World Trade Organization: A Commentary on Blacklisting, Federalism, and Internet Advocacy in the Global Trading Era*, 34 CORNELL INT'L L.J. 1, 7 (2001) ("As of June 2000 . . . twenty-four municipal, county, or state governments had enacted selective purchasing laws specifically targeting Burma.").

56. See Philip Rucker, *Student-Driven Sudan Divestment Campaign Grows*, N.Y. TIMES, Apr. 26, 2006, at B9.

57. See Tanya Schevitz & Jim Doyle, *UC Regents Vote to Shed Sudan Investments*, S.F. CHRON., Mar. 17, 2006, at A1.

58. As of publication, sixty-one large universities had "adopted divestment policies" with respect to Sudan. Sudan Divestment Task Force: Divestment Statistics, <http://www.sudandivestment.org/statistics.asp> (last visited Oct. 21, 2008).

59. As of publication, twenty-seven states had divested from Sudan with divestment campaigns initiated in ten other states. *Id.*

60. A list of state and local governments that have endorsed the Convention on the Rights of the Child (CRC), issued by the U.S. Committee for UNICEF, is available at http://www.abanet.org/intlaw/committees/public_II/human_rights/entitiesuppccr.pdf. With regard to CEDAW, see Resnik, *Horizontal Federalism*, *supra* note 47, at 56–57 ("As of 2004, forty-four cities, eighteen counties, and sixteen states have passed or considered legislation relating to CEDAW, with yet others contemplating action. Many localities responded with expressive, hortatory provisions, calling for the United States to ratify CEDAW.").

CEDAW and alerting the international community to the depth of support for CEDAW among state and local actors. By adopting such resolutions, states and localities seek to associate with a global human rights movement rather than establish normative legal baselines at the local level. Through these efforts, subnational governments establish and strengthen horizontal relationships with other governmental and nongovernmental entities worldwide.

Not surprisingly, “association” laws involving investment and procurement have been controversial, and have attracted more challengers than those laws that incorporate international standards as domestic law without immediately identifiable financial implications for global business. Unlike a municipal CEDAW, for example, local procurement and investment laws put a tangible financial burden on corporate interests. Perhaps because of the strong connections between the U.S. civil rights movement and the efforts to end apartheid in South Africa, and the fear that detractors would be labeled prosegregation, few legal challenges were mounted to antiapartheid divestment initiatives.⁶¹ However, more recent divestment and procurement laws targeting other human rights violators have been actively challenged in federal court by trade organizations such as the National Foreign Trade Council, seeking to avoid a patchwork of state laws regulating investment in markets that its members deem profitable. In *Crosby* and *Giannoulis*, federal courts struck down such provisions as preempted by federal foreign policy activity.⁶²

C. Subnational “Association” and “Incorporation”

As noted above, the rough dichotomy between domestic “incorporation” laws that adopt human rights norms as internal standards and “association” laws that bring local power to bear on external human rights abuses is highly imperfect since most local human rights laws contain elements of both approaches.⁶³ This dichotomy breaks down further in the face of the growing movement to “bring human rights home” and acknowledge human rights abuses in the United States as well as abroad. For example, many states and localities in the United States have adopted antisweatshop procurement policies.⁶⁴ These policies monitor the human rights and labor practices of state and municipal contractors and subcontractors to ensure that businesses involved in exploitative practices do not become business partners of subnational governments. These laws incorporate human rights

61. See Davis, *supra* note 20, at 130–31.

62. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373–74 (2000); *Nat’l Foreign Trade Council v. Giannoulis*, 523 F. Supp. 2d 731, 741–42 (N.D. Ill. 2007).

63. Problems addressed by subnational governments are often both domestic and foreign. Resnik et al., *supra* note 5, at 716.

64. See generally Adrian Barnes, *Do They Have to Buy from Burma?: A Preemption Analysis of Local Antisweatshop Procurement Laws*, 107 COLUM. L. REV. 426 (2007).

standards into local law and also associate states and localities with a global human rights movement to end sweatshop labor practices.

Unlike the South Africa, Burma, and Sudan campaigns, the pinch of these measures is intended to be felt not just in foreign jurisdictions charged with human rights abuses, but also at home in the United States, where homegrown sweatshops are proliferating alongside their foreign counterparts.⁶⁵ As activists abandon the rhetoric of United States exceptionalism and trace the connections between global human rights abuses and domestic policies, subnational human rights laws are likely to become less explicitly focused on “foreign” places.

This trend exposes some important questions about the taxonomy of subnational human rights laws, a taxonomy that has developed as an outgrowth of court decisions that rest on the question of whether a subnational law runs afoul of federal foreign affairs power. If a connection to foreign affairs is the key component, where does a subnational antisweatshop law fall on the continuum between San Francisco’s CEDAW incorporation law, which has not been challenged in court, and Massachusetts’s foreign-focused Burma Law, which was struck down by the Supreme Court?⁶⁶ In the contemporary era, where subnational governments are involved in a range of global activities, which of these distinct approaches impinges on national foreign affairs to a sufficient degree to require preemption? And when a democratically generated subnational law is at issue, which branch of the federal government should make that decision?

