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UNDERSTANDING THE "UNDERSTANDING": FEDERALISM CONSTRAINTS ON HUMAN RIGHTS IMPLEMENTATION

BRAD R. ROTH†

Table of Contents

I. INTRODUCTION ........................................ 891
II. MISSOURI V. HOLLAND, HUMAN RIGHTS, AND THE LIMITS TO FEDERAL POWER ........................................ 895
III. THE LEGAL SIGNIFICANCE OF THE ICCPR FEDERALISM UNDERSTANDING ........................................ 902
IV. CONCLUSION ........................................ 909

I. INTRODUCTION

In 1992, fifteen years after affixing its signature, the United States finally ratified the core international human rights treaty, the International Covenant on Civil and Political Rights (ICCPR).1 Much to the consternation of the treaty’s strongest supporters, however, the ratification was made subject to five “Reservations,” five “Understandings,” four “Declarations,” and a “Proviso.” 2 These

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2. See 138 CONG. REC. S4781 (daily ed. Apr. 2, 1992). A qualification attached to the instrument of ratification is a “Reservation,” regardless of designation, wherever it manifests an intent to withhold consent to a treaty obligation. The terms “Understanding” and “Declaration” have no specified significance in international law; thus, whether qualifications under these headings amount to reservations is a question of intent. The “Proviso” was not attached to the instrument of ratification, and so cannot constitute a reservation. See Stefan A. Riesenfeld & Frederick M. Abbott, The Scope of U.S. Senate Control

891
qualifications, or "RUDs," have generated considerable controversy, both within the United States and in the international community, for they collectively suggest an intention to preclude any obligation to expand upon the substantive rights and procedural mechanisms already present in the constitutional and statutory law of the United States. Although a bare obligation not to backtrack on existing substantive and procedural protections would not constitute an illusory obligation, reservations that so limit the obligation would be difficult to reconcile with the object and purpose of the treaty, and would thus call into question the validity of the ratification.


4. “Reservations designed to reject any obligation to rise above existing law and practice are of dubious propriety: if states generally entered such reservations, the convention would be futile . . . . Even friends of the United States have objected that its reservations are incompatible with that object and purpose and are therefore invalid.” Louis Henkin, Comment, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 AM. J. INT’L L. 341, 343 (1995); but see Curtis A. Bradley & Jack L. Goldsmith, Treaties, Human Rights, and Conditional Consent, 149 U. PA. L. REV. 399 (2000) (defending the propriety of the RUDs).


Doctrine holds that the attachment of incompatible reservations invalidates the ratification. See Reservations to the Convention on the Prevention and Punishment of Genocide (Advisory Opinion), 1951 I.C.J. 15 (May 28). It is doubtful, however, that the ratification can be invalidated absent a declaration
Apart from the formal obligation to submit periodic reports to the Human Rights Committee, it is difficult to identify with certainty a legal difference that the U.S. ratification of the ICCPR has made, on either the international or the domestic plane. There are, however, a number of ICCPR provisions, not subject to any substantive qualification in the instrument of ratification, that arguably entail an international legal obligation to extend protection for individual rights beyond that presently accorded by federal or state law. Although the "non-self-executing" Declaration precludes direct judicial implementation of ICCPR obligations, the United States as a corporative entity remains legally responsible on the international plane for full compliance. The question thus arises: Does the federal government have full domestic legal authority, co-extensive with its international legal responsibility, to take all actions "necessary and proper" to bring the United States into compliance?

Questions of this type were once thought to have been definitively disposed of by the Supreme Court's 1920 decision in

by objecting states that they do not regard the treaty as being in force between themselves and the reserving state. See Vienna Convention on the Law of Treaties, supra, at 687-88. In this case, all of the objecting states have declared the treaty to be in force between themselves and the United States, notwithstanding their assertions of the incompatibility of certain U.S. reservations. See Objections to U.S. Reservations, supra note 3.

