SANCHEZ-LLAMAS, AMERICAN HUMAN RIGHTS EXCEPTIONALISM AND THE VCCR NORM PORTAL

by
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This Essay examines Sanchez-Llamas v. Oregon *within the line of cases challenging U.S. non-compliance with the notification requirements of the Vienna Convention on Consular Relations (VCCR). The VCCR litigations arose as a response to American death penalty exceptionalism. Viewed through the lens of transnational efforts to integrate international human rights norms into the United States,* Sanchez-Llamas *illuminates the ways in which American human rights exceptionalism—in its many forms—is being actively contested and how judges—implicitly and explicitly—respond to arguments for and against exceptionalism.*

I. INTRODUCTION

Any discussion of America's role in the world in the first decade of the 21st Century raises the specter of American exceptionalism—the idea first introduced by Alexis de Tocqueville in 1830 that the United States, in its form of government and its institutions of civil society, is unique and different from the rest of the world.[1] Tocqueville cited the role of the judiciary in resolving

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[1] Tocqueville is the first to refer to the United States as exceptional—"that is, qualitatively different from all other countries." SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 18 (1996).

political questions as evidence of American exceptionalism in the 19th Century, famously observing that there "is virtually no political question in the United States that does not sooner or later resolve itself into a judicial question."[2] In its current incarnation, American exceptionalism describes the ways in which the United States has set itself apart from the rules governing much of the international system. The wisdom of this current type of exceptionalism—going it alone, ignoring prior international commitments and working around multilateral institutions—has itself become a political question. The *Sanchez-Llamas*[3] case, in which the U.S. Supreme Court was asked to consider whether a U.S. treaty commitment created judicially enforceable individual rights and remedies, provides an opportunity to examine the ways in which this modern form of exceptionalism is contested.[4]

As exceptionalism has evolved to include purposive rejection of certain international solutions to transnational problems and U.S. withdrawal from many of the multilateral institutions and regimes the U.S. championed and helped support, the Tocquevillian observation of judicialization as an element of exceptionalism has been turned on its head. Rather than simply reflecting evidence of exceptionalism, the courts in the United States are increasingly confronted with this modern form of exceptionalism in cases where they are asked to give domestic judicial effect to international human rights standards.

Tocqueville's observation about judicialization of core political questions has been so frequently restated that it *feels* true, even as history has proved it to be a flawed claim.[5] To be sure, many important political questions in the United States have eventually transformed into judicial questions. Yet, many significant political questions have not resolved themselves as judicial questions.[6] Or, perhaps more accurately, many of the central political problems

[2] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 310 (Arthur Goldhammer trans., The Lib. of Am. 2004) (1830).

[3] Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006).

[4] The Court granted certiorari in *Sanchez-Llamas* to consider three questions: "(1) whether Article 36 of the Vienna Convention [on Consular Relations] grants rights that may be invoked by individuals in a judicial proceeding; (2) whether suppression of evidence is a proper remedy for a violation of Article 36; and (3) whether an Article 36 claim may be deemed forfeited under state procedural rules because a defendant failed to raise the claim at trial." *Id.* at 2677. The Court declined to answer the first question, finding it unnecessary to reach the question of the creation of individually enforceable rights under the treaty, resting its opinion on the remedial questions. In the case of *Sanchez-Llamas*, it denied the request to suppress his confession made without Article 36 notification, noting that the VCCR does not specify remedies for non-notification and that almost all signatory states of the VCCR do not recognize suppression as a remedy in domestic law. *Id*. at 2678. In the companion case of *Bustillo v. Johnson*, the Court upheld the application of a procedural bar to dismiss a state habeas petition. *Id*. at 2682–83.

[5] Mark A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited*, 21 CONST. COMMENT. 485, 492 (2004) ("Tocqueville's claim that political questions in the United States invariably become judicial questions is more often assumed than tested.") (citations omitted).