II. FEDERAL JUDICIAL APPROACHES TO SUBNATIONAL HUMAN RIGHTS LAWS

The federal judicial response to subnational human rights laws in *Crosby*, *Garamendi*, and *Giannoulis* is in obvious tension with a simultaneous trend, reflected in *Medellín*, to reserve a more expansive policy-setting role for states and localities within the federal system, even when foreign relationships are implicated and undermined. Instead of approaching the issue of subnational human rights laws with sensitivity to states’ and localities’ roles in implementing human rights norms, the federal courts have found federal preemption even in instances where Congress has not acted and where there has been no explicit federal effort to occupy the

65. See, e.g., MIRIAM CHING YOON LOUIE, SWEATSHOP WARRIORS: IMMIGRANT WOMEN WORKERS TAKE ON THE GLOBAL FACTORY 41–47 (2001); Jennifer Gordon, *American Sweatshops*, BOSTON REV., Summer 2005, at 11. Indeed, this pinch caused the Mayor of New York to challenge New York City’s antisweatshop ordinance. *Mayor of N.Y. v. Council of N.Y.*, 789 N.Y.S.2d 860 (Sup. Ct. 2004). The ordinance was enjoined on grounds other than federal preemption. *Id.* at 862–65.

66. See generally Barnes, *supra* note 64.

field.⁶⁷ This essay reviews the relevant preemption cases below, contrasting them with the recent decision in *Medellín*, where the Supreme Court preserved the right of states to default from human rights norms despite the clear and present impact of this state policy on U.S. foreign relations. It concludes that the breadth with which the federal preemption doctrine has been wielded to preclude positive human rights activities by states creates an unjustified asymmetry. This arrangement serves to chill states from engaging in efforts to expand human rights compliance—efforts that would be beneficial both domestically and globally—while permitting states to freely ignore human rights norms absent specific congressional action.

This essay does not intend to question the general propriety of federal preemption. Though the doctrine of federal preemption is judge-made law, it arises from the Constitution's Supremacy Clause. Under the doctrine, once the federal government has acted in an area of law, "any state law . . . which interferes with or is contrary to federal law, must yield."⁶⁸ There are three generally recognized, but overlapping, categories of preemption: express, conflict, and field. Express preemption, which is triggered by an explicit act of Congress and not questioned in this essay, occurs when a federal statute or regulation contains language that specifically displaces state authority in a given area.⁶⁹

In contrast to express preemption, the two types of implied preemption—conflict and field preemption—give much more discretion to the federal judiciary to ascertain congressional intent. Both have been employed in the federal cases involving subnational human rights implementation to strike down laws based on slimly supported presumptions about the national government's foreign affairs goals. Conflict preemption occurs when compliance with both the state and federal law is impossible, or the state rule obstructs the achievement of federal objectives.⁷⁰ Field preemption occurs when the federal interest in the field is "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."⁷¹ As the case descriptions below make clear, the federal authority over foreign affairs has been invoked to support both of these categories of nonexpress preemption. The question raised here is whether, when states implement widely accepted human rights norms through a democratic process on the subnational level, the judicial doctrines of implied preemption should be modified to better encourage and permit such

67. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 430 (2003) (Ginsburg, J., dissenting).

68. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)).

69. See CHRISTOPHER R. DRAHOZAL, *THE SUPREMACY CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 96 (2004).

70. *Id.*

71. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

implementation in the absence of any express congressional statement to the contrary.

A. Crosby v. National Foreign Trade Council

In 1996, the Massachusetts state legislature enacted a statute that imposed economic penalties on companies doing business with Burma, and barred any state investment in Burma by Massachusetts.⁷² This Act, the “Burma Law,” sought to control a narrow set of activities within Massachusetts, but only insofar as the activities might affect the human rights situation in Burma.⁷³ Burma had long denied basic freedoms to its citizens, and monitoring groups have detailed a litany of abuses including child conscription, rape, murder, and forced labor.⁷⁴ According to Amnesty International, “torture has become an institution” in Burma.⁷⁵ Responding to these massive human rights violations, the Massachusetts Burma Law deliberately built on earlier efforts to economically isolate South Africa in order to end apartheid, in part through subnational economic divestment and sanctions.⁷⁶ The goal of the Burma Law, like its South Africa-focused predecessors, was to end foreign human rights violations.

Shortly after the Massachusetts Burma Law was enacted, Congress passed a federal statute imposing a narrower set of mandatory and conditional sanctions on Burma. The federal law authorized the President to impose further sanctions if certain conditions were met. In 1997, President William J. Clinton issued an executive order providing for additional sanctions, prohibiting new investment in Burma by “United States persons.”⁷⁷ Neither the congressional statute nor the executive order specifically stated an intent to preclude preexisting state laws directed against Burma. Further, neither the statute nor the executive order specifically addressed the nineteen municipal government laws already in place restricting purchases from companies doing business in Burma. However, the executive order did state that the Burmese government’s acts of oppression constituted “an unusual and extraordinary threat to the national security and foreign policy of the United States.”⁷⁸

72. KEVIN DANAHER & JASON MARK, *INSURRECTION: CITIZEN CHALLENGES TO CORPORATE POWER* 204 (2003); Davis, *supra* note 20, at 132–34; Guay, *supra* note 21, at 354–55.