Even if the reservations are "objectively" incompatible, it is not clear who can so judge, and with what legal consequence. The ICCPR supervisory body, the Human Rights Committee, has asserted, against all orthodoxy, both that it can authoritatively judge incompatibility and that incompatible ICCPR reservations are severable, so that the ratification brings into force the very provisions to which the state party impermissibly sought to reserve. Human Rights Committee, General Comment 24 (52), supra note 3, at 5. The United States Government rejects both of these assertions, and neither has achieved general acceptance.

6. See 138 CONG. REC., supra note 2, at S4784; but see David Sloss, The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties, 24 YALE J. INT'L L. 129 (1999) (questioning the conventional wisdom that the Declaration has this effect).
Missouri v. Holland, which held that statutes—in that case, the Migratory Bird Treaty Act—enacted in furtherance of treaty compliance are within the power conferred on Congress by the Necessary and Proper Clause. This precedent has yet to be applied to human rights legislation, however, and recent trends in Supreme Court federalism jurisprudence raise doubts about whether the Missouri v. Holland doctrine is sufficiently robust to extend federal authority to rights matters that have been held, in the absence of a relevant treaty obligation, to fall outside the scope of the authority conferred upon Congress by the Commerce Clause and by Section 5 of the Fourteenth Amendment.

This cloud over the authority of the political branches of the federal government to implement the ICCPR is darkened by the fifth Understanding (hereafter, the “Federalism Understanding”) attached to the instrument of ratification, which, in remarkably obscure terms, anticipates that obligations will be implemented by “measures appropriate to the Federal system.” This Understanding, which has received relatively little attention so far in the debate over the RUDs, may be a significant barrier to U.S.

7. 252 U.S. 416 (1920).
8. See id. at 432.
9. A different set of concerns about the effect of recent federalism precedents on scope of the treaty power involves the federal “commandeering” of state officials. See Thomas Healy, Note, Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power, 98 COLUM. L. REV. 1726, 1755-56 (1998) (stating that “[a] close reading of Printz [v. United States, 521 U.S. 898 (1997)], in particular, suggests that the treaty power, long thought to be free from federalism-based restraints, may be subject to some of the same limits that have been applied to the Commerce Clause. Yet while such limits may follow naturally from the Court’s analysis in Printz, these limits are not consistent with the broad foreign affairs responsibility of the federal government.”); see also Carlos Manuel Vázquez, Breard Printz, and the Treaty Power, 70 U. COLO. L. REV. 1317, 1356 (1999) (noting that “the federalism understanding, alongside the non-self-executing declaration, appears to commandeer state legislatures to pass the laws the treaty requires”).
10. 138 CONG. REC., supra note 2, at S4784.
implementation of the ICCPR, potentially placing a class of state-level violations of the international legal obligations of the United States beyond federal remedy. This result would render the U.S. ratification of the ICCPR a Pyrrhic victory indeed for the treaty’s advocates.

II. MISSOURI v. HOLLAND, HUMAN RIGHTS, AND THE LIMITS TO FEDERAL POWER

It is hornbook law that the doctrine of enumerated powers, as reiterated in the Tenth Amendment, is not an impediment to the treaty power. According to the Court in *Holland*:

Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States . . . . It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, “a power which must belong to and somewhere reside in every civilized government” is not to be found. *Andrews v. Andrews*, 188 U.S. 14, 33. What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act.12

The Court thus straightforwardly repudiated the thesis that

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“what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do.” This repudiation was seemingly reaffirmed in the 1950s by the failure in Congress of the proposed “Bricker Amendment,” which would have provided, inter alia, that “[a] treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.”

Moreover, the Holland Court did not regard the Migratory Bird Treaty Act, a statute passed in implementation of the treaty, as presenting a separate issue of Constitutional authority. “If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government.” Thus, federal legislative power may be thought to extend to all matters covered in such international treaties as the President and the Senate deem fit to conclude, including matters of individual rights.

