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Legal, Political, and Ethical Hurdles to Applying International Human Rights Law in the State Courts of the United States (and Arguments for Scaling Them)

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LEGAL, POLITICAL, AND ETHICAL HURDLES TO APPLYING INTERNATIONAL HUMAN RIGHTS LAW IN THE STATE COURTS OF THE UNITED STATES (AND ARGUMENTS FOR SCALING THEM)

Penny J. White[*]

No institution of government can now afford to ignore the rest of the world. The fates of nations are more closely intertwined than ever before.[**]

INTRODUCTION

Legal, political, and ethical hurdles that affect the application of international human rights law[1] in American state courts are often incomprehensible to our international neighbors[2] as well as to practicing attorneys whose practices have not previously involved international law issues. The purpose of this Article is two-fold. The first purpose is to summarize,[3] for our international neighbors, some of the more formidable hurdles that complicate the application of international human rights law in the state courts. The Article's second purpose is to offer to the practicing attorney not versed in international law some arguments for scaling the hurdles.

In Section I, the Article reviews the framework in which these issues arise, the American dual system of state and federal government. Constitutional principles are discussed in simple terms. Next, the Article discusses legal hurdles to the application of international human rights law[4]

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** Gina Holland, *Justice Urges Focus on Int'l Law*, THE TENNESSEEAN, May 17, 2002 (quoting from a speech delivered by Justice Sandra Day O'Connor to the 2002 American Law Institute Meeting (May 15, 2002)).

1. This Article specifically deals with international human rights law originating in provisions of treaties that the United States has ratified.

2. The impetus for this article was an international conference on human rights and the death penalty at which many of the attendees were from countries other than the United States.

3. Since the purpose of this Article is to assist the practicing attorney unfamiliar with international law, it does not seek to evaluate the various scholarly interpretations of international treaty provisions and their applications.

4. Many of the same legal hurdles hamper the application of customary international law in state courts, but for purposes of this article, it will be assumed that the international law that is at issue derives from treaties entered into by the United States.

in American state courts. Three such legal hurdles are created by the United States Senate's attachment of reservations to treaties it ratifies. The treaty reservations that will be discussed are "existing law and substantive" reservations, "federalism" reservations, and "non-self-executing" reservations.

Sections III and IV of the Article discuss, respectively, political and ethical hurdles to applying human rights law in state courts. Section V sets forth ways to scale the barriers and enforce international human rights law in the state courts. In each Section, the concepts are illustrated contextually by the use of various court decisions.

I. INTRODUCTION TO THE FEDERAL AND STATE SYSTEMS OF GOVERNMENT

A. Separate Sovereigns, Separate Branches, Separate Duties

To understand the legal barriers that hinder the application of international human rights laws in the state courts of the United States, one must begin with a basic understanding of the American dual system of government. In the United States, federal and state governments exist separately and independently of each other. Each has its own set of laws and its own courts. In state law matters, state law governs and the states are sovereign.[5] In federal matters, however, the federal government and the laws it has passed are the exclusive authority.[6]

The federal and state governments are tripartite systems, with powers divided between three separate, independent branches—the executive, the legislative, and the judicial branches. Each branch plays some role in whether international human rights laws will have force in the United States collectively, or of any state, individually.

On the federal level, the legislative branch, consisting of two houses, the House of Representatives and the Senate, has the power to enact federal laws and authorize regulations that apply in the federal courts and to the federal government, and often, indirectly, to state governments as well. The executive branch has specific constitutional authority, with the aid of the legislative branch, particularly the Senate, to enter into treaties.[7] Thus, the Treaty Clause of the United States

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5. U.S. CONST. amend. X; Burton v. United States, 202 U.S. 344 (1906); *see generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5-20 – 5-23 (1988).

6. U.S. CONST. art. I, § 1; Whitney v. Robertson, 124 U.S. 190 (1888).

7. For purposes of this Article, "treaty" refers to a contract between two or more nations. For a general discussion of the Senate's treaty power, see Stefan A. Riesenfeld and Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI-KENT L. REV. 571 (1991).

Constitution, found in Article II, grants power to the President "with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[8] In more common parlance, treaties in the United States do not become law until they are ratified.[9] The legislative branch as a whole is responsible for passing laws to effectuate treaty provisions.

In addition to its specific treaty power under Article II, the executive branch of government, through the office of the President, may also enter into executive agreements[10] with foreign states that bind the federal government. Executive agreements are international agreements entered into by virtue of specific congressional authority;[11] authority granted in a prior Article II treaty;[12] or by independent constitutional authority.[13] These executive agreements, in effect, have the same force as a treaty.

The judicial branch is the branch of government that is the actual focus of this Article. Though separate and independent, its power is largely derived from and circumscribed by the other branches of government. It is the duty of the judicial branch to interpret the laws of the nation and of the states, respectively. Thus, for example, the judiciary may be called upon to determine the appropriateness of the exercise of the treaty power or the application or interpretation of specific treaty provisions.

While the functions of the executive, legislative, and judicial branches of state governments are similar to those of the federal government, state governments have no treaty power. States are prohibited, by

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8. U.S. CONST. art. II, § 2, cl. 2.

9. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §103 cmt.c. (1987).

10. These three types of executive agreements are described by THE UNITED STATES DEPARTMENT OF STATES, CIRCULAR as "agreements pursuant to treaty," "agreements pursuant to legislation," and "agreements pursuant to the constitutional authority of the president."

11. The State Department Circular provides that "[t]he President may conclude an international agreement on the basis of existing legislation or subject to legislation to be enacted by Congress . . . ." *Id.*

12. The State Department Circular provides that "[t]he President may conclude an international agreement pursuant to a treaty brought into force with the advice and consent of the Senate, whose provisions constitute authorization for the agreement by the Executive without subsequent action by the Congress . . . ." *Id.*

13. The State Department Circular provides that

> [t]he President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by the Congress in the exercise of its constitutional authority. The constitutional authority for the President to conclude international agreements include: (a) The President's authority as Chief Executive to represent the nation in foreign affairs; (b) The President's authority to receive ambassadors and other public ministers; (c) The President's authority as "Commander-in-Chief"; and, (d) The President's authority to "take care that the laws be faithfully executed. *Id.*

constitutional provision,[14] from entering into treaties, alliances, or confederations, and are likewise prohibited, without the consent of Congress, from entering "into any Agreement or Compact with another State, or with a foreign Power."[15] The exclusive power to enter into treaties is delegated by the United States Constitution to the federal government.

B. Legal Principles Relative to the Application of International Human Rights Law in State Courts

Other legal principles entrenched in the American justice system influence the application of international human rights law in state courts. Foremost of these legal principles is federalism.[16] Federalism refers to the United States system of government, in which a central federal government is granted ("delegated") certain specific rights with all other rights reserved to the states or the people. The United States Constitution, in the Tenth Amendment, sets forth the concept: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[17] As it relates to the topic of this Article, the treaty power is a power specifically "delegated" to the United States by the Constitution; likewise, specifically "prohibited" by the Constitution to the States.[18]

The Constitution declares that "[t]reaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[19] Treaties are subject to the limitations of the Constitution and may not confer any power that the Constitution forbids.[20]

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14. U.S. CONST. art. I, § 10, cl. 1.

15. *Id.* cl. 3.

16. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4.10 (6th ed. 2000).

17. U.S. CONST. amend. X. For an interesting discussion of the founders' thoughts on the need for the Tenth Amendment, see THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 681-704 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS].

18. *See generally* NOWAK & ROTUNDA, *supra* note 16, at § 6.6.

19. U.S. CONST. art. VI, cl. 2.

20. In the 1920 decision of *Missouri v. Holland*, Justice Holmes suggested that treaties in contravention of the Constitution were nonetheless enforceable. 252 U.S. 416, 433 (1920). This view was rejected definitively by Justice Black in *Reid v. Covert*, 354 U.S. 1, 16 (1957): "[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." Though some so feared the misreading of the *Holland* decision that they sought a constitutional amendment limiting federal treaty power, Congress has failed to adopt such a proposal. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 146-47 (1972).

Unless a treaty is contrary to the Constitution, however, it shares with the Constitution the position of being supreme law.[21]

Thus, in *Missouri v. Holland*,[22] for example, the United States Supreme Court was called upon to interpret a treaty's enforcement within the state of Missouri. The State argued that the Tenth Amendment limited the federal government's power to enforce treaties in matters for which the powers are reserved to the states. The Court rejected the argument that the Tenth Amendment restricted the treaty power in *Holland*. The Court explained that

> it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, Section 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States . . . are declared the supreme law of the land.[23]

While the treaty power is exclusively delegated to the federal government, the judicial power is not. Article III of the Constitution vests the "judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may . . . ordain and establish."[24] That power, however, extends only to

> Cases, in Law and Equity, arising under [the] Constitution, the Laws of the United States, and Treaties . . . under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States; . . . between Citizens of Different States;—between Citizens of the same State claiming Lands under the Grants of different States . . . .[25]

Thus, cases arising under state laws or state constitutions fall under the powers reserved to the states. In those cases, the states and their justice systems are sovereign. If, however, the state courts rule on matters of state and federal law, the federal judiciary has the final word on the

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21. U.S. CONST. art. VI, cl.2; Whitney v. Robertson, 124 U.S. 190 (1888).

22. 252 U.S. 416 (1920). In a prior decision, *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1879), the Court had declared that treaties "are as much a part of the law of every State as its own local laws and Constitution."

23. *Id.* at 432.

24. U.S. CONST. art. III, § 1.

25. *Id.* § 2. The Eleventh Amendment added two additional components to federal jurisdiction, suits between states and citizens of other states and suits between states or citizens and foreign states or citizens. U.S. CONST. amend. XI.

federal questions.[26] The judicial power of the United States is therefore distributed between fifty state judiciaries, the District of Columbia, and one federal judiciary, whose authority is limited to review of federal law.

The fifty state judiciaries, the structure of which varies greatly,[27] must ascertain, apply, and interpret state law. In state law matters, the judgment of the state court is said to be final. But just as it is becoming increasingly difficult to draw lines separating national and international laws it is equally difficult to clearly delineate between state and federal law.[28]

In the areas of law most likely to be impacted by international human rights law, federal, as well as state law, will likely be at issue in the state courts. State and federal courts are required to uphold the United States Constitution. By its own terms, the Constitution establishes itself as the supreme law of the land.[29] This means that the principles embodied in the United States Constitution apply to the state and federal governments. Pursuant to the passage of that Supreme law, the United States adopted a Bill of Rights in the form of amendments to the Constitution.[30] Through a complex, not always consistent,

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26. In *Murdock v. City of Memphis*, 87 U.S. 590 (1874), the Supreme Court had to determine whether it had the power under the Judiciary Act of 1867 to decide all issues essential to a state court judgment or whether its jurisdiction was limited to the federal law matters. The Court decided that the "[s]tate courts are the appropriate tribunals . . . for the decision of questions arising under their local law, whether statutory or otherwise." *Id.* at 626.

27. Most state judicial systems are modeled after the three-level federal judiciary. At the first level, or trial level, in courts of record, the parties are generally entitled to a trial by jury. The second level, or appellate level, involves the review of legal issues, known as an appeal as of right. The third level, also involving a review of legal issues, is generally a discretionary appeal. Some states, for example, West Virginia, have only a two-tier judicial system.

28. Examples abound of areas in which both the state and the federal government have legislated. In employment law, for example, the federal government has prohibited discriminatory employment practices under Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. Most states have adopted similar laws.

29. The Supremacy Clause provides that

> [t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2.

30. Literally dozens of interesting books and articles trace the adoption of the United States Constitution and the Bill of Rights. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); 1787: DRAFTING THE UNITED STATES CONSTITUTION (Wilbourn E. Benton, ed. 1986); RICHARD B. BERNSTEIN & KYM S. RICE, ARE WE TO BE A NATION: THE MAKING OF THE CONSTITUTION (1987); THE COMPLETE BILL OF RIGHTS, *supra* note 17; BURTON JESSEE HENDRICK, BULWARK OF THE REPUBLIC: A BIOGRAPHY OF THE CONSTITUTION (1937); BROADUS MITCHELL & LOUISE PEARSON MITCHELL, A BIOGRAPHY OF THE CONSTITUTION OF THE UNITED STATES: ITS ORIGIN, FORMATION, ADOPTION, INTERPRETATION (1975); CARL BRENT SWISHER, AMERICAN

jurisprudence,[31] some of those rights have been applied to the states, making their provisions generally applicable in state courts.[32] Thus, while the Tenth Amendment reserves undelegated power to the states and the people, states and their judges are bound[33] to follow the federal Constitution and treaties adopted pursuant to that Constitution, because they are supreme.