73. Brannon P. Denning & Jack H. McCall, *U.S. Constitutional Law—State Statutes Imposing Indirect Sanctions on Foreign Countries—Federal Pre-emption—Sanctions Against Myanmar (Burma)*, in *International Decisions*, 94 AM. J. INT’L L. 750, 750 (Bernard H. Oxman ed., 2000) (stating that Massachusetts law was aimed at punishing the repressive military government of Burma).

74. See The Burma Campaign UK: About Burma, Human Rights, <http://www.burmacampaign.org.uk/aboutburma/humanrights.html> (last visited Oct. 21, 2008).

75. *Id.* (quoting Amnesty International).

76. DANAHER & MARK, *supra* note 72, at 204.

77. Exec. Order No. 13,047, 3 C.F.R. §§ 202–204 (May 20, 1997).

78. *Id.*

The proliferation of state and local Burma Laws triggered protests by a number of U.S. trading partners in international fora. For example, Japan and the European Union lodged formal complaints with the World Trade Organization, claiming that the Massachusetts law “violates certain provisions of the Agreement on Government Procurement.”⁷⁹ The executive branch also expressed concern. Before the Supreme Court, and in earlier testimony before state governments, the Executive “consistently represented that the state Act has complicated its dealings with foreign sovereigns and proven an impediment to accomplishing objectives assigned it by Congress.”⁸⁰ Yet Congress never sought to explicitly preempt the state and local laws that were causing these alleged complications.

In April 1998, the National Foreign Trade Council filed suit challenging Massachusetts’s Burma Law, arguing that it infringed on federal foreign affairs power and was preempted by the federal Burma Law.⁸¹ The district court and the U.S. Court of Appeals for the First Circuit agreed, enjoining operation of the Massachusetts Law.⁸² In June 2000, the Supreme Court affirmed the lower courts, striking down Massachusetts’s Burma Law; the Supreme Court determined that the federal government had preempted state activities in the area.⁸³ As to the question of Congress’s failure to explicitly provide for preemption, the Court concluded that

[a] failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply, and in any event, the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict.⁸⁴

However, the Court also noted that there was no direct conflict between the state and federal law. Rather, because the laws were not coextensive, “if the Massachusetts law is enforceable[,] the President has less to offer and less economic and diplomatic leverage as a consequence.”⁸⁵ The Massachusetts Burma Law would simply “blunt the consequences of discretionary Presidential action,” rather than create a direct conflict.⁸⁶ Invoking an expansive version of conflict preemption, the Court determined that the inconsistent means adopted by Massachusetts were sufficient to create a conflict supporting preemption.⁸⁷

79. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 383 (2000).

80. *Id.*

81. *Id.* at 371.

82. *Id.*

83. *Id.* at 388.

84. *Id.* at 387–88.

85. *Id.* at 377.

86. *Id.* at 376.

87. The Court’s approach here drew heavily on its prior decision in *Zschernig v. Miller*, 389 U.S. 429 (1968).

Finally, the Court analyzed the question through the lens of field preemption, examining the ways in which the “state Act is at odds with the President’s intended authority to speak for the United States” on matters of foreign relations.⁸⁸ Crediting the protests of U.S. trade partners as well as statements by the Executive about the diplomatic difficulties posed by Massachusetts’s legislation, the Court concluded that the administration’s actions through the executive order preempted the entire field and precluded Massachusetts’s execution of its own foreign human rights agenda through the Burma Law.⁸⁹

The analysis adopted in *Crosby*, of course, could doom any subnational action in the area of human rights, including states’ hortatory resolutions without any formal sanction behind them. Any subnational action that is not coextensive with federal action will necessarily dilute the impact of the federal action. Likewise, as discussed above, a very wide range of state or local laws may have global implications that would, under the Court’s analysis, support the case for field preemption. The Court, however, provided no limiting principle. Indeed, in response to the state’s claim that local South African sanctions would be preempted under the same analysis, the Court only offered the fact that “we never ruled on whether state and local sanctions against South Africa in the 1980s were preempted or otherwise invalid”⁹⁰—a nondistinction between the Burma campaign and the highly successful subnational efforts against South African apartheid.

B. American Insurance Ass’n v. Garamendi

Garamendi involved a challenge to California’s Holocaust Victim Insurance Relief Act (HVIRA), enacted in 1999.⁹¹ Through HVIRA, California sought to pressure certain insurers to compensate European Holocaust victims by requiring any insurer doing business in the state to disclose information about all policies sold in Europe between 1920 and 1945 by the company or related entity upon penalty of loss of its state business license.⁹² HVIRA built on the state’s earlier amendment to the California Insurance Code, making it an unfair business practice for any insurer operating in the state to “fail[] to pay any valid claim from Holocaust survivors.”⁹³

The federal government was simultaneously engaged in efforts to obtain restitution for Holocaust victims. In an agreement concluded in 2000, the U.S. and German governments established the German Foundation Agreement, a fund that makes payments to Holocaust survivors and that covers personal injury claims and certain property loss or damage caused by

88. *Crosby*, 530 U.S. at 380.

89. *Id.* at 383–85.

90. *Id.* at 388.

91. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 401 (2003).

92. *Id.* at 409.