It does not stand to reason, however, that the matter is quite as simple as that. Holland predated the advent of international human rights law as we now know it. Treaties in 1920 were more or less straightforwardly devices for national advantage; an international treaty obligation was understood to be a component of a quid pro quo, undertaken in the service of U.S. foreign policy interests as assessed by those organs of government—the Executive and the Senate—to which furtherance of those interests was textually committed. Those federal organs would not ordinarily have been

13. Id. at 432.
14. S.J. Res. 43, cited in Neuman, supra note 11, at 47 n.78. Arguably, though, the defeat of the Bricker Amendment can be attributed, at least in part, to assurances that treaties would be limited to matters of special “international concern,” and thus would not unduly intrude upon the prerogatives of the states. See Curtis A. Bradley, The Treaty Power and American Federalism, 97 MICH. L. REV. 390, 429-30 (1998); Henkin, supra note 4, at 348-49.
15. Holland, 252 U.S. at 432.
16. Columbia Law School Professor Lori Fisler Damrosch has captured the point best in musical comedy: “If migratory birds can have their treaty and fly, why, oh why, can’t I?” (Skit performed at the Annual Dinner of the American Society of International Law, April 1998).
expected to undertake treaty obligations for reasons other than a quid pro quo with foreign powers, let alone for the purpose of establishing universal standards for internal governance that could then be imposed on the states. More importantly, Congress would not ordinarily have been expected to pass implementing legislation beyond what it thought minimally necessary to effectuate the treaty partners’ privileges—the treaty standards having been conceded in negotiations rather than affirmatively sought. Even though the Migratory Bird Treaty did, in fact, line up with standards that the federal government had previously sought to impose on the states, only to run afoul of the doctrine of enumerated powers, the Holland Court, given the typical nature of treaties at that time, would have been less likely than today’s Court to perceive a federal motive to exploit the treaty power at the expense of the prerogatives of the states.

In the last few years, the Court has powerfully reasserted constitutional limitations on Congressional power to legislate in areas traditionally left to the competence of the states. In striking down the Religious Freedom Restoration Act (RFRA) in City of

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18. For a more elaborate rendition of this point, see Bradley, supra note 14, at 459-60; Bradley, The Treaty Power and American Federalism, Part II, 99 MICH. L. REV. 98, 121-24 (2000). David M. Golove has, however, put a significant dent in this conventional wisdom, pointing out that the decision in Holland came amid a national debate, cited in the briefs, over the prospect that treaties sponsored by the newly-formed International Labor Organization would intrude on the states’ jurisdiction over labor regulation in ways that federal legislation, under then-prevailant constitutional precedents, could not. See David M. Golove, Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power, 98 MICH. L. REV. 1075, 1267-69 (1999); but see Bradley, supra, 99 MICH. L. REV. at 132 n.210 (answering Golove’s point by noting, inter alia, that “U.S. treatymakers perceived federalism limits on their ability to enter into labor treaties after Holland”). One gets the sense that the dust has not yet settled on the debate over the Holland Court’s expectations.
Boerne v. Flores and provisions of the Violence Against Women Act (VAWA) in United States v. Morrison, the Court has made clear its judgment that, notwithstanding the developments of the Civil Rights era, neither the Section Five Enforcement Clause of the Fourteenth Amendment nor the Commerce Clause can be read to confer on Congress plenary legislative power over rights matters. In City of Boerne, where Congress had sought to expand rights of religious exercise beyond the Court’s current interpretation of Free Exercise Clause guarantees, the Court held that the Section 5 of the Fourteenth Amendment conferred on Congress only a remedial power to address state violations of the rights contained in Section 1 (rights subject to the Court’s authoritative interpretation), not a substantive power to create new rights. In Morrison, where