[6] As Graber notes, "[w]ith the exception of slavery, the prominent political questions that dominated national politics during the 1830s, 1840s, and 1850s did not become federal

have been "resolved" judicially only after important social and political shifts have taken place. Whether political issues today are more likely to be resolved as judicial questions depends, in part, on whether the political issue can first be resolved into a constitutional question.[7] And in the area of national security and foreign affairs, the judiciary has typically played a minor constitutional role, deferring, more often than not, to the political branches.[8] The degree to which the central political questions of American interdependency to the global system become judicialized thus rests, in large measure, on the constitutional questions that arise from that interdependency.[9] It is thus appropriate to examine, as many of the contributions to this symposium have done,[10] the ways in which the Court in *Sanchez-Llamas* identified and resolved—or failed to resolve—the question of judicial enforcement of individual rights arising from a treaty.

This Essay takes a different perspective, examining *Sanchez-Llamas's* place within the line of cases challenging U.S. non-compliance with the notification requirements of the Vienna Convention on Consular Relations (VCCR).[11] Viewed through the lens of transnational efforts to integrate

judicial questions." *Id*. at 486. *See also id.* at 505–524 (detailing the political questions of the 1830s through 1860s that did not resolve themselves into judicial questions).

[7] Graber has observed that the process through which political questions are turned into constitutional or legal questions has not altered very much between the time of Tocqueville's writings and today, "[p]olitical questions are resolved into constitutional questions only when a distinctive controversy exists over whether the Constitution permits, forbids, or requires a decision maker to select a particular policy or make some other political choice." *Id*. at 530.

[8] Graber notes that "[t]he Supreme Court did not resolve any major foreign policy question that arose during the three decades before the Civil War." *Id*. at 517. *See also* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L. J. 1255, 1305 (1988) (noting that "[w]hether on the merits or on justiciability grounds, the courts have held for the President in [foreign affairs] cases with astonishing regularity."); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 70 (1990). *But see* David Sloss, *Judicial Deference and Treaties*, 62 N.Y.U. ANN. SURV. AM. L. (forthcoming 2007), *available at* http://law.slu.edu/sloss/publications.htm (manuscript at 3) (noting that between 1789 to 1838, in cases raising treaty interpretation issues where the U.S. Government was a party, courts failed to defer to the executive branch on most treaty interpretation questions).

[9] The ways in which the resolution of constitutional questions is influenced by how other courts and political system has been a theme of a great deal of recent scholarship. *See, e.g.*, Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 488–90 (2005); Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV.. 639 (2005); Eugene Kontorovich, *Disrespecting the "Opinions of Mankind": International Law in Constitutional Interpretation*, 8 GREEN BAG 2D 261 (2005); William N. Eskridge, Jr., *United States:* Lawrence v. Texas *and the Imperative of Comparative Constitutionalism*, 2 INT'L J. CONST. L.555 (2004); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004); Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239 (2003).

[10] Paul B. Stephan, *Private Remedies for Treaty Violations after* Sanchez-Llamas, 11 LEWIS & CLARK L. REV. 65, 66 (2007); Julian G. Ku, Sanchez-Llamas v. Oregon: *Stepping Back from the New World Court Order*, 11 LEWIS & CLARK L. REV. 17, 18–19 (2007).

[11] Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596

international human rights norms into the United States, *Sanchez-Llamas* illuminates how American human rights exceptionalism—in its many forms—is being actively contested and how judges, implicitly and explicitly, respond to arguments for and against exceptionalism.

Sovereigntist observers of the Court initially hailed *Sanchez-Llamas* as a defeat for internationalism in American jurisprudence and thus a triumph for exceptionalism.[12] What could be a more significant rejection of international regulation of individual rights in the United States than an explicit rejection of the International Court of Justice's (ICJ) interpretation of judicial enforceability of an individual right arising from a treaty to which the U.S. is a party and with which the U.S. has expressly and consistently agreed to comply? Yet, such celebrations of exceptionalism on the part of the sovereigntists may be misplaced and may misunderstand the dimensions of American exceptionalism at issue in the VCCR cases.

The VCCR line of cases arose out of an opportunistic adoption of the VCCR as means of collateral attack on death sentences against foreign nationals. The cases to date illustrate that judicialization of the individual right created by the treaty is only one dimension of the means through which international human rights norms are integrated in the American legal system. Just as with other important political questions throughout American history, judges may play a less salient role in resolving the political question of American exceptionalism to the international human rights system than other actors both within and outside the United States. The VCCR line of cases further demonstrates how the debate over the proper role of international human rights practice and law in U.S. courts is only in part a dispute over constitutional doctrine; it is a dispute over the effect that international human rights norms have in the substantive outcomes in these cases.