93. CAL. INS. CODE § 790.15(a) (West 2005).

German companies during the Nazi era, including claims against German banks and insurance companies.⁹⁴ Through this executive agreement, not expressly approved by Congress, the President agreed that whenever a German company was sued on a Holocaust-era claim in U.S. court, the U.S. government would (1) submit a statement that it would be in this country's foreign policy interests for the German Foundation to provide the exclusive forum and remedy for such claims, and (2) try to get state and local governments to respect the Foundation as the exclusive mechanism for resolving claims.⁹⁵

When California began enforcing HVIRA, the U.S. government immediately informed the state that its actions might undermine the German Foundation agreement.⁹⁶ When the state insurance commissioner persisted in enforcing the state law, the American Insurance Association challenged HVIRA's constitutionality.⁹⁷

As with *Crosby*, the California law and the federal executive agreement at issue in *Garamendi* did not squarely conflict. In fact, the Court noted that “[t]he situation . . . calls to mind the impact of the Massachusetts Burma Law on the effective exercise of the President’s power.”⁹⁸ Rather, the California law and the executive agreement employed different means to reach the same ends—according to the Court, “California seeks to use an iron fist where the President has consistently chosen kid gloves.”⁹⁹ But unlike *Crosby*, this quasi conflict did not pit a federal law against a state law; instead, on the federal side, there was no congressional action involved at all, simply an executive initiative.

Despite the absence of any congressional action, the Court ruled that the California law was preempted by the federal government's scheme to secure an economic settlement for damages arising from the Holocaust.¹⁰⁰ “It is true that the President in this case is acting without express congressional authority,” wrote the Court, but “the President possesses considerable independent constitutional authority to act on behalf of the United States on international issues.”¹⁰¹ It follows, the Court said, that a “conflict with the exercise of that authority” is sufficient to find preemption of state law.¹⁰²

94. *See Garamendi*, 539 U.S. at 405.

95. *See id.* at 406.

96. *Id.* at 411.

97. *Id.* at 411–12.

98. *Id.* at 423.

99. *Id.* at 427.

100. *Id.* at 421.

101. *Id.* at 424 n.14.

102. *Id.* at 425 (stating that express federal policy and clear conflict are enough to require the state law to yield).

C. National Foreign Trade Council v. Giannoulas

Despite the Supreme Court's rulings in *Crosby* and *Garamendi*, subnational governments continue to test the limits of preemption with new "associational" laws directed at external human rights abuses. Many of these laws have been directed against Sudan, in an effort to deter the ongoing atrocities in the Darfur region. Charging genocide, the U.S. Department of State listed the situation in Darfur as the world's worst human rights abuse in 2006.¹⁰³ As of February 2008, twenty states, along with many municipalities, had adopted laws restricting financial dealings with Sudan.¹⁰⁴

The Illinois Sudan Act was signed into law in 2006.¹⁰⁵ The Act amended two Illinois state laws, the Deposit of State Moneys Act and the Illinois Pension Code, to prohibit certain investments in the government of Sudan and in companies doing business in Sudan.¹⁰⁶ In particular, the Act prohibited the Illinois Treasurer from depositing state funds into any financial institution that had not certified that its loan applicants did no business with "forbidden entities," defined to include any company involved with Sudan.¹⁰⁷ The Act also amended the Illinois Pension Code to prohibit the fiduciary of any pension fund established under the Code from investing in any company unless the company certified that it did no business with a "forbidden entity."¹⁰⁸ The articulated purpose of the bill was to curtail human rights abuses in Sudan.¹⁰⁹

The federal government has also turned its attention to the events unfolding in Sudan.¹¹⁰ In 1997, President Clinton issued an executive order prohibiting a wide range of transactions between the United States and Sudan.¹¹¹ In 2002, the Sudan Peace Act gave additional authority to the President to address the U.S. relationship with Sudan and required regular briefings of Congress on the status of efforts to resolve the Sudan

103. *Darfur Tops US List of Worst Human Rights Abuses*, USATODAY.COM, Mar. 6, 2007, http://www.usatoday.com/news/washington/2007-03-06-human-rights_N.htm.

104. These efforts are not only focused on Sudan. Similar laws mandating divestment from Iran have also recently been enacted in thirteen states, including Florida, California, and Arizona. *Arizona Governor OKs Iran Divestment Law*, PIONLINE.COM, June 9, 2008, <http://www.pionline.com/apps/pbcs.dll/article?AID=/20080609/PRINTSUB/522582072/1025/TOC>.

105. The Act to End Atrocities and Terrorism in the Sudan, Public Act 094-0079 (June 27, 2005, effective Jan. 27, 2006), *repealed by* Nat'l Foreign Trade Council v. Giannoulas, 523 F. Supp. 2d 731, 741-42 (N.D. Ill. 2007), *available at* <http://www.ilga.gov/legislation/publicacts/94/PDF/094-0079.pdf>.

106. *Id.*

107. *Id.*

108. 40 ILL. COMP. STAT. 5/1-110.6 (2006).

109. *Giannoulas*, 523 F. Supp. 2d at 734.

110. *Id.* at 735.