21. See, e.g., South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding the Voting Rights Act under Section 5 of the Fourteenth Amendment as a measure in remediation of patterns of state violation of the Equal Protection Clause); Katzenbach v. Morgan, 384 U.S. 641 (1966) (holding Section 5 to be “a positive grant of legislative power” that includes authority to prohibit state conduct that is not itself unconstitutional); United States v. Guest, 383 U.S. 745 (1966) (indicating in two separate opinions, by six justices, that Congress may legislate against interference with Fourteenth Amendment rights, even by non-state actors); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding the Civil Rights Act under the Commerce Clause’s conferral of power to regulate “moral and social wrongs” that have a “substantial effect” on interstate commerce).
22. The Court thus resolved doubts about the continued vitality of a series of “Redemption”-era decisions that had struck down, as exceeding the authorization of Section 1, federal legislation addressing the discriminatory practices of non-state actors. See United States v. Harris, 106 U.S. 629 (1883); Civil Rights Cases, 109 U.S. 3 (1883); United States v. Cruikshank, 92 U.S. 542, 554 (1876). The Court pointed out that an early draft of Section 5 had contained a more substantive authorization:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

City of Boerne, 521 U.S. at 520-21 (quoting CONG. GLOBE, 39th Cong., 1st Sess., 1034 (1866)). This version was withdrawn after objections that it would confer
Congress had sought to regulate gender-motivated violence by private persons, the Court reiterated the limitation of Congressional power under Section 5 to the remediation of constitutional violations by state actors, and further denied Congressional power under the Commerce Clause to regulate private activities that are non-economic in nature, irrespective of the purported "substantial effects" of those activities on interstate commerce.²³

It is hard to believe that the Court's reaffirmation of limitations on Congressional power to legislate in areas of individual rights—either against non-state actors outside the realm of commerce, or against the states themselves beyond the scope of Supreme Court interpretations of Section 1 of the Fourteenth Amendment—can lightly be trumped by invocation of Missouri v. Holland. At minimum, the Court would likely disallow any transparent effort to use the treaty power as an "end run" around those limitations. A treaty of convenience designed to impose federal values on recalcitrant states—for example, a treaty hastily concluded with a single foreign government on the prohibition of the execution of any persons under the age of eighteen at the time of the commission of their crimes—would almost certainly occasion a judicial qualification of the sweeping dictum articulated in Holland. The same can be said of implementing legislation that manifestly exceeds the requirements of compliance with a bona fide human rights treaty standard—for example, legislation barring the states from executing persons under eighteen, based on a tendentious Congressional interpretation of treaty language prohibiting "deprivation of life without due process of law."

The real question is not whether the Missouri v. Holland doctrine provides blanket validation of treaty-based federal rights measures, but rather, under what circumstances a Congressional interpretation of human rights treaty obligations can serve to extend federal authority over matters otherwise reserved to the

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²³ See id.

23. See Morrison, 529 U.S. at 626.
states. Even if unambiguous obligations under a *bona fide* human rights treaty can be implemented under the Necessary and Proper Clause, treaty obligations are seldom completely unambiguous, and are often subject to wide-ranging interpretation. The international legal system conspicuously lacks mechanisms for treaty interpretations that bind the states parties generally, and international evaluation of state party performance in particular cases requires state party consent to adjudication, which the United States most often withholds. This lack of authoritative interpretation at the international level raises the question of whether Congress should be given broad latitude to determine the scope of the obligation it purports to implement, or whether the Court, in reconciling federal foreign policy interests with the prerogatives of the states, should substantively review the reasonableness of the Congressional implementation, perhaps even holding Congress to the narrowest possible interpretation of the international obligations so as to guard against exorbitant impositions of Congressional power upon the states.

Although no case testing the limits of the *Missouri v. Holland*

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24. Even the International Court of Justice (ICJ) technically lacks authority to issue binding treaty interpretations, except as addressed to the state parties before it in a particular controversy. See Statute of the International Court of Justice, 59 Stat. 1055, T.S. 993 (1945), Art. 59. The Human Rights Committee established under the ICCPR has no power of binding interpretation whatsoever.