An offshoot of the Tenth Amendment and another essential piece to the puzzle of applying international human rights laws in state courts is the doctrine known as independent state constitutional grounds.[34] Each

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CONSTITUTIONAL DEVELOPMENT (Edward McChesney Sait ed., 1954); JOHN R. VILE, A COMPANION TO THE UNITED STATES CONSTITUTION AND ITS AMENDMENTS (1993).

31. *See generally* NOWAK & ROTUNDA, *supra* note 16, at § 6.6. Initially, the Supreme Court determined that the provisions of the Bill of Rights did not apply to the states. *Barron v. Mayor*, 32 U.S. 243 (1833). The Fourteenth Amendment to the United States Constitution was passed asserting that

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. Following its passage, it was argued that the Privileges and Immunities and Due Process clauses of the Fourteenth Amendment served to "incorporate" the guarantees of the Bill of Rights. The Court, in a series of decisions, rejected the idea of "total incorporation" choosing instead to hold that certain of the rights, and other penumbras of those rights, were selectively incorporated so as to apply to the states. The Supreme Court's most recent standard for determining whether rights set forth in the Bill of Rights are applicable to the states as a result of Fourteenth Amendment incorporation is set forth in *Duncan v. Louisiana*, 391 U.S. 145 (1968).

32. For articles detailing the Supreme Court's decisions regarding whether the rights contained in the Bill of Rights applied to the states, see, e.g., Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 STAN. L. REV. 5 (1949); William Crosskey, *Charles Fairman, Legislative History' and the Constitutional Limits on State Authority*, 22 U. CHI. L. REV. 1 (1954).

33. The simple assertion that state court judges are bound to follow treaties passed by the Congress would seem defensible in light of previous Supreme Court decisions including *Baldwin v. Franks*, 120 U.S. 678 (1887). The issue framed by the Court in *Baldwin* was

> not whether Congress has the constitutional authority [to provide for punishment of the accused] but whether it has so done. That the treaty-making power has been surrendered by the states, and given to the United States, is unquestionable. It is true, also, that the treaties made by the United States, and in force, are part of the supreme law of the land, and that they are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States.

Id. at 682-83. Three decades later the Court reiterated the supremacy of the treaty power, this time in the context of whether states could enjoin the enforcement of treaty provisions within their state boundaries. In *Missouri v. Holland*, 252 U.S. 416, 433-34 (1920), the Court said:

> 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 open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way . . . . The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.

34. A virtual library of information exists on the issue of independent state constitutional grounds, including many extensive bibliographies. *See, e.g.*, JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW:

state in the United States has its own state constitution, often similar, and sometimes virtually identical to the federal constitution. But because of the principles explicit in federalism and the reserved powers of the Tenth Amendment, the states are at liberty to provide different or additional constitutional rights to their citizens so long as they preserve, at a minimum, the rights secured by the United States Constitution.[35] If a state court has made a decision on state grounds, independent from federal grounds and adequate to support the state court decision, a federal court cannot interfere with or review the state court ruling unless the state has failed to protect rights granted by the federal constitution.[36]

A good backdrop for illustrating the principles of federalism, the reservation of states' rights, and independent state constitutional grounds is provided by recent and not-so-recent developments in capital punishment law in the United States.[37] In 1989, the United States Supreme Court found "insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment."[38] In the legal principles nomenclature described in this Article, the Court held that the federal Constitution did not prohibit the execution of the mentally retarded.[39] Thus, states were free to pass laws allowing the execution of mentally retarded capital offenders.

While the federal Constitution did not prohibit this punishment, it did not, and could not, require it. The Supreme Court noted, for example, that at least one state, Georgia,[40] and the federal government, by

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LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES (1992); TIM WATTS, STATE CONSTITUTIONAL LAW DEVELOPMENT: A BIBLIOGRAPHY (1991); *see generally* authorities cited in Randall T. Shepard, *The Renaissance in State Constitutional Law: There are a Few Dangers, But What's the Alternative?*, 61 ALB. L. REV. 1529, 1532 nn. 14, 15 (1998).

Most scholars in this area attribute the beginning of the deluge to a speech given by Justice William Brennan, printed in the *Harvard Law Review*. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Even this attribution has generated some controversy. *See* Shepherd, *supra* at 1530 n.6 (arguing the "work of multiple state supreme courts who continued to engage in state constitutional adjudication in spite of the nearly overpowering judicial activism of the Warren court" spawned state constitutional jurisprudence). Whatever the cause, the effect has been a dramatic increase in the number of state supreme court decisions that are based solely on the state constitution.

35. *See generally* NOWAK & ROTUNDA, *supra* note 16, at § 1.6(c).

36. *Id.*

37. *See* notes 39-47 *infra* and accompanying text..

38. Penry v. Lynaugh, 492 U.S. 302, 335 (1989).

39. *Id.* at 340.

40. Georgia prohibited the execution of the mentally retarded in 1989. GA. CODE ANN. § 17-7-131(j) (Supp. 1988). Maryland had passed a statute to prohibit such executions beginning on July 1 of that year. MD. ANN. CODE, Art. 27, § 412(f)(1)(1989). *Penry* was decided on June 26, 1989.

statute,[41] did not allow the execution of the mentally retarded. Because of federalism and the Tenth Amendment, Georgia could certainly enact a state law, by virtue of its state constitution, that bestowed additional rights on certain citizens, i.e., the "right" of a mentally retarded individual to avoid execution for a capital offense.

Between 1989 and June 2002, sixteen states[42] enacted laws like Georgia's that prohibited the execution of the mentally retarded. In two states, Virginia and Nevada, one of the two legislative branches had passed legislation to disallow execution of the mentally retarded.[43]

On June 20, 2002, the United States Supreme Court revisited its 1989 decision and held, in *Atkins v. Virginia*, that the Cruel and Unusual Punishment Clause of the Eighth Amendment of the United States Constitution "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender."[44]

As a result of the *Atkins* decision, states can no longer execute mentally retarded offenders, even if state laws allow it. This is because the Supreme Law of the Land, the United States Constitution, as presently interpreted by the Supreme Court of the United States, does not allow the execution of the mentally retarded. The rights reserved to the states under the Tenth Amendment do not include the right to pass laws that run afoul of the United States Constitution as interpreted by the United States Supreme Court.

Another example will clarify the contrast between state and federal law. During the same year that the Supreme Court of the United States originally upheld a state's right, under the federal Constitution, to

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41. 21 U.S.C. § 848(l) (1988) (The Federal Anti-Drug Abuse Act of 1988).

42. Those states were Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina. The Texas legislature unanimously adopted legislation prohibiting the execution of the mentally ill, but the governor of Texas vetoed the bill. Atkins v. Virginia, 536 U.S. 304, 346 nn.12-15 (2002).

43. Both Nevada and Virginia had pending legislation at the time of the *Atkins*' decision. *See id.* at 346 n.17.

44. *Id.* at 350 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)). Justice Stevens wrote the majority opinion in which five justices agreed. In his analysis, Justice Stevens began with the Eighth Amendment prohibition against cruel and unusual punishment noting that it requires as a "'precept of justice that punishment for crime should be graduated and proportioned to the offense.'" *Id.* at 343-44 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)). Next, Justice Stevens wrote that proportionality and excessiveness are to be judged by current standards, not historic ones. The Eighth Amendment "'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 344 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). Proportionality under evolving standards of decency must be based on "'objective factors,'" the most reliable of which "'is the legislation enacted by the country's legislatures.'" *Id.* (quoting Rummel v. Estelle, 445 U.S. 263, 274-75 (1980) & Penry v. Lynaugh, 492 U.S. 302, 331 (1989)). Finally, while the judgment of state legislatures is significant, Justice Stevens concluded that "'the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'" *Id.* (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)).

execute the mentally retarded, it upheld a state's right to execute those who committed capital offenses as juveniles, at least those who had attained the age of sixteen at the time of their offenses. In *Stanford v. Kentucky*,[45] the Court held that executing offenders who were either sixteen or seventeen years of age when they committed a capital offense "does not offend the Eighth Amendment's prohibition against cruel and unusual punishment."[46] A year earlier, in *Thompson v. Oklahoma*, a plurality of the Court had concluded that "the Eighth and Fourteenth Amendments [to the United States Constitution] prohibit the execution of a person who was under 16 years of age at the time of his or her offense"[47]

At the time of the *Stanford* decision, fourteen states and the District of Columbia disallowed capital punishment.[48] Twelve states[49] that authorized capital punishment disallowed the execution of those who were under eighteen years of age at the time of their offenses. Since 1989, two states, Montana and Indiana, have passed laws prohibiting the execution of those who commit their capital crimes while under the age of eighteen years.[50]

Since the *Stanford* and *Thompson* cases, the Supreme Court has been asked on numerous occasions to reconsider the issue of whether the United States Constitution allows the execution of those who were juveniles at the time they committed capital offenses.[51] Each time the Court has declined the invitation.[52] In a footnote in the *Atkins* decision,

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45. 492 U.S. 361 (1989).

46. *Id.* at 380.

47. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988). Justice O'Connor, who furnished the fifth vote that spared the life of Thompson, did not agree that the evidence before the Court established a national consensus against the execution of those whose crimes were committed before age sixteen; she, instead, concurred because she would have set aside the sentence on "narrower grounds." *Id.* at 849 (O'Connor, J., concurring).

48. *Stanford*, 492 U.S. at 384 (Brennan, J., dissenting).

49. *Id.* The states that did not allow the execution of those who committed their offenses while under the age of eighteen are listed in note 2 of the opinion. *Id.* at 370-71 n.2.

50. MONT. CODE ANN. § 45-5-102 (1999); IND. CODE § 35-50-2-3 (1998).

51. *See, e.g.*, Hain v. Mullin, 123 S.Ct. 993 (2003); *In re* Stanford, 123 S.Ct. 472 (2002); Patterson v. Texas, 536 U.S. 984 (2002); Beazley v. Texas, 535 U.S. 1091 (2002); Richardson v. Luebbers, 536 U.S. 957 (2002); Simmons v. Luebbers, 534 U.S. 924 (2001); Hain v. Oklahoma, 511 U.S. 1020 (1994).

52. Most recently the Court denied habeas relief in the case of Kevin Stanford, the appellant in the original juvenile death penalty case. Four justices, Justices Stevens, Breyer, Ginsburg, and Souter dissented. The four justices urged consideration of the case in light of *Atkins* and noted that "with one exception [the reasons for the *Atkins*' decision] apply with equal or greater force to the execution of juvenile offenders." *In re Stanford*, 123 S. Ct. at 472 (Stevens, J., dissenting). Justice Stevens quoted at length from Justice Brennan's dissenting opinion in the original *Stanford* decision, 492 U.S. at 394-96, and suggested that what had transpired since that decision made it even more inappropriate to allow the execution of those who committed capital offenses while juveniles. In addition to laws giving juveniles fewer legal obligations, Justice Stevens referred to

the Court noted that since the date of the *Stanford* decision only two states had raised the threshold age for execution.[53]

The United States Constitution allows,[54] but does not, and could not require, due to the Tenth Amendment, the execution of those who are sixteen or seventeen at the time they commit a capital offense. The now-twenty-eight states that do not allow these executions have decided, pursuant to state authority,[55] to provide these additional "rights" to juvenile offenders. Arguably, though not with certainty (because of the *Thompson* plurality), no state may authorize capital punishment for those who commit their offenses when they are less than sixteen years of age.

One final circumstance, presented by a hypothetical, will complete the explanation of the federal/state law distinction. Assume that a state court, interpreting the Eighth Amendment of the United States Constitution, concludes that the death penalty is unconstitutional because of the risk of executing the innocent.[56] Under current Supreme

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> [n]euroscientific evidence of the last few years [that] has revealed that adolescent brains are not fully developed [leading] to erratic behaviors and thought processes . . . . Moreover, in the last 13 years, a national consensus has developed that juvenile offenders should not be executed. . . . The practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society. We should put an end to this shameful practice.

In re Stanford, 123 S.Ct. at 474-75.