111. *Id.*

conflict.¹¹² The Comprehensive Peace in Sudan Act, passed in 2004, instructed the President to seek imposition of United Nations sanctions if the government of Sudan failed to comply with certain agreements and Security Council resolutions.¹¹³ Finally, in 2006, Congress passed the Darfur Peace and Accountability Act, which restricted travel and froze U.S. assets of certain Sudanese government officials.¹¹⁴ Because Illinois's pension funds are not controlled by the federal government, none of these Acts imposed any express restriction on Illinois's investment policies.¹¹⁵

The National Foreign Trade Council challenged Illinois's law on behalf of its members that qualified as "forbidden entities" under Illinois law.¹¹⁶ An opinion issued by the federal district court in February 2007 granted a permanent injunction against enforcement of the Illinois Sudan Act.¹¹⁷

In analyzing the amendments to the Illinois Deposit of State Moneys law, the court noted that "it is possible to comply with both federal law regulating business dealings with Sudan and the Illinois Sudan Act."¹¹⁸ But, the court concluded, following *Crosby* and *Garamendi*, differences in approach between the federal government and the state were sufficient to support preemption.¹¹⁹ Invoking both conflict and field preemption, the court wrote, "the Illinois Sudan Act's lack of flexibility, extended geographic reach, and impact on foreign entities interferes with the national government's conduct of foreign affairs," despite the absence of a direct conflict.¹²⁰

On the question of the amendments to the Illinois Pension Code, the court reached a different conclusion.¹²¹ These amendments, the court observed, imposed a less tangible burden that might not have any impact on companies' decisions to do business in Sudan.¹²² This law therefore did not obstruct federal foreign policy goals in the region.

In analyzing these Illinois laws, the court specifically noted that the Supreme Court's earlier decisions had not yet delineated "with clarity what role, if any, the states retain" in foreign affairs.¹²³ In an attempt to

112. *Id.* at 736; *see also* Sudan Peace Act, Pub. L. No. 107-245, 116 Stat. 1504 (codified at 50 U.S.C. § 1701 (Supp. IV 2004)).

113. *Giannoulis*, 523 F. Supp. 2d at 736; *see also* Comprehensive Peace in Sudan Act of 2004, Pub. L. No. 108-497, 118 Stat. 4012 (codified as amended at 50 U.S.C. § 1701 (Supp. IV 2004)).

114. *Giannoulis*, 523 F. Supp. 2d at 736; *see also* Darfur Peace and Accountability Act of 2006, Pub. L. No. 109-344, 120 Stat. 1869 (codified at 50 U.S.C. § 1701 (Supp. IV 2004)).

115. *Giannoulis*, 523 F. Supp. 2d at 736-42.

116. *Id.* at 736.

117. *Id.* at 750-51.

118. *Id.* at 737.

119. *Id.* at 741-42.

120. *Id.*

121. *Id.* at 742.

122. *Id.* at 746.

123. *Id.* at 744.

articulate a rule of decision for these cases, the court opined that Supreme Court rulings would not appear to prohibit a state or local government from issuing a resolution condemning actions of a foreign government, even if the national government had made no such declaration or did not support such a view.¹²⁴ According to the court, “[i]n such a case, although the United States would not be speaking with ‘one voice,’ the absence of actual hindrance to the national government’s conduct of foreign policy would appear to preserve the state or local enactment.”¹²⁵

The court further averred that “sister state” agreements or other bilateral agreements between subnational governments appear to be beyond the reach of the preemption doctrine, provided they have no “practical effect . . . on the national government’s ability to conduct foreign policy on behalf of the United States.”¹²⁶ In short, the district court would require evidence of tangible effects of state law on foreign policy in order to permit federal preemption; the speculative effects that plaintiffs identified as arising from the pension amendments, i.e., the mere possibility that a company’s investment practices would be influenced by the Act, were not sufficient.¹²⁷

Yet, while it does confront the issue, the *Giannoulis* court leaves the precise content of “real” foreign policy effects largely undefined. Certainly, few would dispute that the judicial branch is the branch of government with the weakest claim to foreign policy expertise. Because judges are not privy to the nuances of the nation’s foreign affairs agenda, and are not directly involved in setting that agenda, they are reduced to examining only the most visible aspects of foreign affairs—formal protests or international complaints by foreign governments, and so on—to determine when subnational policies have resulted in some tangible interference with federal foreign policy. This focus on the actions of foreign governments actually reduces the foreign-policy-defining role of the executive and legislative branches, which may actually tolerate much more tension, ambiguity, and nuance than the foreign government (or the U.S. courts) might.

Indeed, in the wake of the *Giannoulis* ruling, Congress clarified its support for subnational divestment laws by passing the Sudan Accountability and Divestment Act, intended to provide assurances to states and municipalities that local divestment legislation would be protected from preemption challenges.¹²⁸ The law is denominated as “[a]n Act to authorize State and local governments to divest assets in companies that conduct business operations in Sudan.”¹²⁹ However, whether the law actually has

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, §§ 1–12, 121 Stat. 2516 (codified at 50 U.S.C. § 1701 (Supp. IV 2004)).