25. For example, the United States has withdrawn its consent from the general-purpose ("compulsory") jurisdiction of the ICJ (in the wake of an adverse ICJ judgment in the case brought by Nicaragua over the "contra" war in the 1980s), has reserved to the provisions of the Genocide, Torture, and Racial Discrimination Conventions that provide for ICJ adjudication, and has not consented to the individual complaint mechanism of the ICCPR Human Rights Committee. See Henkin, *supra* note 4, at 344-45. Interestingly, the United States is subject to ICJ adjudications in cases involving the Vienna Convention on Consular Relations, resulting in an adverse judgment involving Arizona’s execution of German nationals who had not been given appropriate access to the German consulate at the time of their arrest. See LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27), also available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>.
doctrine has yet arisen, Gerald L. Neuman's 1997 law review article on the Religious Freedom Restoration Act of 1993 (RFRA) illustrates the doctrine's potential significance for human rights.\textsuperscript{26} RFRA would have prohibited the state and federal governments from "substantially burdening" the exercise of religion, even by facially neutral laws, unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."\textsuperscript{27} Neuman notes that the Act, struck down in \textit{City of Boerne} as exceeding Congressional power, could plausibly be rearticulated as an implementation of Article 18(3) of the ICCPR, which provides that "[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as . . . are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."\textsuperscript{28} Although acknowledging that the fit is not a perfect one, Neuman argues that Congress should have leeway to use its judgment in crafting implementing legislation.

The compelling interest test of RFRA appears to be more demanding than the standard for "necessary" limitations under Article 18. RFRA's category of substantial burdens on the exercise of religion might be broader than the category of limitations on the right to manifest one's religion in worship, observance, practice, and teaching. Nonetheless, just as Congress found in RFRA that the compelling interest test was a traditional and workable standard for resolving conflicts between the exercise of religion and other government interests, so Congress could

\textsuperscript{26} See Neuman, \textit{supra} note 11.
\textsuperscript{28} International Covenant on Civil and Political Rights, \textit{supra} note 1, Art. 18(3), 999 U.N.T.S. 171, 178.
reasonably find that the traditional categories of religious exercise and compelling interest provided an appropriate mechanism for protecting the manifestation of religious beliefs in practice within the legal system of the United States.\textsuperscript{29}

Neuman concludes that Article 18(3) of the ICCPR, in conjunction with the \textit{Missouri v. Holland} doctrine, could have provided an independent basis for the legislation.\textsuperscript{30}

Neuman's reasoning is enticing to the international lawyer. If accepted by the courts, his thesis would demonstrate a domestic legal significance to U.S. acceptance of "non-self-executing" human rights obligations. Yet even if he is correct that the \textit{Missouri v. Holland} doctrine opens the way for the expansion of federally-guaranteed rights, there is still the ICCPR Federalism Understanding to consider. Although Neuman argues that the Understanding "does not decrease the United States' international obligations and does not decrease in the slightest the power of Congress to implement those obligations,"\textsuperscript{31} there is reason to question the latter conclusion.

\section*{III. The Legal Significance of the ICCPR Federalism Understanding}

The fifth Understanding attached to the U.S. instrument of ratification reads as follows:

\begin{quote}
29. Neuman, \textit{supra} note 11, at 50 (footnote omitted).

30. Gerald L. Neuman initially argued that the \textit{Missouri v. Holland} rationale "would support a verbatim re-enactment of the statute if Congress so chose." Neuman, \textit{supra} note 11, at 53. He subsequently reports having "been reasonably admonished, however, that now that the Supreme Court has decided \textit{City of Boerne}, and given the particular reasons on which the Supreme Court relied for invalidating RFRA, a new statute substantively identical to RFRA could not be based on the treaty power without encountering a high risk of invalidation as a subterfuge." Neuman, \textit{Lecture: The Nationalization of Civil Liberties, Revisited}, 99 \textit{COLUM. L. REV.} 1630, 1645 n.101 (1999).

\end{quote}
That 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.32

Neuman treats this language dismissively: "The content of the understanding is wholly circular—'measures appropriate to the Federal system' include, when Congress deems it necessary, federal legislation ensuring that state and local governments comply with the international obligations of the United States."33 Louis Henkin has similarly stated that the Understanding "serve[s] no legal purpose."34 Yet the Understanding, though so convoluted as virtually to belie that designation, cannot so easily be regarded as surplusage.