In reaction to the Court's decision to not revisit the issue, the *New York Times* praised the dissenting justices. In an editorial published on October 24, 2002, the *Times* noted:

> As the dissenters correctly observed, the rationale that led the court to declare the execution of retarded persons to be unconstitutional argues for revisiting the juvenile death penalty. In both instances there are profound questions of the defendant's capacity to fully understand the consequences of their actions, and thus their level of culpability.

Editorial, *The Disgrace of Juvenile Executions*, N.Y. TIMES, Oct. 24, 2002 at 34. Similarly, the *Washington Post* noted that the "juvenile death penalty . . . is one of the least defensible aspects of American capital punishment . . . . Distinguishing between legal childhood and adulthood seems a far more rational place to [draw the line] than between the sophomore and junior years of high school." *End the Juvenile Death Penalty*, WASH. POST, Oct. 23, 2002 at A26.

53. 536 U.S. at 347. This comment was for the purpose of demonstrating the consistent state trend away from allowing the execution of the mentally retarded and to contrast that trend with state legislature's actions with regard to execution of juveniles. Apparently, however, according to the justices who dissented from the denial of certiorari in *Stanford*, the comment in the footnote was incorrect. The dissenters noted that in addition to Montana and Indiana whose legislatures had acted to prohibit the execution of those who were juveniles at the time of their offenses after *Stanford*, the federal government, New York, and Kansas, whose death penalty laws were enacted after the first *Stanford* decision likewise did not allow the execution of juveniles. Similarly, Washington, by a decision of its supreme court, had banned the practice as well. *In re Stanford*, 123 S. Ct. at 473.

54. Stanford v. Kentucky, 492 U.S. 361 (1989).

55. In most states, the state "authority" is a statute passed by the state legislature. One notable exception is the state of Washington whose supreme court decided that executing those who were juveniles at the time of their capital offenses was not authorized under state statutes. State v. Furman, 858 P.2d 1092, 1103 (Wash. 1993); *see infra* for discussion of this case.

56. During the preparation of this Article, a non hypothetical federal judge made just such a ruling, which was later reversed by the Second Circuit Court of Appeals. Judge Jed S. Rakoff, a federal district

Court interpretation, that ruling should be reversed by a federal court, whose obligation it is under Article VI, to apply the Constitution and to bind state court judges to its terms. If the same state judge decided that issue solely on state constitutional grounds, the federal courts would be unable to set aside the decision. Only a higher state court, with the similar obligation to apply state constitutional precedent, would be able to reverse or affirm the state court decision interpreting state law.

The hypothetical demonstrates a point that is essential to the arguments set forth in the last section of this Article as a means of scaling the hurdles to the application of international human rights law in state courts. When a state court's decision is based on the application or interpretation of state law or of a provision of the state constitution, the state courts are the final arbiters. The federal courts cannot interfere with the state court's judgment, unless the state court judgment violates federal law to the citizen's detriment.

These underlying structural, procedural, and institutional principles, referred to succinctly as the separation of powers, the independence of government branches, federalism, supremacy, and independent state grounds, are essential to the following discussion of the legal, political, and ethical hurdles to applying international human rights law in state courts.

II. LEGAL HURDLES TO THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN STATE COURTS

The juxtaposition of two of the underlying legal principles—federalism and the Tenth Amendment reservation of state's rights—forms the most frequently discussed, and perhaps the most formidable, hurdle to applying international law in state courts. A third principle—supremacy—coupled with federalism and the expanded Tenth

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judge for the Southern District of New York, ruled that the current federal death penalty violated due process because the

> unacceptably high rate at which innocent people are convicted of capital crimes, when coupled with the frequently prolonged delays before such errors are detected (and then often only fortuitously or by application of newly-developed techniques), compels the conclusion that execution under the Federal Death Penalty Act, by cutting off the opportunity for exoneration, denies due process and, indeed is tantamount to foreseeable, state-sponsored murder of innocent human beings.

United States v. Quinones, 205 F. Supp.2d 256, 268 (S.D.NY 2002), *rev'd*, 313 F.3d 49 (2d Cir. 2002). Judge Rakoff had announced his view preliminarily in *United States v. Quinones*, 196 F. Supp.2d 416 (S.D. N.Y. 2002), but had given the government time to respond. *Id.*; *see also* Benjamin Weiser, *Manhattan Judge Finds Federal Death Law Unconstitutional*, N.Y. TIMES, July 2, 2002, at B1.

Amendment concept of independent state constitutional grounds, provides a viable solution.

A. Reservations to Treaties

As any student of the United States' ratifications of human rights treaties knows, the United States has routinely adopted important human rights treaties subject to so-called reservations, understandings, and declarations.[57] These reservations[58] are several,[59] but for the purpose of this Article,[60] three reservations will be briefly addressed.[61]

1. Existing Law Reservation

One of the reservations frequently employed by the United States Senate, in ratifying treaty provisions that impact human rights, is a reservation that United States' "adherence to an international human rights treaty should not effect—or promise—change in existing law or

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57. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

58. Under international law, nations cannot attach reservations that are "incompatible with the object and purpose of the agreement." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 313. This section of the Restatement summarizes Article 19 of the VIENNA CONVENTION ON THE LAW OF TREATIES, 8 I.L.M. 679. The United States is not a party to the Vienna Convention, but recognizes most of its provisions as customary international law that is binding on the United States.

59. Professor Henkin has described the reservations as being guided by several "principles:"

> 1. The United States will not undertake any treaty obligation that it will not be able to carry out because it is inconsistent with the United States Constitution; 2. United States adherence to an international human rights treaty should not effect—or promise—change in existing U.S. law or practice. 3. The United States will not submit to the jurisdiction of the International Court of Justice to decide disputes as to the interpretation or application of human rights conventions. 4. Every human rights treaty to which the United States adheres should be subject to a "federalism clause" so that the United States could leave implementation of the convention largely to the states. 5. Every international human rights agreement should be "non-self-executing."

Henkin, *supra* note 57, at 341.

60. Many other articles deal exhaustively with the issue of treaty reservations, their effect, and their interpretations. *See, e.g.*, Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERKELEY J. INT'L L. 277 (1999); Douglass Cassel, *International Human Rights Law in Practice: Does International Human Rights Law Make A Difference*, 2 CHI. J. INT'L L. 121 (2001); Martin S. Flaherty, *Are We To Be A Nation? Federal Power vs. "States Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277 (1999); Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 A.J.I.L. 531 (July 2002); Andres E. Montalvo, *Reservations to the American Convention on Human Rights: A New Approach*, 16 AM. U. INT'L L. REV. 269 (2001).

61. Numerous authors have written on the "non-self executing" reservation as well as the jurisdiction reservation. *See, e.g.*, Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999).

practice."[62] Thus, if the provisions of the treaty are inconsistent with the current United States law, the Senate is asserting by attaching an existing law reservation that the ratification neither changes, nor promises to change, the existing law. This kind of reservation, albeit a more explicit one, attached to the Senate's ratification of the International Covenant on Civil and Political Rights in 1992,[63] is the basis for the conclusion reached by state courts that, despite the treaty ratification, states may continue to execute those who committed capital offenses while at least sixteen years of age.[64]

As noted above, states have different rules respecting the execution of those who committed capital offenses while they were juveniles.[65] A plurality of the United States Supreme Court has disallowed the execution of those who were under sixteen at the time of the commission of the capital offense, but a majority has paved the way for states to execute those who commit capital crimes while sixteen years of age or older.[66] Thus, in the terms used by the Senate reservation in the International Covenant on Civil and Political Rights, existing law in the United States allows the execution of those who commit capital offenses while at least sixteen years of age. The Senate's reservation asserts that the ratification of the Covenant does not change, nor promise to change, that law.

But can the Senate ratify a treaty, thereby making the treaty the "Supreme law of the land" under the United States Constitution and then nullify essential provisions by attaching an existing law reservation? Those who support the Senate's power to attach reservations argue that since the Senate has the exclusive power to ratify treaties, it must have the power to ratify them in an altered form.[67] The converse argument

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62. Henkin, *supra* note 57, at 341.

63. Among other things, the International Covenant on Civil and Political Rights provides in Article 7 that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment." The ratification by the United States Senate included a reservation that this phrase referred to "the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States." The validity of this reservation, and similar ones attached to the ratifications of the convention on Racial Discrimination and the Torture Convention, has been debated widely. *See, e.g.*, William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOKLYN J. INT'L L. 277 (1995); Lawyers Committee for Human Rights, *Statements on U.S. Ratification of the CCPR*, 14 HUM. RTS. L. J. 125 (1993); Connie de la Vega & Jennifer Brown, *Can a United States Treaty Reservation Provide Sanctuary for the Juvenile Death Penalty?*, 32 U.S. F. L. REV. 735 (1998).

64. *See e.g.*, McGilberry v. State, 2003 WL 751279 (Miss. 2003); Servin v. State, 32 P.3d 1277 (Nev. 2001); Domingues v. State, 961 P.2d 1279 (Nev. 1998).

65. *See supra* text accompanying notes 45-55.

66. Stanford v. Kentucky, 492 U.S. 361 (1989); Thompson v. Oklahoma, 487 U.S. 815 (1988).

67. Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 584-85 (1992).

is that, under the accepted principles of customary international law, reservations that are incompatible with the purpose and object of the agreement may not be attached.[68] Has the Senate, by reserving the right to execute juveniles despite clear treaty provisions to the contrary, violated customary international law? Does the attachment of the incompatible reservation have the effect of nullifying the treaty ratification? Or is the incompatible reservation of no effect?

These and other complex questions were before the United States Supreme Court in late 1999. The State of Nevada was preparing to execute an offender sentenced to death for an offense committed while sixteen years of age.[69] On a post conviction motion for correction of an illegal sentence, allowed under state law, the defendant challenged the state's right to execute him in light of the United States' ratification of the International Covenant on Civil and Political Rights[70] and customary international law, which he argued prohibited the execution of those whose crimes were committed while they were juveniles. The United States Senate, however, ratified the treaty with the following reservation:

> That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.[71]

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68. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 313(1)(c). Under the Vienna Convention on the Law of Treaties, for example, a state may not submit a reservation to the treaty obligation if the reservation "is incompatible with the object and purpose of the Covenant." Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 at art. 19(c)(1969); *see also infra* note 71.

69. Domingues v. State, 917 P.2d 1364 (Nev. 1996), *cert. denied*, 519 U.S. 968 (1996).

70. Article 6, paragraph 5 of the International Covenant on Civil and Political Rights provides that "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, S. TREATY DOC. NO. 95-2, 999 U.N.T.S. 171, 175.

71. *Id.* The United Nations Human Rights Committee addressed the issue of the United States' reservation in April 1994 and issued this comment:

> The Covenant neither prohibits reservations nor mentions any type of permitted reservation. [W]here a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty .... Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. ... Accordingly, a State may not reserve the right ... to execute ... children .... The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.

General Comment 24. General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, U.N. GAOR Human Rights Comm., 52d Sess., ¶¶ 5, 6, 8, 18, U.N. Doc.

When the Nevada Supreme Court was faced with the issue of applying the provisions of the treaty to "supersede"[72] state law, which specifically allowed the execution of individuals who committed capital offenses after they had reached sixteen years of age,[73] it declined to do so. "We conclude that the Senate's express reservation of the United States' right to impose a penalty of death on juvenile offenders negates Domingues' claim that he was illegally sentenced."[74]

Two of Nevada's high court justices were not so easily persuaded. For both, the issue of the conflict between a state statute and a treaty ratified by the United States government required greater inquiry.[75] For one of the dissenting justices, the treaty provision was the "supreme law of the land" and was, as a result, binding on the State of Nevada.[76]

It appeared that the Supreme Court of the land would resolve the issue. In June 1999, the Court invited the Solicitor General's office to file a brief in the case "expressing the views of the United States."[77] After receipt of the brief, which argued that the petition should be denied,[78] the United States Supreme Court denied certiorari,[79] leaving state courts to grapple with the issue without high court guidance.[80]

CCPR/C/21/Rev/1/Add.6 (1994). A year later, the Human Rights Commission commented that the United States's reservation was "incompatible with the object and purpose of the Covenant." Annual General Assembly Report of the Human Rights Committee, U.N. GAOR Human Rights Comm./, 50thSess., Supp. No. 40, ¶¶ 279, 292, U.N. Doc. A/50/40 (1995).