129. *Id.* pmbl.

this impact remains unclear. In an effort to preserve the Executive's authority to override Congress's authorization, should it conflict with executive foreign policy priorities, President George W. Bush's signing statement accompanying the new law stated that,

This Act purports to authorize State and local governments to divest from companies doing business in named sectors in Sudan and thus risks being interpreted as insulating from Federal oversight State and local divestment actions that could interfere with implementation of national foreign policy. However, as the Constitution vests the exclusive authority to conduct foreign relations with the Federal Government, the executive branch shall construe and enforce this legislation in a manner that does not conflict with that authority.¹³⁰

Through this signing statement, President Bush sought to extend executive power even beyond the broad scope found in *Garamendi*, to permit the Executive to flout explicit congressional legislation permitting subnational human rights laws. Though criticized widely, the President's gambit has not been tested in court. As some scholars have observed, however, this executive action fits within a pattern in which the "federal government pressed expansive understandings of the President's authority over . . . 'foreign' affairs."¹³¹

D. *Medellín v. Texas*

The Executive's foreign affairs authority has certainly not been given such wide scope when the President's goal is to *promote* subnational implementation of human rights norms in the absence of congressional implementation.

Medellín considered whether the State of Texas was obligated to give credence to a federal executive order mandating the state's compliance with the terms of the Vienna Convention on Consular Relations.¹³² The United States is a signatory to the Convention, which requires that non-nationals charged with a crime be informed of their right to contact their consulate for assistance prior to trial.¹³³

Most crimes are charged at the state level, so state implementation of the Vienna Convention is critical to its effectiveness.¹³⁴ However, state implementation has been spotty at best. Some states, like California, have adopted the consular notification requirement as their own state law.¹³⁵

130. Press Release, The White House, Statement by the President (Dec. 31, 2007), available at <http://www.whitehouse.gov/news/releases/2007/12/20071231.html>.

131. Resnik et al., *supra* note 5, at 781.

132. *Medellín v. Texas*, 128 S. Ct. 1346, 1352–53 (2008).

133. *Id.* at 1357 n.4.

134. *See id.* at 1363.

135. *See* CAL. PENAL CODE § 834(c)(a)(1) (West 2000).

Others, like Texas, have resisted the requirement.¹³⁶ Some, like Florida, have enacted legislation that affirmatively flouts the international human rights norms.¹³⁷

This patchwork implementation has resulted in real, tangible impacts on U.S. foreign relations. The governments of Mexico and Germany have independently charged the United States with treaty violations before the ICJ.¹³⁸ In each instance, the United States was found to be in violation.¹³⁹ The problem is compounded by the fact that some of the nonnationals whose rights have been affected are charged with the death penalty, giving the nations from which they hail an additional reason to protest the U.S. procedures.

In 2006, following yet another loss before the ICJ, the Bush administration issued a memorandum directing states to comply with the terms of the Vienna Convention and, presumably, to provide some additional process to assess whether cases that had already gone to trial might have had different outcomes if the defendants' consular rights had been honored.¹⁴⁰ The State of Texas disputed its obligation to comply with the executive memorandum on, among others, the grounds that (1) decisions of the ICJ are not directly binding on states; and (2) the executive memorandum is ineffective to implement the Vienna Convention and nonbinding, since only congressional action can implement a non-self-executing treaty.¹⁴¹

The Supreme Court majority upheld the state's assertions, ruling that the State of Texas has no obligation to abide by the Vienna Convention absent congressional implementation.¹⁴² In concurrence, Justice John Paul Stevens underscored the moral obligation that should still weigh on Texas,

136. Reynaldo Anaya Valencia, Craig L. Jackson, Leticia Van de Putte & Rodney Ellis, *Avena and the World Court's Death Penalty Jurisdiction in Texas: Addressing the Odd Notion of Texas's Independence from the World*, 23 YALE L. & POL'Y REV. 455, 503 (2005).

137. Marc J. Kadish & Charles C. Olson, *Sanchez-Llamas v. Oregon and Article 36 of the Vienna Convention on Consular Relations: The Supreme Court, The Right to Consul, and Remediation*, 27 MICH. J. INT'L L. 1185, 1232 (2006) (stating that Florida's statute explicitly states that "failure to provide consular notification under the Vienna Convention on Consular Relations . . . shall not be a defense in any criminal proceeding against any foreign national and shall not be cause for the foreign national's discharge from custody" (internal quotation marks omitted)).

138. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31); *LaGrand Case (F.R.G. v. U.S.)*, 1999 I.C.J. 9, 12 (Mar. 3).

139. *Avena*, 2004 I.C.J. at 72 (ordering the United States to provide review and reconsideration of convictions and sentences "by means of its own choosing"); see also *LaGrand*, 2001 I.C.J. at 516-17 (same).

140. Memorandum from George W. Bush, President, U.S., to U.S. Attorney Gen. (Feb. 28, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>.

141. Brief of Respondent-Appellee at 9-11, *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984).

142. *Medellín*, 128 S. Ct. at 1372.

but also agreed that there was no legal bar to Texas's planned execution of Jose Medellín.¹⁴³

The questions presented to the Court were narrow and leave open some additional issues concerning state compliance with international law. For example, the federal government has long taken the position that states have an obligation through the federal system to implement international human rights obligations undertaken at the federal level.¹⁴⁴ The *Medellín* decision seems to confirm the notion of state obligation, but ties it directly to the international system rather than routing it through the federal structure. Perhaps this posits a new, more direct relationship between the states and the international system, but the Court does not directly address this.