At the extremes, the sovereigntist position brings constitutional doctrinal arguments to support the value of non-participation in international human rights and maintaining exclusively U.S. approaches to individual rights, including retention of the death penalty.[13] This approach can be characterized as strong exceptionalism. On the internationalist side, doctrinal arguments are

U.N.T.S. 261.

[12] *See* Julian Ku, Opinio Juris, U.S. Supreme Court to ICJ—You're Wrong, Wrong, Wrong! (June 28, 2006), http://www.opiniojuris.org/posts/1151524182.shtml.(noting that "there is very little support on this court for the classic internationalist view (reflected in the brief of leading international law scholars) that ICJ interpretations are binding on U.S. courts.") *See also* Paul Stephan, Opinio Juris, Professor Paul Stephan on Sanchez Llamas/Bustillo (June 29, 2006), http://www.opiniojuris.org/posts/1151608333.shtml (noting that the majority opinion "does not accord with the polyarchic model of the international order that some German theorists and their New World followers celebrate . . . ." Stephan also notes that "Breyer's opinion strikes me as a wonderful example of diplomacy but very poor law.").

[13] Stephan, *supra* note 10, at 88; Ku, *supra* note 10, at 19. *See* Brief for Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States as Amici Curiae in Support of Respondent, Medellin v. Dretke, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 497763. *See also* Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 4 (2006).

made in support of the application of a different or higher international standard of human rights protection, for example, abolition of the death penalty. The internationalist position represents strong anti-exceptionalism.[14] Between these two poles lies an emerging—and in my view appropriate—pragmatically engaged transnationalism. One that views incorporation of the international human rights standards—whether through political or judicial means—as valuable where the U.S. is radically out of step with the international norm, where the international standard tends to give broader protection to individuals than domestic standards, and where adoption of the norm tends to reflect and strengthen, rather than dilute, domestic democratic processes.[15] Justice Ruth Bader Ginsburg's concurrence in *Sanchez-Llamas*—letting stand two *non-capital* convictions of foreign nationals—represents a judicial form of this pragmatism as a response to aggressive exceptionalism.[16] As discussed below, because the Court in *Sanchez-Llamas* left to the states what approach to take in applying the procedural protections of the VCCR Article 36 notification requirement, this pragmatism is likely to emerge as a judicial, and in some states political, response to contestations of human rights exceptionalism.

II. AMERICAN EXCEPTIONALISM AND THE VCCR NORM PORTAL

Harold Koh has observed that not all American exceptionalism, or at least "not all the ways in which the United States exempts itself from global treaty obligations are equally problematic."[17] "Good" American exceptionalism results from American leadership during the past sixty years to promote democracy and human rights around the world.[18] "Bad" American exceptionalism, by contrast, occurs where the United States rejects full participation in the international human rights system by failing to ratify or only conditionally ratifying central human rights treaties.[19] Koh has described four types of American human rights exceptionalism: distinctive rights, different labels, "flying buttress" mentality, and double standards.[20] Distinctiveness refers to the way in which American rights culture—increased protection for speech and religious rights and against discrimination on the basis of race—arises from America's "peculiar social, political, and economic

[14] *See* Kontorovich, *supra* note 9, at 261; Eskridge, *supra* note 9, at 43–44.

[15] Justice Ginsburg's concurrence in *Sanchez-Llamas* reflects this pragmatic engagement. *See infra* text accompanying notes 80–92. Many of the opinions of the state and federal judges in the earlier VCCR cases also reflect this pragmatism. *See* Margaret E. McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755 (2006).

[16] *See* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2688–90 (2006) (Ginsburg, J., concurring); *see also infra* text accompanying notes 80–92.

[17] Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1484 (2003).

[18] *See id*. at 1487–89 (discussing the indispensability of American leadership to international efforts to promote human rights within rights-violating regimes).

[19] *Id*. at 1482–87.