72. The Nevada Supreme Court framed the issue as "whether NRS 176.025 is superseded by an international treaty ratified by the United States, which prohibits the execution of individuals who committed capital offenses while under the age of eighteen." Domingues v. Nevada, 961 P.2d 1279, 1279 (Nev. 1998).

73. NEV. REV. STAT. § 176.025 prohibits the imposition of the death penalty on those individuals who were under sixteen years of age at the time that the offense was committed.

74. 961 P.2d at 1280.

75. *Id.* at 1281, 1282 (Springer, J., dissenting) (Rose, J., dissenting). For Justice Rose, "these [were] not easy questions . . . " but "complicated" ones that "deserved a full hearing, evidentiary if necessary, on the effect of our nation's ratification of the ICCPR and the reservation by the United States Senate to that treaty's provision prohibiting the execution of anyone who committed a capital crime while under eighteen years of age." *Id.* at 1281.

76. *Id.* at 1280-81 (Springer, J., dissenting).

77. Domingues v. Nevada, 526 U.S. 1156 (1999).

78. Brief for the United States as Amicus at 26, Domingues v. Nevada, 526 U.S. 1156 (1999) (No. 98-8327).

79. Domingues v. Nevada, 528 U.S. 963 (1999).

80. In his dissent, Justice Rose noted that a federal court "that deals with federal law on a daily basis might be better equipped to address the[ ] issues." *Id.* at 1281 (Rose, J., dissenting). Since the denial of certiorari in *Domingues*, Nevada has ruled consistently with its *Domingues* decision in *Servin v. State*, 32 P.3d 1277 (Nev. 2001). In *Servin*, the Nevada Supreme Court cited its prior decision, the Supreme Court's denial of certiorari, and a recent Fifth Circuit decision which "agreed with [the] conclusion that the Senate's reservation to Article 6(5) of the ICCPR was valid." *Id.* at 1286 n.29 (citing Beazley v. Johnson, 242 F.3d 248, 266-67 (5th Cir. 2001)).

An order of the United States Supreme Court denying certiorari is not an expression of an opinion on the merits of a case.[81] Standard protocol attaches no interpretive guidance to the denial of certiorari. That being recognized, however, the practical result of the High Court's failure to accept and decide the issue is that most state courts faced with the issue will give effect to the reservation, not the treaty.[82] That practice will pose another significant legal dilemma. If the Constitution defines a ratified treaty as the supreme law of the land, can the Senate both adopt a treaty and subject it to a reservation that has the effect of negating its provisions? Under the tripartite separation of powers, does not the Senate's action have the effect of usurping certain powers granted to the judicial branch, that is the application and interpretation of the law of the land?[83]

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81. Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950). As Justice Houston of the Alabama Supreme Court noted on a case raising the international human rights treaty claims, the Supreme Court sometimes "points out those concerns which, although unrelated to the merits, justify the decision not to grant review." *Ex parte* Burgess, 811 So. 2d 617, 631 (Ala. 2000) (Houston, J., concurring) (quoting Carpenter v. Gomez, 516 U.S. 981 (1995)). In the words of Justice Stevens, from whose memorandum on denial of certiorari Justice Houston was quoting:

> [A]n order denying a petition for certiorari expresses no opinion on the merits of the case. That is so, in part, because the Court properly exercises broad discretion in the administration of its docket, and in part because there are often jurisdictional or prudential reasons for refusing to grant review of the questions presented in a petition. Nonetheless, when the Court denies a petition that raises a substantial question, it is sometimes useful to point out those concerns which, although unrelated to the merits, justify the decision not to grant review.

Carpenter, 516 U.S. at 981.

82. Since the Court's denial of certiorari in *Domingues*, a number of state and federal courts have relied on either the denial or the Nevada Supreme Court majority decision in *Domingues* to rule similarly on challenges raised to death sentences imposed on juveniles. In *Beasley v. Director*, No. 1: 98cv1601, 1999 U.S. Dist. LEXIS 22606 (E.D.Tex. Sept. 30, 1999), the court overruled a death-sentenced inmate claim under international law stating:

> Only one court has submitted an opinion on the specific issue that petitioner alleges. The Nevada Supreme Court reviewed the claim of a person who was convicted of capital murder for a crime committed while the person was sixteen years old. The Nevada Court found that the ICCPR did not supersede state law which allowed the sentence of death upon a sixteen year old and the express reservation by the Senate negated the claim. Additionally, the Fifth Circuit has reviewed the issue of the Senate reservations to the ICCPR and found the reservations must be given effect when reviewing claims under the ICCPR. Thus, petitioner's claim under the ICCPR is without merit given the Senate reservations and the lack of a self executing treaty.

Id. at *21 (citations omitted).

Judges in Alabama, Florida, and Kansas have also cited *Domingues*. *See, e.g.*, *Ex parte Burgess*, 811 So. 2d at 630 (Houston, J., concurring); Brennan v. State, 754 So. 2d 1 (Fla. 1999); State v. Kleypas, 40 P.3d 139 (Kan. 2001).

83. An academic answer to the question can be provided by the so-called rules of construction that give effect to the latter of two inconsistent provisions. The application of that rule of construction in this context seems questionable.

2. Federalism Reservation

A second reservation commonly employed by the United States Senate in its ratification of international human rights treaties is the federalism reservation. The reservation, premised on the Tenth Amendment's reservation of undelegated powers to the states, asserts that the federal government does not have the express constitutional authority to bind states to the provisions of international human rights laws found in treaty provisions.[84] The basis of the assertion is that the scope of the treaty power, which is not defined in the Constitution, is subject to the limitations of the Tenth Amendment, thereby depriving Congress of the right to bind states to treaty provisions that impact matters that are reserved for the states. For purposes of this Article, then, the contention is specifically that international human rights standards, provided by treaty, cannot impact the criminal justice laws or standards of the individual states.

Those adverse to the states' rights approach, and suspect of federalism reservations, argue that the Supremacy Clause of Article VI clearly elevates treaties and their provisions above state law.[85] Thus, a treaty "made under the Authority of the United States" would trump state law and bind all "Judges in every State."[86] This approach seems to be clearly supported by United States Supreme Court precedent.

In *Missouri v. Holland* Justice Oliver Wendell Holmes in a brief opinion, discussed for decades by a multitude of scholars,[87] upheld a statute, passed to enforce a treaty, against a Tenth Amendment challenge raised by the State of Missouri. To Justice Holmes, the question could not be resolved by reference to the Tenth Amendment alone; rather, the resolution of the case required consultation of Article VI as well.

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84. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 181 & 453 n.31 (2d ed. 1996); Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 568 (1997); David Stewart, *United States Ratification of the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1183, 1201 (1993); John C. Yoo, *Laws as Treaties? The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 826 (2001).

85. John Quigley, The International Covenant on Civil and Political Rights and the Supremacy Clause, 42 DEPAUL L. REV. 1287, 1300-02 (1993); Yoo, *supra* note 84, at 828.

86. U.S. CONST. art. VI.

87. 252 U.S. 416 (1920); *see, e.g.*, Edward D. Re, *The Universal Declaration of Human Rights and the Domestic Courts*, 14 ST. THOMAS L. REV. 665 (2002); Brad R. Roth, *Understanding the 'Understanding': Federalism Constraints on Human Rights Implementation*, 47 WAYNE L. REV. 891 (2001); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalism Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); Curtis Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); Harold Hongju Koh, *Is International Law Really State Law*, 111 HARV. L. REV. 1824 (1998); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

Despite the confluence of two significant constitutional provisions, the *Holland* majority made the resolution of the matter seem almost glib:

> Valid treaties of course "are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States." No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power . . . . Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power . . . .[88]

The Court had often stated the proposition that "state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty."[89] In *Pink*, for example, the Court said that "the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum must give way before the superior Federal policy evidenced by a treaty or international compact or agreement."[90]

Though given ample opportunity to do so, the United States Supreme Court has not revisited the alleged Tenth Amendment/Supremacy Clause conflict. Thus, the Senate's consistent federalism reservation attached to the major human rights treaties of this decade has, at best, complicated the already complex issue of the application of international human rights laws in state courts.

An example of the double-edged nature of the federalism sword is a recent state court decision, again involving the state's right to execute those who committed criminal offenses while a juvenile. In *Ex Parte Pressley*[91] the defendant argued before the Alabama Supreme Court that his execution, permissible under state law, would violate international law and international treaty provisions. The Alabama Supreme Court, like the Nevada Supreme Court in *Domingues*, declined to find any international barrier to the execution of the defendant who was sixteen years of age at the time of the offense.[92] The Alabama Supreme Court noted the Senate's existing law reservation, as had the Nevada Supreme

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88. *Holland*, 252 U.S. at 434. In *Baldwin*, a Court had commented, also rather matter-of-factly, that

> the treaty-making power has been surrendered by the states, and given to the United States . . . . [T]he treaties made by the United States, and in force, are part of the supreme law of the land, and . . . are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States.

120 U.S. at 682-83.

89. United States v. Pink, 315 U.S. 203, 231 (1942) (citing numerous other cases for the same proposition).

90. *Id.* (citations omitted).

91. 770 So. 2d 143 (Ala. 2000).

92. *Id.* at 148-50.

Court, but also focused on the declaration made by the Senate that the "provisions of Articles 1 through 27 . . . are not self-executing."[93]

Rejecting the defendant's argument that the reservation was invalid since it was incompatible with the treaty's purposes and objects, the Alabama Supreme Court concluded:

> We are not persuaded that Pressley has established that the Senate's express reservation of this nation's right to impose a penalty of death on juvenile offenders, in ratifying the ICCPR, is illegal . . . . [T]he United States Supreme Court [has] rejected the argument that international law should influence rulings under the federal Constitution pertaining to the death penalty.[94]

A lone concurrence in the Alabama Supreme Court placed a different perspective on the issue and brought the federalism issue into sharp focus:

> The majority opinion indicates that . . . the United States Senate Reservation 1(2) relieves state justices from their constitutional obligation to be bound by this treaty. . . . *Federalism is alive and well. The United States Constitution binds me as a Supreme Court Justice of the State of Alabama to abide by the ICCPR, Article 6(5), and not to impose the sentence of death on Pressley for the crimes committed when he was 16 years of age.* I am not persuaded that the Senate's reservation, if not invalid for other reasons, frees me as a *state justice*, as opposed to a federal justice or judge, from the treaty's restriction against the imposition of a sentence of death for a crime committed by a person below the age of 18 years.[95]

Notwithstanding the concurring justice's concern, however, he nonetheless joined the majority in affirming the death sentence.[96]

3. Non Self-Executing Reservation

A third reservation often attached to treaty ratifications by the United States Senate is a reservation that the treaty rights are not "self-

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93. *Id.* at 148. The Alabama Supreme Court noted that the "Senate declared that the ICCPR was not self-executing, stating that the declaration was to 'clarify that the Covenant will not create a private cause of action in U.S. Courts.'" *Id.* at n.3 (quoting S. EXEC. REPT., No. 102-23, at 15(1992)).

94. *Id.* at 148-49.

95. *Id.* at 150-51 (Houston, J., concurring) (emphasis added).

96. Though somewhat ambiguous, it appears that Justice Houston believed his decision to be dictated by the Supreme Court's denial of certiorari in *Domingues*, which he read as a denial on the merits since the Court did not "point out concerns justifying the decision not to grant review that were unrelated to the merits." *Id.*; *see also supra* note 72. For a somewhat different explanation of the reasons that dictated Justice Houston's decision to concur, see notes and accompanying text *infra* notes 128-42.

executing."[97] Although treaties that are ratified are declared by the Constitution to be the "supreme law of the land," the attachment of a non self-executing reservation suggests that the provisions do not become effective until federal legislation implementing the provisions is passed.[98] The internal inconsistency between federalism and non self-executing reservations should be immediately apparent.

The practical effect of having international human rights provisions in treaties declared to be "non self-executing" is to mollify any effect in the state (or federal) courts. If the treaties do not grant individual rights, courts may disregard arguments based on the treaties or allow procedural mechanisms to eliminate any real consideration of the rights. The recent state and federal court decisions involving juveniles and foreign nationals[99] offer examples of the barriers constructed by non self-executing reservations.[100]

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97. Numerous authors have addressed the myriad of issues raised by the non self-executing reservation. *See, e.g.*, David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129 (1999); John Quigley, *Human Rights Defenses in U.S. Courts*, 20 HUM. RTS. Q. 555 (1998); Jordan J. Paust, *Avoiding 'Fraudulent' Executive Policy: Analysis of the Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257 (1993); Frank Newman, *United States Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures*, 42 DEPAUL L. REV. 1241 (1993); Damrosch, *The Role of the United States Senate Concerning 'Self-Executing' and 'Non-Self-Executing' Treaties*, 67 CHI.-KENT L. REV. 515 (1991).