Medellín does, however, illustrate a troubling asymmetry between the treatment of subnational initiatives that promote internationally accepted rights versus those that undermine such rights. The *Garamendi* and *Medellín* cases are similar in one important sense: in both, state activities apparently had an impact on foreign relations. But in *Medellín*, specific congressional action was deemed necessary in order to keep states from violating human rights norms; executive action in exercise of its foreign affairs power was insufficient. In *Garamendi*, executive action alone was sufficient to preempt state legislative action that would promote human rights, and might thus more closely ally subnational governments with external human rights forces outside of the United States.¹⁴⁵

III. PROMOTING SUBNATIONAL HUMAN RIGHTS LAWS: UP FROM THE CELLAR

Unbowed by the Supreme Court's repeated rejection of subnational initiatives, states and localities continue to pursue human rights efforts in an ever-wider range of arenas. These efforts are, by and large, democratic exercises, initiated and approved by the people or endorsed by elected officials. However, the *Garamendi* line of cases discussed above invites further challenges to, for example, local Sudan divestment laws, Iran divestment initiatives, antisweatshop laws, local CEDAWs and Conventions on the Elimination of Racial Discrimination, and subnational adoption of Vienna Convention standards, based on implied preemption.

143. *Id.* at 1375 (Stevens, J., concurring).

144. 138 CONG. REC. 8071 (1992) (noting that states and local governments "shall" implement Covenant obligations in areas within their jurisdiction); *see also* 140 CONG. REC. 14326 (1994) (same understanding for CERD); 136 CONG. REC. S17486 (daily ed. Oct. 27, 1990) (same understanding for Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

145. One might ask whether *Medellín v. Texas* might have been decided differently if it were framed as a preemption case. The petitioners included these arguments in their briefs, but the Court did not squarely address them. Brief of Respondent-Appellee, *supra* note 141, at i.

Courts are ill-equipped to adopt the *Giannoulis* court's approach to determining which of these subnational initiatives have tangible foreign affairs effects that usurp the executive function.¹⁴⁶ The Supreme Court has so far avoided making such determinations by adopting broad parameters for federal preemption.¹⁴⁷ Yet the effect of such a broad application of federal preemption doctrine is to undermine exercises of democracy at the subnational level; to eliminate the positive tension, dialogue, and policy depth associated with federalism; and to chill more comprehensive implementation of widely accepted human rights norms in the United States consistent with the recognized role of subnational governments in human rights implementation.

As courts examine these future challenges, this essay proposes the following two guiding principles, consistent with the Constitution's structural allocations of foreign affairs power. These proposed principles are intended to challenge perpetuation of an "upstairs, downstairs" approach to federal preemption by instead reflecting the realities and benefits of subnational governments' horizontal involvement in global issues. These principles are also intended to respect the importance of structural checks and balances in U.S. law relating to human rights implementation.

First, the tension between subnational and national policy approaches, while at times uncomfortable and destabilizing, also has important benefits. Broad versions of the implied preemption doctrine should not be applied to undermine the tension inherent in coexisting state and federal sovereignty. Any attempt to eliminate this tension implicates the very autonomy of state sovereigns that the Court recognized in *Medellín*, which is a critical component of our system of government. A broad version of federal preemption has the potential to cut off robust dialogue between the states and the federal government in the area of human rights, limiting the inherent benefits that might otherwise be derived from the federal system.¹⁴⁸ Like the upstairs Bellamys, certain interests within the federal government may want to keep states "in their place" under the stairs, barred from forming productive international alliances without express federal approval. This sort of limitation is not only undesirable as a matter of our federal system, it is also simply not possible in an era of global social, economic, and political connections. Indeed, states are already covert "players" in many international arenas.¹⁴⁹ Their participation in these arenas is an important component of creating balanced federal policies.

Second, judicial interference with subnational human-rights-promoting activities should be disfavored, and subnational governments should instead

146. See *supra* text Part II.C.

147. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 n.14 (2003).

148. See Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 249 (2001).

149. See Resnik et al., *supra* note 5, at 740, 784.

be encouraged to maximize their incorporation of and association with human rights norms. As Justice Stevens cogently recognized in his concurrence in *Medellín*, recognition of human rights norms is a net good for the United States, not to mention humanity in general.¹⁵⁰ More pointedly, in implementing human rights norms, subnational governments help bring the United States as a whole into compliance with its international obligations. Indeed, state implementation may be the only means of realizing certain human rights on the domestic level. Federal imposition of human rights standards might run afoul of federalism constraints¹⁵¹ by interfering with state police powers or other areas traditionally reserved to state and local regulation such as family or criminal law. But if the subnational government itself chooses to adopt human rights standards, particularly if those standards comport with international obligations that have been assumed by the federal government, the positive effect is to expand human rights protections within the United States. This should surely weigh against interfering with such state and local decisions.