[20] *Id*. at 1483.

history."[21] Exceptionalism on the basis of different labels results from the American use of unique vocabulary to describe substantially similar concepts.[22] The "flying buttress" mentality (originally described by Louis Henkin)[23] refers to the way in which the U.S. supports the cathedral of international human rights from the outside, rather than as a pillar from within the system.[24] Koh is troubled by the flying buttress notion of "compliance without ratification" under which the U.S. tries to have it both ways: enjoying the appearance of compliance while maintaining "the illusion of unfettered sovereignty."[25] Distinctiveness, different labels, and the flying buttress are more problematic for the U.S. than for the rest of the world because they result in reputational damage disproportional to the actual record of human rights protection within the U.S.[26]

The double standard type of American exceptionalism is where the U.S. "uses its exceptional power and wealth" to propose that "a different rule should apply to itself than applies to the rest of the world."[27] The retention of the death penalty—accompanied by persistent objection to international efforts toward its *de jure* abolition—is one of the examples in which the U.S. has engaged in "double standard" exceptionalism to the international human rights system. Indeed, American double standard exceptionalism on the death penalty prompted the spate of VCCR Article 36 litigation from which *Sanchez-Llamas* arose.

A. The Consular Function as Norm Mediator

The VCCR, on its own, does not appear to raise the specter of American exceptionalism. The United States is a party to the VCCR, and, until March 2006, was a party to the Optional Protocol under which the U.S. agreed to permit the ICJ to resolve all disputes arising under the treaty.[28] The U.S. continued—even in the briefs it submitted in S*anchez-Llamas*—to emphasize the centrality of the VCCR to protecting the interests of Americans around the

[21] *Id*. Koh cites non-discrimination on the basis of race and the First Amendment protections for speech and religion among the "distinctive" rights that receive more judicial protection in the U.S. than in Europe or Asia.

[22] *Id.* at 1483–84. For example, "torture and cruel, inhuman or degrading treatment" are categorized in the U.S. as "cruel and unusual punishment," "police brutality," or "section 1983 actions."

[23] Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 421 (1979).

[24] *Id.*; Koh, *supra* note 17, at 1484–85.

[25] *Id*. at 1485.

[26] *Id*. at 1485. Koh acknowledges that from the perspective of domestic politics, human rights activists are acting rationally: the costs to bring about ratification of human rights treaties may simply be too high.

[27] *Id*. at 1485–86 (noting U.S. decision not to join the International Criminal Court and the claim of exemption in the post-9/11 environment from application of the Geneva Conventions also represent "double standard" exceptionalism).

[28] *See* Vienna Convention on Consular Relations, Optional Protocol Concerning the Compulsory Settlement of Disputes art. 1, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 488.

world.[29] Indeed, because the VCCR is crucial to facilitating U.S. economic and political activities around the world, the U.S. has no intention of remaining outside its protections and obligations.

Moreover, the core provisions of the treaty—protecting the privileges and immunities of consular officials—reflect hundreds of years of state practice. Bilateral and multilateral consular treaties—in particular the provision of immunity for consular officers of the sending state—represent paradigmatic interstate agreements, amenable to effective political enforcement because of the strong reciprocal interest protected.[30] The notification and assistance provisions of the treaty were not intended, initially, to "legalize" or "judicialize" the rights of individual nationals of a sending state within a foreign legal system. Rather, the notification and assistance provision in the treaty formalized the function that consular officers had traditionally played: mediation between the foreign legal system (that of the receiving state) and the home legal system (that of the sending state).[31]

Historically, the notification and assistance provision reflected an extension of traditional notions of Westphalian[32] sovereignty to co-nationals present in a foreign state. Consular contact with a detainee bolstered sovereignty because it triggered the ability of the foreign state to intervene politically in the fate of the individual detainee. States expected to be able to negotiate and cajole foreign states to release their nationals or to apply diplomatic pressure to receive assurance of fair treatment. Diplomatic pressure was brought to bear where the detainee faced the death penalty or enslavement, with the hope of avoiding these fates. In the era before the establishment and growth of the international human rights system, the consular function worked to facilitate the application of higher standards of treatment than might otherwise be typical in the receiving state.