98. Fervent scholarly debate exists as to whether a treaty, once ratified, can be declared non self-executing. One author, for example, contends that there "is a principled position in international law which holds that an invalid reservation must be severed from the treaty leaving the underlying treaty provisions as well as the remainder of the treaty fully operational." Richard J. Wilson, *Defending a Criminal Case with International Human Rights Law*, THE CHAMPION 28 (May 2000) (citing 15 HUM. RTS. L. Q. 464 (1994)). That debate, and its appropriate resolution, is beyond the scope of this Article.

99. Many authors have addressed the issues of Vienna Convention consular notification rights for foreign nationals. *See, e.g.*, Ann Woolhandler, *Treaties, Self-Execution, and the Public Law Litigation Model*, 42 VA. J. INT'L L. 757 (2002); Jennifer Lynne Weinman, *The Clash Between U.S. Criminal Procedure and the Vienna Convention on Consular Relations*, 17 AM.U. INT'L L. REV. 857 (2002); Margaret Mendenhall, *A Case for Consular Notification: Treaty Obligations as a Matter of Life and Death*, 8 SW. J. L. & TRADE AM. 335 (2001-02); Amanda E. Burks, *Consular Assistance For Foreign Defendants: Avoiding Default and Fortifying a Defense*, 14 CAP. DEF. J. 29 (2001). Mexico recently sued the United States in the International Court of Justice alleging continual violations of the right to consular relations under the Vienna Convention. Mexico v. United States, 2003 WL 256903 (I.C.J. Jan. 21, 2003). That topic, however, is beyond the scope of this Article.

100. The federal and state courts continue to apply procedural default rules to avoid addressing claims based on international human rights law despite the decision of the International Court of Justice in *F.R.G. v. United States*, 2001 ICJ 104. That case involved two brothers, sentenced to death by the state of Arizona, notwithstanding the violation of their consular notification rights under the Vienna Convention. The ICJ found that the United States, through the State of Arizona, had violated Article 36 of the Convention, the rights of Germany, and the individual rights of the LaGrand brothers. Further, the ICJ held that the application of rules of procedural default cannot be applied by the states or by the United States to avoid application of treaty rights because the application prevented "the full effect from being given to the purposes for which rights accorded under the article are intended." *Id.*

III. POLITICAL HURDLES TO THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN STATE COURTS

In the vast majority of states in the United States, the men and women who serve as judges are elected to their offices.[101] In most states, citizens are given the right to vote for judges, just as they are for legislators, governors, and presidents. In those few states where the citizens neither vote directly for judges nor decide whether to retain them, judicial selections are generally made by executive or legislative appointment and sitting judges are generally subject to periodic legislative or executive approval. In only three states is the judiciary, after appointment, granted quasi-life tenure[102] without subsequent review or retention. While all federal judges are appointed for life, the congressional confirmation process is certainly not apolitical.

For the American electorate, then, and for some of those who seek the office, judges are simply political candidates. It logically follows, that judges who raise funds, campaign, and seek support from the voters[103] must also have political platforms that assert their beliefs and opinions and make promises of conduct after election.[104] Political accountability requires adherence to one's platform, fulfillment of one's promises, and responsiveness to public sentiment.

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101. *See* AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES' APPELLATE AND GENERAL JURISDICTION COURTS, SUMMARY OF INITIAL SELECTION METHOD (June 11, 1996 revision) (on file in the author's office and available from the American Judicature Society) [hereinafter AMERICAN JUDICATURE SOCIETY]; Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in the Era of Judicial Politicalization*, 72 NOTRE DAME L. REV. 1133, 1134, nn.6-7 (1997).

102. Judges are appointed until age 70 in Massachusetts and New Hampshire, while in Rhode Island, judges are appointed for life. AMERICAN JUDICATURE SOCIETY, *supra* note 101, *available at* http://ajs.org/js/MA.htm (Mass.); http://ajs.org/js/NH.htm (N.H.); and http://ajs.org/js/RI.htm (R.I.).

103. It is true that judicial campaigns are subject to restrictions set forth in the Model Code of Judicial Conduct. These restrictions affect fund-raising, advertising, and the content of campaigns and subject violators to discipline. Nonetheless, few judicial campaigns viewed from the perspective of lay citizens, appear any different from standard political campaigns.

104. The Model Code of Judicial Conduct, discussed in the next section, restricts a candidate's ability to make promises of conduct in office. Justice Stevens once observed that "[a] campaign promise to be 'tough on crime' or to 'enforce the death penalty' is evidence of bias and should disqualify a candidate from sitting in criminal cases." Justice John Paul Stevens, Address at the American Bar Association Annual Meeting (Aug. 3, 1996). The United States Supreme Court, however, has recently ruled that certain restrictions on a judicial candidate's campaign conduct violate the candidate's right to free speech guaranteed under the First Amendment. Republican Party v. White, 536 U.S. 765 (2002). For general discussions of the politicization of the judiciary, *see* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L REV. 759 (1995); Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133 (1997).

The politically correct, and astute, judicial platform, has long been "tough on crime." Candidates compete to see who can amass the toughest record on crime as a means of securing a seat on the bench.[105] Judges at every level have found it advantageous to voice their support for capital punishment.

In a Supreme Court race in Nevada, for example, an incumbent justice, supported by the state's attorney general, announced that he had a "record of fighting crime," supported the death penalty, and "had voted to uphold the death penalty 76 times."[106] In Alabama, an appellate judge campaigning for the state supreme court called upon the court to set execution dates in cases in which habeas claims were pending in federal courts.[107] A lawyer in Texas promising greater use of the death penalty, as well as the harmless error and frivolous appeal rules, successfully challenged an incumbent appellate judge who had authored an unpopular opinion on capital punishment.[108] Others campaigning for judgeships emphasize their stance on capital punishment and their "successes" in securing death sentences as prosecutors.[109]

Even those judges who do not face a vote by the citizens of their states sense reason to appear in favor of capital punishment. In California, for example, individuals who seek judicial appointments are reportedly asked whether they personally favor the death penalty.[110] Governors in other states have campaigned against justices, even some of their own appointees, because of their decisions in capital cases.[111]

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105. *See, e.g.*, Bright & Keenan, *supra* note 104; Uelmen, *supra* note 104.

106. Nevius v. Warden, 944 P.2d 858 (Nev. 1977). In a per curiam opinion denying relief to a death-sentenced inmate who moved that the justice be disqualified, the Nevada Supreme Court expressed their viewpoint as follows: "[JusticeYoung] was simply responding to an assertion, based on one case, that he was soft on the death penalty and demonstrating to the electorate that the allegation against him was distorted . . . . Citing [his] record in upholding the death penalty was nothing more than showing that he will enforce Nevada law in an area very important to Nevada voters . . . ." *Id.* at 859. The dissenting justice noted that "[i]f the public praise and endorsement . . . by the attorney general were not enough in itself, Justice Young's putting forth his 'record' of fighting crime *rather than judging crime* adds up, . . . to an unacceptable appearance of bias in this case. *Id.* at 860-61 (Springer, J., dissenting) (emphasis added).

107. T. Hughes, *Montiel Challenges Court to Schedule Executions*, MONTGOMERY, ALA. ADVERTISER, May 19, 1994, at 3B.

108. Jane Elliott & Richard Connelly, *Mansfield: The Stealth Candidate: His Past Isn't What It Seems*, TEX. LAW., Oct. 3, 1994, at 1.32. Mansfield defeated Judge Charles F. Campbell, a twelve year veteran of the court, who had authored the court's opinion reversing a capital conviction in *Rodriguez v. State*, 848 S.W.2d 141 (Tex. Crim. App. 1993) the year before. For a more detailed discussion of Judge Mansfield and his campaign, see Stephen Bright, *Death in Texas*, THE CHAMPION, July 1999, at 16-26.

109. Bright & Keenan, *supra* note 104, at 781-84, 811-13.

110. Harriet Chiang, *Defense Attorneys Accuse Davis of Bias in Handing out Judgeships* S.F. CHRON., Feb. 21, 2000, *available at* http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archinef/2000/02/21/MN99490.DTL.

111. Burt Hubbard & Ann Carahan, *Angered over the Death Penalty, Lamm Assails Two Judges: Colorado*

Judges who desire to move to a higher court at some point in their career may shy away from politically sensitive decisions. As one United States Supreme Court Justice has observed "[t]he 'higher authority' to whom present-day capital judges may be 'too responsive' is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly confess their fealty to the death penalty . . . ."[112]

Candidates for judicial office, who are seen as neutral, or "liberal" in their view on crime and punishment rarely stand a chance in elections (or appointments) for state judicial positions. Similarly, incumbent judges who appear too fair, too forward-thinking in their views on crime and capital punishment will often find themselves targeted by victim's groups, opposing candidates, or members of the state legislative and executive branches. Increasingly, incumbent judges are unsuccessful in their retention or re-election bids because of decisions they have rendered in capital punishment cases or labels they have acquired, fairly or unfairly.[113]

A more recent political dagger, but a serious one nonetheless, is the categorization of a judge or a judicial candidate as an "activist." While the tag is largely devoid of meaning, it is a label that seems to be attached to judges whose cases involve social and political issues.

Scholars point out that until the middle of the twentieth century, most court decisions involved the restriction of government rights, not the creation of personal ones.[114] But it is equally true that the growing frequency of court decisions often seen as "active" or "liberal" ones are prompted by the sheer number of legislative acts, many of which involve indefinite and difficult language, and the increased litigiousness of American citizens. Congressional actions, and the creativity of modern litigators, spawned by anxious citizens, have "propelled the courts into an unaccustomed regulatory and quasi-legislative role. Both the pettiest details and the broadest concepts of government have come within the judicial ambit."[115]

High Court Justices' 'Disregard Vote of People,' Former Governor Charges, ROCKY MTN. NEWS, Mar. 12, 1994, at 5A. The author was challenged and defeated in a retention election largely orchestrated by the governor and the governor's party. The governor promised to appoint only death penalty supporters to judgeships. Stephen Bright, *Political Attacks on the Judiciary*, 80 JUDICATURE 165, 168-71 (Jan.-Feb. 1997) (citing Wade, *White's defeat poses a legal dilemma: How is a replacement judge picked?*, MEMPHIS COMMERCIAL APPEAL, Aug. 3, 1996, at A1).

112. Harris v. Alabama, 513 U.S. 504, 519 (1995) (Stevens, J., dissenting) (citing Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

113. Bright & Keenan, *supra* note 104.

114. JUDGE IRVING R. KAUFMAN, CHILLING JUDICIAL INDEPENDENCE 9 (1979).

115. *Id.* at 13.

No judge can sit passively by in the face of growing dockets overflowing with complex litigation. The judge must manage the cases, hear the cases, and rule on the cases. Once the ruling is made, the judge must enforce it, thereby requiring additional effort and activity on the part of the judge. Notwithstanding these facts, judges who are labeled as "activists" are similarly targeted, often successfully, for removal from the bench.[116]

Judicial interpretations of state constitutions often provide rich fodder for criticisms of sitting judges. Twenty years ago, judges in Oregon and California were attacked based on opinions that interpreted provisions of state constitutions.[117] And within the last few years, supreme court justices in Florida, Nebraska, and Wyoming, to name a few, have suffered similar attacks, all as a result of interpreting provisions of state constitutions.[118]

In the present political climate, it is unrealistic to expect a state court judge, subject to retention or reelection, to initiate the application of international human rights law in a state court, in the absence of higher state court or federal court precedent or a directive from another branch of government. In the two state cases previously discussed in this Article, the judges who accepted the applicability of the international human rights law in the state court were distinctly in the minority.[119] The great majority of state courts and judges who have been faced with the prospect of applying international treaties or customary international law in the state courts have avoided the issue either by asserting a procedural bar, a binding Senate reservation, or a federalism rationale.[120]

One might expect that appointed federal judges would assume the necessary leadership role in applying international human rights law, thereby providing at least persuasive authority, for use by state court

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116. Bright & Keenan, *supra* note 104; Uelman, *supra* note 104.