These two guiding principles lead to a conclusion about the application of implied federal preemption to instances of subnational human rights implementation. Just as the Court recognized in *Medellín* that congressional action is generally required to force implementation of a treaty subnationally,¹⁵² a prerequisite to preemption of subnational human-rights-promoting activity should be a statement by Congress expressing its intention to preclude such activities in the field or its conclusion that subnational activities are interfering with the conduct of foreign affairs. Absent such positive preemptive action, subnational activity to promote human rights should be permitted to proceed just as freely as subnational efforts to undermine or ignore human rights norms are permitted to proceed under *Medellín*.¹⁵³ Courts should not exercise the implied preemption doctrine to curtail subnational human rights efforts.¹⁵⁴

150. According to Justice Stevens, the costs of refusing to respect the ICJ's judgment are significant. . . . When the honor of the Nation is balanced against the modest cost of compliance, Texas would do well to recognize that more is at stake than whether judgments of the ICJ, and the principled admonitions of the President of the United States, trump state procedural rules in the absence of implementing legislation.

Medellín v. Texas, 128 S. Ct. at 1375 (Stevens, J., concurring); see *supra* text accompanying notes 26–32 (discussing the benefits of human rights policies).

151. Davis, *supra* note 35, at 362.

152. *Medellín*, 128 S. Ct. at 1369.

153. This principle was recently proposed by Judith Resnik, Joshua Civin, and Joseph Frueh, who argue that, “[a]bsent a clear statement from Congress directing preemption, the judiciary ought to be reluctant to ban local majoritarian activities Indeed, local actions could have a stronger claim to judicial deference than . . . congressional actions” Resnik et al., *supra* note 5, at 774.

154. Of course, Congress might take another route entirely and take steps to domestically implement human rights agreements once they are ratified. If, for example, CERD was fully implemented domestically, the question of federal preemption would turn on whether the federal statute overcomes the state or local initiative—an inquiry that does not require the

Significantly, this conclusion is not in tension with the accepted notion that ultimate foreign affairs power rests with the federal government. Even within the United States, the federal government has recognized a role for states and cities in implementing the United States' international obligations.¹⁵⁵ The starting point is the U.S. Constitution, which provides that ratified treaties such as the International Convention on the Elimination of All Forms of Discrimination (CERD) are not just relevant to the federal government, but constitute the "supreme Law of the Land" binding on the "Judges in every State."¹⁵⁶ Further, the U.S. government has repeatedly observed that state and local authorities have an independent role to play in implementation of ratified treaties. According to the statements made by the U.S. Senate in ratifying CERD (1994), the ICCPR (1992), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1994),

the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.¹⁵⁷

In other words, the federal government takes responsibility for implementing human rights treaties only so far, and leaves the rest to state and local authorities.

But what, then, are the areas over which state and local governments properly exercise jurisdiction? The United States offered its view in 1994 when it submitted its first report to the United Nations Human Rights Committee detailing its compliance with the ICCPR. According to the federal government, its authority did not extend to those areas where state and local governments exercised significant responsibilities, including "matters such as education, public health, business organization, work conditions, marriage and divorce, the care of children and exercise of the ordinary police power."¹⁵⁸ Again, the United States reiterated that it would "remove any federal inhibition to the abilities of the constituent states to meet their obligations" under the ICCPR and presumably any other ratified treaty.¹⁵⁹

federal court to speculate about foreign affairs agendas and impacts, though it may raise some of the same questions about state and local roles in human rights implementation under the federal system.

155. *See supra* note 144 and accompanying text.

156. U.S. CONST. art. VI, §1, cl. 2.

157. 138 CONG. REC. 8071 (1992).

158. U.N. Human Rights Comm., *Initial Reports of States Parties Due in 1993: United States of America*, ¶ 3, U.N. Doc. CCPR/C/81/Add.4 (Aug. 24, 1994).

159. *Id.* ¶ 4.

While perhaps efficient in their time, the vertical households of the *Upstairs, Downstairs* era ultimately toppled when downstairs servants gained recognition of their full range of relationships and found new horizontal opportunities—opportunities that gave them greater autonomy and independence. The factors in play were largely external to these households. A tighter rein from the master of the house would have done nothing to reverse the trend. The *Upstairs, Downstairs* metaphor holds here as well. The federal courts have spoken through their implied preemption cases, and the executive branch has threatened to unilaterally challenge state activity with a foreign flavor, yet state efforts to form horizontal alliances and to implement human rights policies continue. A tighter federal rein, with broad judicial applications of implied preemption, has not deterred either new or old forms of subnational action, which are often supported by the international community.¹⁶⁰

Like the downstairs servants of the past, subnational governments are not content with their domestic “place” in an exclusively vertical federal arrangement and seek recognition of their capacities in the larger world. This essay concludes that, when subnational entities act to promote widely accepted human rights norms, in the absence of congressional instructions to the contrary, the federal courts should allow the fruits of these subnational horizontal arrangements to grow and ripen in ways that further human rights.

160. Davis, *supra* note 20, at 148–49. For example, foreign governments and international organizations have been particularly ready to work with U.S. states and localities that are prepared to adopt aggressive environmental efforts to combat global warming. *See, e.g.*, Press Release, Office of the Governor, State of Cal., Gov. Schwarzenegger, British Prime Minister Tony Blair Sign Historic Agreement to Collaborate on Climate Change, Clean Energy (July 31, 2006), *available at* <http://gov.ca.gov/index.php/press-release/2770/>; *see also* Resnik et al., *supra* note 5, at 719.