As the modern era brought improved global transportation and increased movement of individuals, formalization of the consular function became necessary. In turn, increased legalization and formalization of the international protection of individual rights—which began with the League of Nations system and accelerated with the creation of the United Nations (UN) and the adoption of the Universal Declaration of Human Rights—transformed the notification and assistance function. Consular notification was no longer only a means through which to assert sovereignty and invoke political protection, but

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[29] *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondents, Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006) (No. 04-10566), 2006 WL 271823 [hereinafter Brief for the United States, Sanchez-Llamas v. Oregon]; Brief for the United States as Amicus Curiae Supporting Respondent, Medellin v. Dretke, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 504490.

[30] For a discussion of how reciprocity of interest leads to compliance with international law, see Andrew T. Guzman, *The Promise of International Law*, 92 VA. L. REV. 533, 553–55 (2006) (describing the role reciprocity plays in determining whether states uphold their treaty obligations).

[31] The next three paragraphs draw from McGuinness, *supra* note 15.

[32] The 1648 Treaty of Westphalia lead to the modern conception of the territorial state. *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 19 (2d ed. 2004).

was a channel through which to enforce compliance with emerging international standards of criminal due process.

This legalization and formalization of the VCCR notification right, however, did not result in immediate *judicialization* of the right. Despite the admitted widespread non-compliance of the U.S. with the notification and assistance provisions, there were no cases in the first two decades after ratification of the treaty that sought individual remedies for non-notification. It was not until American exceptionalism to international regulation of the death penalty reached a tipping point that individual foreign nationals detained in the U.S. began to seek judicial remedies as a complement to political remedies for non-notification.

B. Death Penalty Exceptionalism and the VCCR Norm Portal

The way in which American exceptionalism to the death penalty prompted adoption of the VCCR as a means of importing international human rights standards into the U.S. illustrates the effect of norm portals. The United States led the creation of the post-World War II international human rights system, which incorporated progressive limitations on the application of capital punishment and a norm of regulation aimed at eventual abolition.[33] Application of the death penalty in the U.S. fell during the immediate postwar period.[34] Between 1969 and 1976 the U.S. experienced a Court-imposed moratorium on the death penalty.[35]

After the death penalty was re-constitutionalized by the Court in the late 1970s, the number of death sentences and executions began to climb.[36] By the early 1990s, U.S. practice and international practice—which was shifting from toleration of the death penalty toward *de jure* and *de facto* abolition—began to diverge. While the world moved rapidly toward a norm of abolition, the US steadfastly clung to the death penalty. Internationally, American exceptionalism to abolition was expressed through persistent objection to attempts to codify abolition.[37] Domestically, the federal government sought to limit access to

[33] *See* William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797 (1998).

[34] The number of executions in the U.S. dropped from 1,289 in the 1940s to 715 in the 1950s. *See* Death Penalty Information Center, Part I: History of the Death Penalty, http://www.deathpenaltyinfo.org/article.php?scid=15&did=410#IntroductionoftheDeathPenalty.

[35] *See* McGuinness, *supra* note 15, at 783.

[36] Between 1973 and 2004, 3,337 people were added to death rows in the United States, which averages around 108 persons added each year. *See* Eric Tennen, *The Supreme Court's Influence on the Death Penalty in America: A Hollow Hope?*, 14 B.U. PUB. INT. L.J. 251, 256 (2005); *see also* Death Penalty Information Center, Executions in the U.S. 1608–1987: The Espy File, http://www.deathpenaltyinfo.org/article.php?scid=8&did=269.

[37] The U.S. accomplished this through the attachment of reservations, understandings, and declarations to the ICCPR and by opting not to become a party to Optional Protocol 2 of ICCPR, which outlaws the death penalty. Second Optional Protocol to the International Covenant on Civil and Political Rights art. 1, Dec. 15, 1989, 1642 U.N.T.S. 414.

collateral constitutional attacks on the death penalty through the adoption of the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA).[38]

The pendulum began to swing back in the late 1990s, after the international abolitionist movement reached a tipping point.[39] In a series of cases, the Court increased regulation of how and when the death penalty could be carried out: *Atkins v. Virginia*[40] abolished the death penalty for the mentally retarded; *Roper v. Simmons*[41] abolished the juvenile death penalty (only 17 years after *Stanford v. Kentucky*[42] set the age at 16). It was in this context of domestic rights advocates chipping away at the application of the death penalty that the VCCR was seized upon by capital defense lawyers—quite serendipitously, initially—as a means through which foreign nationals could avoid capital sentences. This exploitation of the VCCR as a means to attack the death penalty cascaded through the defense bar, whose efforts were bolstered by foreign states and transnational NGOs who together formed a transnational advocacy network to shift the effect of the death penalty on aliens.