117. Justice Hans Linde in Oregon was subject to an attack based on his interpretations of the Oregon Constitution. Ronald K. L. Collins, *Hans Linde and His 1984 Judicial Election: The Primary*, 70 OR. L. REV. 747, 761 (1991). Chief Justice Rose Byrd and two Associate Justices, Joseph Grodin and Cruz Reynozo, were unseated in California based largely on death penalty decisions and state constitution interpretations. Gerald F. Uelmen, *California Judicial Retention Elections*, 28 SANTA CLARA L. REV. 333, 342 (1988).

118. *See generally* Jennifer Friesen, *Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law*, 3 WIDENER J. PUB. L. 25 (1993).

119. *See* text accompanying *supra* notes 75-76, 95-96.

120. Many decisions about the application of international law are avoided by application of the Anti-Terrorism and Effective Death Penalty Act's procedural bar provisions. For example, in *Breard v. Netherland*, 949 F. Supp. 1255, 1263 (E.D.Va. 1996), the federal district court procedurally defaulted Breard's international law claims, determining that they had not been raised in state court and that Breard failed to establish cause for the failure and actual prejudice resulting from the violation. The Fourth Circuit Court of Appeals affirmed the findings. Breard v. Pruett, 134 F.3d 615, 618-19 (4th Cir. 1998).

judges. This, however, is an unrealistic expectation and unlikely to be fulfilled. The United States Supreme Court has demonstrated a dearth of leadership in this area, as is exemplified by their decision in a case involving a foreign national, Angel Franscisco Breard. Breard was sentenced to death by the Virginia state courts, which also denied his appeals and his attempts to get collateral relief.[121] When he attempted to raise an international law issue in the federal district court, he was likewise unsuccessful.[122]

While Breard was seeking relief in the American federal courts, Paraguay was seeking relief in the international courts. The International Court of Justice recognized that the impending execution date would prohibit it from conducting an adequate hearing. It, therefore, issued the following order:

> The Court unanimously indicates the following measures: The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order.[123]

Five days after the International Court of Justice issued its Order, on the day of Breard's scheduled execution, the United States Supreme Court issued a decision addressing, in a very limited fashion, some of Breard's claims as well as claims raised by Paraguay in separate civil lawsuits.[124] For purposes of this Article, only the briefest critique of the Court's action is necessary.

Demonstrative of its penchant toward the avoidance of international law issues, the Court somewhat incredulously described the circumstances:

> It is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to the court

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121. Breard v. Commonwealth, 445 S.E.2d 670 (Va. 1994) (affirmance of death sentence by Virginia Supreme Court); *Netherland*, 949 F. Supp. 1255 (dismissal of petition for writ of federal habeas corpus), *aff'd, Pruett*, 134 F.3d 618. While all of the federal proceedings in Breard's case refer to the filing and dismissal of a state habeas petition, and the dismissal of an appeal by the Virginia Supreme Court, the decision is not cited and cannot be located, presumably because it was a dismissal of the appeal.

122. Many authors have written about the *Breard* decision and about the federal Anti-Terrorism and Effective Death Penalty Act, the provisions of which served as the procedural basis for the denial of Breard's claims. *See, e.g.*, Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Claims*, 77 N.Y.U. L. REV. 699 (2002); Jeffrey Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COL. L. REV. 1 (2002); Philippe J. Sands, *The Future of International Adjudiciation*, 14 CONN. J. INT'L L. 1 (1999); Erik G. Luna & Douglas J. Sylvester, *Beyond Breard*, 17 BERKELY J. INT'L L. 147 (1999).

123. Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. No. 248 (April 9, 1998).

124. Breard v. Greene, 523 U.S. 371 (1998).

> earlier. Nonetheless, this Court must decide questions presented to it on the basis of law. The Executive Branch, on the other hand, in exercising its authority over foreign relations, may and in this case did, utilize diplomatic discussion with Paraguay. Last night the Secretary of State sent a letter to the Governor of Virginia requesting that he stay Breard's execution. If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him.[125]

The dissenting justices noted the existence of court rules that would have given the Court ample opportunity—and ample time—to review the case.[126] Instead, the Governor of Virginia declined the Court's invitation and Breard was executed.

The political hurdles to the application of international human rights law in state courts, then, exist not only due to the judicial selection methods in most states, but also because of some judges' desires to curry political favor, which might assist them in climbing the judicial ladder, and other judges' desires to remain free from criticism for their decisions. Consequently, judges in states that elect, as well as states that appoint, and judges appointed to life tenure on the federal bench, may nonetheless be expected to avoid initiating any application of international human rights laws in capital cases in the United States.

IV. ETHICAL HURDLES TO THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN STATE COURTS

Judges also face ethical hurdles in the application of international human rights law in the state courts. In every state, judges take oaths of office to uphold the constitution of their state and of the United States. To the extent a higher state or federal court has interpreted a constitutional provision, those interpretations are binding on the judges of the lower courts.

Assume, for example, that a Kentucky state court trial judge is asked to stay an execution on the sole grounds that the Kentucky and United States Constitutions disallow the execution of those who committed capital offenses while juveniles. Given the present state of the law in Kentucky and federal law, and the precedents of the Kentucky and United States Supreme Courts, the trial judge would violate his or her oath of office by making such a ruling.

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125. *Id.* at 378.

126. *Id.* at 379-81 (Stevens, J., dissenting) (Breyer, J., dissenting) (Ginsburg, J., dissenting).

In addition to the oaths of office taken by those who assume the role of state court judges, each state subscribes to rules of judicial conduct. Judges who violate the ethical code for judges are subject to discipline, including removal from office.

Most states have adopted judicial ethics codes based on the American Bar Association's Model Code of Judicial Conduct, or some variation thereof. The Code is divided into several canons, usually seven, that set forth either mandatory or suggested rules pertaining to judicial conduct on and off the bench.[127] Although the order of the canons vary greatly from state to state, the canons of each state generally address judicial independence, competence, integrity, diligence, impartiality, and impropriety, as well as extra-judicial and political activities. The canons require, for example, that judges "uphold the integrity and independence of the judiciary,"[128] "avoid impropriety and the appearance of impropriety in all . . . activities,"[129] and "perform the duties of office impartially and diligently."[130]

Particularly relevant to this discussion, however, is the following provision, usually codified in Canon 3. "A judge shall be faithful to the law and maintain professional competence in it."[131] "Law" is defined to include court rules, statutes, constitutional provisions, and "decisional law."[132]

A very good example of the limits that a judge's oath of office and ethical obligations place on his or her personal opinions about the law is present in the case of *Ex parte Burgess*.[133] Burgess was sentenced to death by judge-override.[134] On appeal, among other issues facing the

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127. The ABA Model Code of Judicial Conduct is written in mandatory terms. ABA MODEL CODE OF JUDICIAL CONDUCT (1998). Each canon begins with the words "[a] judge shall" or "shall not." Some states, however, in addition to modifying specific standards within the Code, have phrased their canons in terms of what judges "should" or "should not" do. A third category of states, by far the smallest, has differentiated between mandatory and preferred canons requiring in some instances that judges "shall" or "shall not" and, in other instances that judges "should" or "should not."

128. *Id.* at Canon 1. "An independent and honorable judiciary is indispensable to justice in our society . . . . A judge should . . . observe high standards of conduct so that the integrity and independence of the judiciary may be preserved." *Id.*

129. *Id.* at Canon 2. "A judge shall . . . conduct himself [or herself] at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary . . . . A judge shall not allow family, social, or other relationships to influence judicial conduct or judgment." *Id.* at (A), (B).

130. *Id.* at Canon 3.

131. *Id.* at Canon 3 (B)(2).

132. *Id.* at Terminology [10].

133. 811 So. 2d 617 (Ala. 2000).

134. The Alabama sentencing procedure, which provides for a sentence recommendation by a jury with a final decision determination to be made by the judge, ALA. CODE § 131A-5-47 (2002), was eliminated by the United States Supreme Court in *Ring v. Arizona*, 536 U.S. 584 (2002). In the *Burgess* case the jury had recommended 10-2 that the defendant, who was 16 at the time of the capital crime, be sentenced to life imprisonment without parole. *Ex parte* Burgess, 811 So. 2d 617, 629 (Ala. 2000).

Alabama Supreme Court was whether the execution of one who was a juvenile at the time of the crime would violate international human rights law. In a per curiam decision, the court reiterated a prior holding and concluded "that the death penalty can legally be imposed upon a 16-year-old charged with a capital offense."[135]

Concurring in the affirmation of guilt, but voting to reverse the death sentence, was Justice Houston. Justice Houston's opinion may be read as expressing frustration with the conflict between a treaty provision disallowing the execution of juveniles ("The United States Supreme Court binds me as a Supreme Court Justice of the State of Alabama to abide by the ICCPR . . . and not to impose the sentence of death . . . .")[136] and the duties of a state court judge in a federalist system ("I infer that the United States Supreme Court indicated that [the Senate's reservation removes the ICCPR prohibition in State courts] . . . .").[137] It may also be read as recognizing the difference in a judge's personal interpretation of a contested legal issue ("I am not persuaded that the Senate's reservation . . . frees me as a state justice . . . from the treaty's restriction against the imposition of a sentence of death for a crime committed by a person below the age of 18 years.")[138] and a judge's ethical duty to apply a different interpretation made by a higher court ("Even though I am not persuaded that the Senate's reservation removes the ICCPR prohibition in State courts, I infer that the United States Supreme Court indicated that it did.").[139] In the end, the justice's personal ethical conflict is obvious: "I pray that in [concurring in upholding the sentence of death] I am not committing 'an unforgivable act.'"[140]

Justice Houston's personal-judicial conflict was resolved in favor of his promise to "uphold the Constitutions of the United States and of the State of Alabama" and his ethical obligation to "be faithful in the law."[141] As a justice of a state supreme court, he was obligated to follow

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135. *Ex parte Burgess*, 811 So. 2d at 629 (citing *Ex parte* Pressley, 770 So. 2d 143 (Ala. 2000)).

136. *Ex parte Burgess*, 811 So. 2d at 631 (Houston, J., concurring in result).

137. *Id.* at 632 (Houston, J., concurring in result).

138. *Id.*

139. *Id.* at 632 (Houston, J., concurring in result).

140. *Id.* In both of his concurrences, Justice Houston confessed to having read Clarence Darrow's closing argument in the case of Leopold and Loeb before voting and to have wondered:

> [if] we are turning our faces backward toward the barbarism which once possessed the world. If Your Honor can hang a boy of eighteen, some other judge can hang him at seventeen, or sixteen, or fourteen. Someday . . . men would look back upon this as a barbarous age which deliberately set itself in the way of progress, humanity and sympathy, and committed an unforgivable act.

Id. (quoting CLARENCE DARROW, ATTORNEY FOR THE DAMNED 82 (Arthur Weinberg ed. 1957)).

141. ALA. CONST. § 279 (oath of office for judges); MODEL CODE OF JUDICIAL CONDUCT Canon

the interpretation of the United States Constitution adopted by the United States Supreme Court. Neither his personal opinions nor his own inconsistent legal interpretation of the United States Constitution justified his failure to 'be faithful in the law.'[142]

V. ARGUMENTS TO SCALE THE LEGAL, POLITICAL, AND ETHICAL HURDLES TO THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN STATE COURTS

This Article has discussed, in the previous sections, legal, political, and ethical hurdles to the application of international human rights laws in state courts, often against the backdrop of a recent state capital punishment case. This section will identify some methods for scaling the hurdles, and will then use state court decisions to illustrate those methods.

A. Federalism as a Solution, not the Problem

As at least one state court justice has recognized, the concept of federalism not only provides states sovereignty in state-law matters, it also requires state-court deference to some federal authority, notably the United States Constitution and treaties that are the "Supreme law of the land."[143] When the United States ratifies a treaty, that treaty becomes the "Supreme law of the land," which must be applied in state courts as well as federal courts. When the Senate ratifies a treaty, thereby making it the "Supreme law of the land," yet attempts to modify certain provisions of the treaty by attaching reservations, the treaty does not lose its status as "Supreme" for four reasons.

1. Rules of Treaty Interpretation Support Application

Very often, the treaties to which the Senate has attached reservations specifically disallow a reservation that is incompatible with the terms and provisions of the treaty. In addition, well-established rules

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3 (1972) (ethics code).