Those who have commented on the Understanding have focused on the fact that the Executive and the Senate did not intend it to have the legal effect of a reservation.35 That is to say, the Understanding does not seek to limit the legal responsibility of the

32. 138 CONG. REC., supra note 2, at S4784 (emphasis added).
33. Neuman, supra note 11, at 52.
34. Henkin, supra note 4, at 346. Henkin articulated that view prior to the City of Boerne and Morrison decisions, however, and in the course of an overall analysis at odds with the spirit of those decisions: "There are no significant 'states' rights' limitations on the treaty power. There is little that is not 'within the jurisdiction of the United States,' i.e., within the treaty power, or within the legislative power of Congress under the Commerce Power, under its authority to implement the Fourteenth Amendment, or under its power to do what is necessary and proper to carry out its treaty obligations." Id. at 345 (footnote omitted).
35. See Paust, supra note 11, at 328-31; Henkin, supra note 4, at 345-46; Stewart, supra note 11, at 1202.
United States, on the international plane, to see to it that, by whatever means of implementation, all aspects of the treaty's obligations (other than those subject to an express reservation) are fulfilled.36

But the effect of the Understanding in domestic law is a wholly separate question. Defaulting on treaty obligations is not unthinkable from the standpoint of domestic law; the United States has the sovereign power to violate the treaty and take whatever legal consequences may follow on the international plane.37 If the Senate's consent to ratification manifests an intent that domestic implementation proceed only in certain ways or not at all, it is hardly clear why this condition—which may have been integral to the consent to ratification—should not be given effect in domestic law.38

According to David P. Stewart, who while serving as a State Department Assistant Legal Adviser helped to secure the Senate's consent, "[t]he understanding serves to emphasize domestically that there is no intent to alter the constitutional balance of authority between the state and local governments or to use the provisions of

36. Had the Federalism Understanding been intended as an interpretation of the limits of the treaty obligation, and thus as a conditional reservation (i.e., we understand our treaty obligation to extend only so far, and insofar as it is held to extend farther, we reserve), it would have been in tension with the principle that "a party may not invoke the provisions of its internal law as justification for failure to perform a treaty." Vienna Convention on the Law of Treaties, supra note 5, at 690. It is an open question whether such a conditional reservation could be reconciled with the object and purpose of the treaty.

37. A familiar manifestation of this sovereign power is the "later-in-time" rule, which holds that, in the domestic law of the United States, treaties are overridden by directly inconsistent subsequent statutes, which constitute "the latest expression of sovereign will." See Detlev F. Vagts, The United States and Its Treaties: Obligation and Breach, 95 AM. J. INT'L L. 313, 313-21 (2001).

38. The so-called "Helms Proviso," highlighting the constitutional truism that "Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States," 138 CONG. REC., supra note 2, at S4784, is directed precisely to the point that treaty compliance is not a categorical imperative.
the Covenant to ‘federalize’ matters now within the competence of the states.”

It is unclear how much thought the Executive and the Senate gave to the implications of this statement of “non-intent.” It has been suggested that the main function of the language is to negate any implication of federal preemption, thereby to invite state and local implementation, but this interpretation seems far-fetched, since the ICCPR provisions at issue pertain precisely to those exercises of the police power that are least likely to be federally preempted. The far more natural interpretation is that the Understanding was intended as a Bricker Amendment in miniature: ratification of the ICCPR was not to have any Missouri v. Holland effect of extending federal competence to matters not otherwise within the scope of Congressional power.