142. The uncertain aspect of Justice Houston's decision, however, was his decision to read the Supreme Court's denial of certiorari in *Domingues* as a statement by the Court that the Senate reservation removed the ICCPR prohibition against the execution of those who are convicted of capital offenses while juveniles. *See Ex parte Burgess*, 811 So. 2d at 630 (Houston, J., concurring); *Ex parte Pressly*, 770 So. 2d at 150 (Houston, J., concurring).

143. Treaty provisions are "equal in status to congressional legislation, and, as expressly provided in the text of the Constitution, the supreme law of the land." NOWAK & ROTUNDA, *supra* note 16, at § 6.6.

regarding the interpretations of treaties disallow reservations that are incompatible with the object and purpose of the treaty.[144] The international treaty that governs treaty interpretations, the Vienna Convention on the Law of Treaties, provides specifically that a nation-state "may, when signing, ratifying, accepting, approving, or acceding to an international treaty, formulate a reservation unless . . . the reservation is incompatible with the object and purpose of the treaty."[145] While the United States has not yet ratified the Vienna Convention, State Department protocol accepts it as the authoritative guide to treaty interpretation.[146] As a result, the American Law Institute in setting forth the Restatement of the Law of Foreign Relations has recited the principles of the Vienna Convention.[147] Customary international law provides similarly that signatory nations cannot invalidate their agreements by the attachment of reservations that disembowel the treaty's provisions.[148]

Given the clearly established law that incompatible treaty reservations are invalid, the remaining question is whether the Senate reservation to a specific treaty was compatible or incompatible with the treaty's objects and purposes. In evaluating the reservation to the International Covenant on Civil and Political Rights, for example, one need only look to Article 6 for its stated purpose: "the right to life." An express limitation of the treaty is the prohibition against death sentences for crimes committed by juveniles. The Senate reservation that purports to reserve the "right . . . to impose capital punishment on any person . . . including such punishment for crimes committed by persons below eighteen years of age,"[149] is clearly incompatible with the object and purpose of the treaty.[150]

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144. *See supra* note 68.

145. VIENNA CONVENTION ON THE LAW OF TREATIES, 8 I.L.M. 679 art. 19(c). The Vienna Convention also provides that "[a] state is obliged to refrain from acts which would defeat the object and purpose of a treaty when (a) it has signed the treaty . . . subject to ratification, acceptance, or approval, until it shall have made its intention clear not to become a party to the treaty . . . ." *Id.* at art. 18.

146. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. pt. 3, Introductory Note. The Department of State, noted in a transmittal letter to the President, that "[a]lthough not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92nd Cong., 1st Sess. (1971) p.1 (quoted in *id.*).

147. *Id.*; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 313(1)(c); *see also* Maria Frankowksa, *The Vienna Convention on the Law of Treaties Before the United States Courts*, 28 VA. J. INT'L L. 281, 286 (1988).

148. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 313, Comments.

149. 138 CONG. REC. S4781-01, § (2) (daily ed. Apr. 2, 1992).

150. It should also be noted that the express terms of Article 4.2 of the ICCPR provides that "no derogation from Article 6 . . . may be made under this provision." This provision further illustrates how essential Article 6.5 regarding the execution of juveniles is to the central purpose and object of the treaty. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 4.2, 999 U.N.T.S. 171, 175.

2. Established Rules of Statutory Construction Support Application

Courts should apply well-established doctrines of statutory construction in interpreting the treaties to uphold their purposes. The first applicable doctrine of construction requires courts to maintain, rather than destroy, the applicability of congressional acts.[151] "In exercising its power to review the constitutionality of a legislative Act, a federal court should act cautiously."[152] If a statute is inconsistent with the Constitution, however, the court is required to invalidate it only to the extent necessary.[153] Courts should use this doctrine of severability to sever incompatible congressional reservations from the treaty, so that the remaining provisions remain viable.

The doctrine of severability, used frequently to uphold parts of statutes, allows repugnant or inconsistent provisions to be severed from a statute so that the statute continues to be valid. Specifically, if part of a statute is void or unconstitutional, the remainder is not necessarily invalid. Rather, it is the duty of a court to uphold the statute when it can, and to invalidate only so much as is necessary to make the statute consistent with the Constitution. "[W]henever an act of Congress contains unobjectionable [separable] provisions, [the court must] maintain the act in so far as it is valid."[154]

The Supreme Court has applied the severability doctrine to treaties. In a case involving a treaty negotiated between the nation and native Americans, the Court upheld a treaty, but severed from it amendments attached to the treaty and not communicated to the contracting parties as part of the treaty.[155] The Court noted that "[t]here is something, too, which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties . . . ."[156]

Two arguments against applying the severability doctrine to treaties may arise. The first argument is that treaties, unlike statutes, do not have explicit severability clauses.[157] While it is true that statutes often

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151. Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992).

152. Regan v. Time, 468 U.S. 641, 652 (1984) (plurality opinion).

153. NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION §§ 45.11 & 56.04 (6th ed. 2000).

154. *Id.* (quoting El Paso & N.E. Ry. Co. v. Gutierrez, 215 U.S. 87, 96 (1909)).

155. New York Indians v. United States, 170 U.S. 1 (1898).

156. *Id.* at 23.

157. Nevada Supreme Court Justice Rose, who concurred in the decision to modify the death sentence of Robert Paul Servin, a 16-year old at the time of his capital offense, lists this as one of three

include severability clauses not contained in treaties, the Supreme Court has clearly held that "whatever relevance such an explicit clause might have in creating a presumption of severability, the ultimate determination of severability will rarely turn on the presence or absence of such a clause."[158]

An illustration of a response to this argument is provided, again, by the International Covenant on Civil and Political Rights. While the Covenant does not contain an express provision allowing severability, it does contain an express provision disallowing amendments or reservations to Article 6.[159]

The second argument is, perhaps, more formidable. The test that the United States Supreme Court has set forth for determining the appropriateness of severability is one that requires severability "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not . . . ."[160] One might suggest that an attachment itself is convincing evidence that Congress would not have ratified the treaty if it could not also limit its application by the attachment. In reality, however, if a treaty's essential purpose is undermined by the reservation, at best congressional intent is inconsistent, for Congress has both endorsed the treaty, yet attempted to undermine its very purpose with a reservation.

Some evidence suggests that the reservation to the International Covenant on Civil and Political Rights was made with knowledge that it would be ineffective. When it adopted the Covenant, the Senate Foreign Relations Committee commented on the treaty's provisions regarding the execution of those whose capital crimes were committed while juveniles.[161] The Committee "recognize[d] the importance of adhering to international standard[s]" and noted that the trend by states in disallowing execution of those whose crimes were committed as juveniles might be "appropriate and necessary" "to bring the United States into full compliance at the international level."[162]

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arguments for upholding the Senate reservation to the ICCPR. Servin v. Nevada, 32 P.3d 1277, 1290 (Nev. 2001) (Rose, J., concurring) ("[T]he ICCPR does not expressly prohibit reservations or make reference to the object-and-purpose test.").

158. United States v. Jackson, 390 U.S. 570, 585-86 n.27(1968) (citing numerous cases in which severability was used to excise invalid statutory provisions despite the absence of any explicit severability provision).

159. *See* discussion *supra* note 98.

160. Buckley v. Valeo, 424 U.S. 1, 108 (1976) (per curiam) (quoting Champlin Ref. Co. v. Corp. Comm'n, 286 U.S. 210, 234 (1932)).

161. U.S. SENATE COMM. ON FOREIGN RELATIONS ON THE INT'L COVENANT ON CIVIL & POLITICAL RIGHTS, 31 I.L.M. 645 (1992) (found in Report, IV Committee Comments, at 3-4).

162. *Id.* at 650 (found in Report, Reservations 2, at 6-10).

3. Customary International Law Supports Application

Customary international law is consistent with and supports the first two reasons that treaties do not lose their "Supreme" quality as a result of Congress's attachment of a reservation. Many respected international scholars argue that in addition to interpretive rules, customary international law may produce substantive rules that must be followed.[163] Customary international law encompasses "the customs and usages of civilized nations .... International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[164] The Restatement concludes that "the customary law of human rights is part of the law of the United States to be applied as such by state as well as federal courts."[165]

One such customary international law,[166] urged by commentators and some courts, is that individuals should not be executed for crimes they committed while juveniles.[167] Thus, they would argue that "an emerging customary international law," supported by the majority of nations and influencing many states prohibits the capital punishment of juveniles.[168]

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163. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 102; HENKIN, *supra* note 84, at 136; *see also* The Pasquete Habana, 175 U.S. 677, 700 (1900) ("The law of nations ... is part of the law of the land.").

164. *Paquete Habana*, 175 U.S. at 700; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, n.4 (1987) ("matters arising under customary international law also arise under 'the laws of the United States' since international law is 'part of our law' and is federal law").

165. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 702 (1987).

166. Much has been written about customary international law, tests to determine whether an international law norm has risen to the point of becoming "binding," and the effect of binding international norms. This discussion is beyond the scope of this Article.

167. Koh, *supra* note 87, at 1835; F. Giba-Matthews, *Customary International Law Acts as Federal Common Law in U.S. Courts*, 20 FORDHAM INT'L L. J. 1839, 1854 (1997); Ved Nanda, *The United States Reservation of the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311, 1328-33 (1993); David Weissbrodt, *Execution of Juvenile Offenders by the United States Violates International Human Rights Law*, 3 AM. U.J. INT'L & POLICY 339, 357-69 (1988); James F. Harman, *"Unusual Punishment": The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 669-82 (1983).

168. Nanda, *supra* note 167, at 1328. Supporters point also to Article 37 of the Convention on the Rights of the Child, which was ratified by all but two of 193 nation-states and signed, but not ratified by the United States. The two non-ratifying nation-states are Somalia and the United States. Article 37 prohibits the execution of juvenile capital offenders. Two other treaties that the United States has either signed or ratified also prohibit such executions. American Convention on Human Rights, Chapter II, art. 4, 5 (signed but not ratified); Convention Relative to the Protection of Civilians in Time of War (Fourth Geneva Convention)(ratified).

An example of this approach of using international law as binding common law was outlined by Nevada Supreme Court Justice Rose in his concurring opinion in *Servin v. State.*[169] Among the reasons why Justice Rose voted to modify Servin's death sentence to two life sentences without the possibility of parole was his acceptance of the argument that "assessing the death penalty upon juveniles violates an international customary law norm."[170]

4. Separation of Powers Supports Application

The fourth reason that the Senate's reservations should not eviscerate state court application of international human rights law is a function of both federalism and the separation of powers. A ratified treaty is, in effect, a legislative enactment. When Congress passes a legislative enactment that provides rights, and then in a separate provision removes those rights, courts have no difficulty in exercising their authority of judicial review to evaluate the legislative action. Courts should do no less when the rights that Congress creates and then abolishes are bestowed by treaties.

B. Separation of Powers as a Solution, Not a Problem

Thus, in an appropriate exercise of judicial power, the power of judicial review, courts should not hesitate to declare the reservations attached by Congress to be in derogation of or beyond congressional authority. This "judicial review" of legislative decision-making is firmly established in the American judicial system. It is just as applicable to congressional adoption of international law as it is to congressional enactment of domestic law.

C. Independent State Grounds as a Solution, Not a Problem

Despite political concerns, state courts may also apply international human rights law in state cases by finding that those rights are required by state law or by the state constitution. State constitutions are, in effect, an agreement between the state's governing branches and the state's

169. 32 P.3d 1277, 1290 (Rose, J., concurring).
170. *Id.* at 1291 (Rose, J., concurring).

citizens.[171] State courts must consult state constitutions because they are the essential statement of state rights and responsibilities.[172]

In interpreting a state constitution,[173] generally, the question is what the state constitution intended for its citizens.[174] The interpretation of the federal constitution by the United States Supreme Court may provide guidance, but it is not controlling.[175] To consider it so, would render state constitutions a "mere row of shadows" denying them the important role they should play in the adjudication of important constitutional rights.[176]

Some state constitutions refer specifically to United States treaties as binding law in the state. When the application of international human rights law under a treaty is raised in those states, state court judges may frame their decision in terms of state constitutional law, thereby insulating the decision from federal court modification. In those state constitutions that do not specifically reference the supremacy of federal treaties, the same effect may be accomplished by basing the application of the treaty rights on state, rather than federal, constitutional principles.

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171. Shepard, *supra* note 34, at 1553.

172. *Id.* "If state courts fail to consider [the state constitution] as 'valid,' they are saying as well that their own authority is not valid . . . . The assertion that state constitutions are no longer meaningful . . . appears . . . to be ludicrous." *Id.* The author of this statement was at the time of the writing the Chief Justice of the Indiana Supreme Court.

173. For a discussion of the methods by which state courts apply their own constitutions, a topic beyond the scope of this Article, see Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudicaiton*, 72 NOTRE DAME L. REV. 1015 (1997).

174. Justice Hans A. Linde of the Oregon Supreme Court, for example, has suggested that "[t]he right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand." Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984).

175. The United States Supreme Court's interpretations have been described by one state supreme court justice as

> valuable sources of wisdom . . . But although that Court may be a polestar that guides us as we navigate the [state] Constitution, we bear ultimate responsibility for the safe passage of our ship. Our eyes must not be so fixed on that star that we risk the welfare of our passengers on the shoals of constitutional doctrine.

State v. Hempele, 576 A.2d 793, 800 (N.J. 1990).

176. Justice Souter, while a state supreme court justice in New Hampshire, observed:

> It is the need of every appellate court for the participation of the bar in the process of trying to think sensibly and comprehensively about the questions that the judicial power has been established to answer. Nowhere is the need greater than in the field of State constitutional law, where we are asked so often to confront questions that have already been decided under the National Constitution. If we place too much reliance on federal precedent we will render the State rules a mere row of shadows; if we place too little, we will render State practice incoherent. If we are going to steer between these two extremes, we will have to insist on developed advocacy from those who bring the cases before us.

State v. Bradberry, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring).

Thus, for example, a state court faced with the issue of whether the violation of Vienna Convention rights has an effect on a state-court prosecution, can analyze the issue in terms of the state, rather than the federal, due process clause.

An illustration of a court construing its nation's due process clause to incorporate standards that disallowed a death sentence while petitions were pending before the United Nations Human Rights Commission[177] is found in a decision of the Judicial Committee of the Privy Council. In *Thomas and Hilaire v. Baptiste*,[178] the Privy Council was called upon to interpret the "due process of law" clause in the Constitution of Trinidad and Tobago. Relating the history of the clause and noting that the "expressions mean different things to different ages," the Council concluded that "due process of law is a compendious expression in which the word 'law' invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilized nations which observe the rule of law."[179]

Other states have specific provisions in their death penalty statutes that require the state appellate court to make an independent determination as to whether the death penalty is "disproportionate," "nonarbitrary," or "excessive."[180] State appellate courts, in applying state law, are free to utilize international treaty provisions and customary international law in making those assessments.[181]

A recent state court decision illustrates the application of this strategy. In *Valdez v. State*,[182] the Oklahoma state court was asked to grant relief to an inmate sentenced to death who had been denied his consular notification rights under the Vienna Convention on Consular Relations. After Valdez's trial, conviction, and death sentence, the Mexican officials were notified about his case by a relative. They became involved and assisted in developing mitigating evidence that was

177. The Council described the argument as based on the "general right accorded to all litigants not to have the outcome of any pending appellate or other legal-process pre-empted by executive action." *Id.* at 8.

178. Privy Council of Appeal No. 60 of 1998 (Jan. 27, 1999).

179. *Id.* at 6.

180. For a review of each state's laws regarding appellate review of the death sentence, see Penny White, *Can Lightning Strike Twice? Obligations of State Courts after* Pulley v. Harris, 70 COL. L. REV. 815, 841-50 (1999).

181. The United States Supreme Court's assessment has varied as to whether international norms are relevant to determining the appropriateness of capital punishment under the federal constitution. For example, in the *Stanford* case, Justice Scalia wrote that "American conceptions of decency . . . are dispositive." More recently, however, the *Atkins*' majority noted that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." Atkins v. Virginia, 536 U.S. 304, 347 n.21 (2002).

182. 46 P.3d 703 (Okla. Crim. App. 2002).

presented to the Oklahoma Board of Pardons and Paroles. The Board recommended clemency, but the governor rejected the recommendation stating that he did not believe that the international law violation had a "prejudicial effect on the jury's determination of guilt and sentence."[183]

The Oklahoma Court of Criminal Appeals, in addressing the second post conviction petition filed by Valdez, recognized the potential barriers to the claim. Valdez had failed to raise the issue as required by state procedural law.[184] The United States Supreme Court had let stand a state court decision finding procedural default in almost identical circumstances [185] and had held that the rule of procedural default applied to federal constitutional violations.[186] The state appellate court would violate principles of federalism and supremacy if it gave primacy to a decision of an international tribunal over a conflicting United States Supreme Court decision.[187]

Strict adherence to principles of federalism and concern for interference with the country's foreign relations, however, did not prohibit the Oklahoma Court of Criminal Appeals from drawing upon its state law to grant relief, at least in the form of a fair and informed sentencing.[188]

> [T]his Court cannot have confidence in the jury's sentencing determination and affirm its assessment of a death sentence where the jury was not presented with very significant and important evidence bearing upon Petitioner's mental status and psyche at the time of the crime. Absent the presentation of this evidence, we find there is a reasonable probability that the sentencer might have concluded that the balance of aggravating and mitigating circumstances did not warrant death.... By our ruling today, this Court exercises its power to grant relief when an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.[189]

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183. *Id.* at n.7 (citing Exec. Order No. 2001-24 (July 20, 2001)).

184. *Id.* at 708-09. "The 1995 Amendments to the Capital Post-Conviction Procedure Act greatly circumscribed this Court's power [to address issues not raised in prior petitions]."

185. *Id.* at 709.

186. *Id.*

187. "For this Court to decide the ICJ's ruling [in LaGrand] overrules a binding decision of the United States Supreme Court and affords a judicial remedy to an individual for a violation of the Convention would interfere with the nation's foreign affairs and run afoul of the U.S. Constitution." *Id.* at 709.

188. The court noted important omissions in Valdez's trial. No evidence suggested that Valdez's medical problems were known to trial or appellate counsel. Trial counsel was inexperienced, having never before tried a capital case, and sought no financial resources for investigation. Representatives of the state failed in their duties to inform Valdez of his right to consul notification. *Id.* at 710.

189. The court carefully cited only Oklahoma law as authority for this point. *Id.* at 710-11. (citing OKLA. STAT. tit. 20, § 3001.1 (2001)).

Sometimes it is the nonexistence rather than the existence of state authority that forms the basis for a state court ruling applying international legal standards. In the State of Washington, for example, the legislature had not specifically authorized the execution of juveniles who committed capital offenses.[190] Other statutes, however, potentially allowed the execution of any person who was convicted of aggravated murder, a result that would violate the federal Constitution for those defendants fifteen years of age or younger. Recognizing its duty to construe state statutes in a manner as to uphold their constitutionality, the Washington Supreme Court imposed a ban on the execution of those who commit capital crimes while juveniles.[191]

> We cannot rewrite the juvenile court statute or the death penalty statute to expressly preclude imposition of the death penalty for crimes committed by persons who are under age 16 and thus exempt from the death penalty under *Thompson.* Nor is there any provision in either statute that could be severed in order to achieve that result. The statutes therefore cannot be construed to authorize the imposition of the death penalty for crimes committed by juveniles. Absent such authorization, appellant's death sentence cannot stand.[192]

D. Scaling Ethical and Political Hurdles

When a state court applies state law, albeit in a way that is inconsistent with a federal court's application of federal law, no ethical concerns are raised. The state judge is not violating the oath of office, nor the judicial canon requiring faithfulness to the law. Thus, these methods for scaling the legal hurdles to the application of international human rights law in state courts do not impugn ethical obligations.

It is unfortunate that a similar observation cannot be made about the political barriers. Judges who utilize state constitutional provisions to

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190. Washington law included a juvenile transfer statute that allowed the prosecutor to transfer any case to the adult court upon the finding of specified criteria, regardless of the age of the child. WASH. REV. CODE § 13.40.110(2)(1993). Additionally, Washington law imposed either a death sentence or a life sentence without parole on persons convicted of aggravated murder. *Id.* at 10.950.080. Read together, the statute would allow the imposition of a death sentence on any juvenile, even those who could not constitutionally be executed under the United States Supreme Court decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989).

191. Furman v. State, 858 P.2d 1092 (Wash. 1993).

192. *Id.* at 1103 (citations omitted). The Washington legislature could act, but has not acted, to overturn the decision by passing specific legislation authorizing executions for those sixteen or older. One justice went beyond the ostensible statutory construction basis for the decision and stated bluntly "I believe Washington should join the emerging national trend of legislatures recognizing that it is improper to execute persons who were juveniles at the time the crime was committed." *Id.* (Utter, J., concurring).

apply international human rights standards in state courts will be criticized, sometimes brutally.[193] The majority of the Oklahoma Court of Criminal Appeals was, for example, accused of "disregarding binding authority, in order to assist a defendant in litigating issues already decided or waived;" of "disregarding law to achieve a desired result in a case;" and of "start[ing] down a slippery slope, which ultimately fractures and decimates the Rule of Law."[194] The majority responded to this criticism in a manner that will hopefully become a guiding light for other state court judges: fairness must in the end prevail.[195]

> What justice can this Court guarantee and protect if it cannot correct a Constitutional violation which is fundamentally unfair? The case before us today is truly a "special case" where the interests of justice and due process are genuinely implicated . . . . The concept of the Rule of Law should not bind this Court so tightly as to require us to

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193. No discussion of brutal criticism of judges would be complete without quotations from the champion, Justice Scalia. In the most recent decision in which he disagreed with the majority on a capital punishment issue, for example, Justice Scalia accused the majority of deciding the case based on "nothing but the personal views of its members." Atkins v. Virginia, 536 U.S. 304, 363 (2002) (Scalia, J., dissenting). In Justice Scalia's words, the majority "argues," "pays lip service," "miraculously extracts," "set[s] its righteous face," "thrashes about," "counts faulty," "talks empty," "throws one last factor into its grab bag of reasons," and "attempts to bolster with embarrassingly feeble evidence." For its efforts, Justice Scalia awards the majority the "Prize for the Court's Most Feeble Effort to fabricate . . . ." *Id.* at 363-70.

194. Valdez v. State, 46 P.3d 703, 712 (Okla. Crim. App. 2002) (Lumping, J., concurring in part, dissenting in part).

195. A recent example of political courage, albeit by a life-tenured federal judge, can be found in the case of United States v. Quinones, 196 F. Supp. 2d 416 (S.D.N.Y. 2002), 205 F. Supp. 2d 256 (S.D.N.Y. 2002). In the earlier of the two decisions, Judge Rakoff deemed it prudent to "give the Government . . . the benefit of the Court's views" on the issue of the constitutionality of the federal death penalty. *Quinones*, 196 F. Supp. 2d at 420. The view espoused by the judge was:

> We now know, in a way almost unthinkable even a decade ago, that our system of criminal justice, for all its protections, is sufficiently fallible that innocent people are convicted of capital crimes with some frequency. Fortunately . . . scientific developments and other innovative measures . . . may enable us not only to prevent future mistakes but also to rectify past ones . . . but only if such persons are still alive to be released. If, instead, we sanction execution, with full recognition that the probable result will be the state-sponsored death of a meaningful number of innocent people, have we not thereby deprived these people of the process that is their due? Unless we accept . . . that considerations of deterrence and retribution can constitutionally justify the knowing execution of innocent persons, the answer must be that the federal death penalty is unconstitutional.

Id.

Judge Rakoff ruled that the federal death penalty was unconstitutional, noting, as he did so, the wrath he expected to follow. "[N]o judge has a monopoly on reason, and the Court fully expects its analysis to be critically scrutinized." *Quinones*, 205 F. Supp. 2d at 268. His prediction was not wrong. Weiser, *supra* note 56.

advocate the execution of one who has been denied a fundamentally fair sentencing proceeding . . . .[196]

196. Valdez v. State, 46 P.3d 703, 711 n.25 (Okla. Crim. App. 2002) (citations omitted). The dissent retorted: "how does one dissent to principles of fundamental fairness? . . . . What is 'fundamental fairness' to one judge may not be 'fundamental fairness' to another." *Id.* at 712 n.3.