The first part of the first clause states that the treaty “shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein.” The necessary implication is that there are matters over which the federal government does not currently possess or does not currently exercise jurisdiction, and as to which

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39. Stewart, supra note 11, at 1202.
40. Jordan J. Paust argues as follows:
The federal clauses delegate and guarantee a competence of state and local authorities to act affirmatively to implement human rights and to have those choices protected as long as they are otherwise in fulfillment of the treaties. Thus, the federal clauses provide state and local competencies to participate in treaty effectuation in ways that might otherwise have been suspect under more inhibiting notions of federal preemption. The new implementary freedom guaranteed under the treaty regimes encourages participation and provides an opportunity for states and sub-state entities to choose affirmative approaches to human rights implementation.
Paust, supra note 11, at 330-31 (footnote omitted).
41. It is, however, worth noting the ingenious argument of Thomas Buergenthal that the Federalism Understanding actually invites state courts to implement the ICCPR as they deem “appropriate,” thereby partly circumventing the “non-self-executing” Declaration. Thomas Buergenthal, Modern Constitutions and Human Rights Treaties, 36 COLUM. J. TRANSNAT'L L. 211, 222 (1997).
42. 138 CONG. REc., supra note 2, at S4784.
this first clause, at least, excludes the promise of federal implementation. The second part of the first clause—"and otherwise by the state and local governments"—reinforces the idea that matters not already within federal jurisdiction are not hereby, at least so far, placed within federal jurisdiction.

The second clause begins with a delimitation of its subject matter—"to the extent that state and local governments exercise jurisdiction over such matters"—and ends with a statement of its objective—"to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant." In other words, matters that begin within the competence of state and local governments are intended to remain within the competence of state and local governments, with no suggestion of "measures" of direct implementation being taken at any other level. The intermediate words that unite the beginning and the end of the second clause—"the Federal Government shall take measures appropriate to the Federal system"—do not change the agents of ultimate implementation ("the competent authorities of the state or local governments"). Rather, they suggest federal measures to spur those agents to action, measures themselves subject to a limitation of "appropriateness." The natural referent of "appropriateness" is the deference due state and local authorities in a federal system within which, in accordance with the terms of the first clause, the pre-treaty balance of competencies remains unchanged.

Perhaps there is a contrary way to read the Understanding, but it is hard to see how such a reading could avoid reducing crucial terms to sheer meaninglessness. If "measures appropriate to the Federal system" amount to plenary power, and if measures "to the end that the competent authorities of the state or local governments

43. Id.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id.
may take appropriate measures for the fulfillment of the Covenant”\textsuperscript{49} include direct implementation measures that circumvent state and local authority, there is little way to account for the existence of any of this language. The Understanding is thus best interpreted as intended to disable the ratification from enhancing federal power at the expense of the states, thereby to overcome some of the qualms that for fifteen years denied the treaty the needed margin in the Senate.

One can argue that even if this was the intent, it is not legally controlling. There has been controversy among academics, in connection with the “non-self-executing” Declaration, as to whether qualifications other than reservations, attached to the instrument of ratification, are actually dispositive of the domestic legal effects of the ratification. Under the terms of the Constitution, it is the treaties themselves that have the status of federal law, and the qualifying declarations of various designations are merely an innovation of Senate practice.\textsuperscript{50}

Courts, though, have typically held, at minimum, that while such a “declaration may not carry controlling weight on this issue, the Senate’s view is entitled to substantial deference given the role the United States Constitution confides in the Senate with regard to the process of making treaties the law of the United States.”\textsuperscript{51} There seems little reason why the Senate, which is empowered to block treaty ratification altogether or to limit the international legal

\textsuperscript{49} Id.

\textsuperscript{50} See John Quigley, \textit{The International Covenant on Civil and Political Rights and the Supremacy Clause}, 42 DEPAUL L. REV. 1287, 1303-04 (1993) (“Additional statements are not part of the treaty and thus are not ‘law’ under the Supremacy Clause”); Reisenfeld & Abbott, \textit{supra} note 2, at 609 (although “[i]t may well be that U.S. courts in the process of interpreting treaties should give great weight to Executive/Senate statements of intent in their making... great weight does not demand blind obedience”); Charles H. Dearborn III, Note, \textit{The Domestic Legal Effect of Declarations that Treaty Provisions are Not Self-Executing}, 57 TEX. L. REV. 233, 248 (1979) (“It would be inappropriate... for a court to consider a Senate declaration as evidence of intent because courts have established that the crucial intent is that of all the contracting parties.”).

consequences of ratification through the attachment of reservations, should not be able to limit domestic legal consequences through "understandings," "declarations," and "provisos." If anything, the case for deference to the Federalism Understanding is stronger than that for deference to the "non-self-executing" Declaration, since the latter arguably intrudes upon the integrity of a separate branch of government, the judiciary, whereas the former merely disavows any effort to appropriate power to the branches that have made the treaty. And since treaty ratification requires the approval of two-thirds of the Senate, the conditions that secured this super-majority may properly hold in check the subsequent implementation efforts of a Congressional majority.

In sum, the ICCPR Federalism Understanding seems fatal to any Congressional effort to employ the ICCPR, in conjunction with the Missouri v. Holland doctrine, to extend federal power over rights questions beyond the limitations specified in the Supreme Court's holdings in City of Boerne v. Flores and in United States v. Morrison. A Court that issued those latter holdings will have no difficulty in deciding that the Understanding blocks any treaty-based strategy to circumvent them.

52. See Buergenthal, supra note 41, at 222 (questioning the constitutionality of the declaration, but conceding its otherwise controlling nature by stating that "in the absence of the above declaration, most provisions of the Covenant would be considered to be self-executing under U.S. law"); Restatement (Third) of Foreign Relations Law of the United States 303 cmt. d (1987) ("The Senate may also give its consent on conditions that do not require change in the treaty but relate to its domestic application, e.g., that the treaty shall not be self-executing . . . .") ; Louis Henkin, The Treaty Makers and the Law Makers: The Niagara Reservation, 56 COLUM. L. REV. 1151, 1176-77 (1956) (opining that qualifications other than reservations, attached by the Senate as conditions of ratification, can be valid as domestic law).


55. Gerald Neuman suggests that a 1996 statute outlawing female genital mutilation, 18 U.S.C. § 116 (2001), may provide a test case. In enacting the statute, Congress specifically invoked the treaty clause, along with other rationales now seemingly moribund in the wake of Morrison. Congressional Findings, Pub. L. 104-208 (Sept. 30, 1996), Div. C, Title VI, Subtitle D, § 645(a),
IV. Conclusion

Although it is an often-repeated slogan that "international law is part of our law," the United States has largely resisted the incorporation of international law into the domestic legal order, just as it has largely resisted adopting international human rights obligations that might lead to calls for modification of U.S. institutions and practices. The RUDs attached to the 1992 ratification of the ICCPR both reflect and effectuate that resistance. Collectively, they all but nullify the legal effect of the ratification on both the international and the domestic planes. As Louis Henkin has noted with sadness, "By its package of RUDs, the United States effectively fulfilled Senator Bricker's purpose, leaving the Covenant without any life in United States law . . . ."

Gerald Neuman's RFRA proposal, in suggesting that the ICCPR ratification may extend federal power to legislate rights beyond otherwise-applicable constitutional limitations, holds out the hope of a residual effect for the ratification in domestic law. A close reading of the Federalism Understanding, however, exposes that hope as quite probably forlorn, just as the spirit animating the RUDs as a whole would lead one to anticipate. At the heart of the RUDs is the conviction that international human rights law should not be allowed to modify any aspect of U.S. constitutionalism, and that includes, unsurprisingly, the federal-state balance.

Whether the RUDs represent due regard for time-tested and authentically American institutions and practices, or merely the arrogance of a superpower that exempts itself from the accommodation of international sensibilities that it demands of other states, will long be debated. Either way, examination of the RUDs might well cause one to reflect on the possibility that the

110 Stat. 3009-708.
56. The Paquete Habana, 175 U.S. 677 (1900).
57. Henkin, supra note 4, at 349.
58. Neuman, supra note 11, at 51-53.
foreigners whom we routinely criticize for human rights shortcomings are no more doggedly attached to their institutions and practices than we are to our own.