I have noted elsewhere that, through this transnational advocacy process, the VCCR was transformed into a norm portal—a "horizontal gateway that allows, through a formal procedural mechanism or substantive right, the importation of external norms into a legal system."[43] As a norm portal, the VCCR:

> [R]epresents an alternative pathway for international human rights norms to enter a legal system. Where those norms may not otherwise be enforceable through traditional vertical adjudicatory processes—either because the importing state has not formally adopted the human rights obligation, or because vertical judicial structures have failed to enforce it—the norm portal permits those norms to seep into the legal system, forcing mediation between the external norm and the domestic standard.[44]

The result of this forced mediation between the external abolitionist norm and the domestic death penalty norm in the VCCR death penalty cases was a softening of American exceptionalism to the international death penalty standard:

> The VCCR norm portal enabled a transnational advocacy support network comprised of individual advocates, NGOs, international and regional organizations, and foreign state governments to support the

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[38] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). (codified as amended in scattered sections of 42, 28, 22, 18, & 8 U.S.C.) (barring federal courts from reconsidering legal and factual issues already ruled upon by the state courts, creating a six month statute of limitations to file a habeas claim in death penalty cases, and requiring appellate court approval for repetitious habeas petitions).

[39] *See* McGuinness, *supra* note 15, at 785–86 (discussing worldwide trend toward de jure and de facto abolition of the death penalty beginning in the early 1990s).

[40] 536 U.S. 304, 321 (2002).

[41] 543 U.S. 551, 574 (2005).

[42] 492 U.S. 361 (1989).

[43] McGuinness, *supra* note 15, at 760 (emphasis removed).

[44] *Id.*

> defense of capital defendants and engage in legal and political advocacy at the federal, state, and local level. The network was successful in winning clemency in one case, additional review in dozens of cases, passing two state statutes codifying procedural rights for foreign nationals, and setting general conditions through which the U.S. complies with its consular notification obligations. Compliance with the notification obligation has in turn permitted foreign governments to advocate directly on behalf of their nationals and therefore avoid death sentences.
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> This shift has taken place notwithstanding the persistent objection of the U.S. to any international efforts to constrain its use of capital punishment, and without any change of official federal policy about the death penalty or change in the U.S. position on the VCCR. If the purpose of persistent objection to the abolitionist position in international human rights regimes was to preserve complete sovereign prerogative over the manner and timing of expansion of criminal procedural rights in this country, it appears to have failed, at least in regard to foreign national defendants. And, because the VCCR cases came at a time when the death penalty was already under concerted attack by advocates within the U.S., the exploitation of the VCCR norm portal has contributed to the momentum toward convergence with the international abolitionist norm.[45]

Though abolitionists see much more work to be done, the momentum continues because they have laid the groundwork for norm internalization by the actors on the ground in the criminal justice system—police, prosecutors, state courts, and defense counsel.[46] The pattern of the VCCR death penalty cases, taken together with the results in other VCCR non-death penalty cases in state and federal courts (including *Sanchez-Llamas*), demonstrates that the norm portal effect is most salient when the external norm provides greater individual protection—that is, has the effect of being rights-expanding—than the internal norm. In death penalty cases, as the outside norm of regulation shifted toward one of abolition, notification and assistance by consular officers, this effectively made the difference between adherence to the external norm (no death penalty) and rejection of the norm (permitting death sentences).

C. The Diminished Role of Formal Vertical Adjudication in Contestations of Death Penalty Exceptionalism

Prevailing theories that seek to explain and predict how international human rights standards are integrated into domestic law and practice suggest four types of norm integration: Formal Vertical (supranational and national adjudication); Informal Vertical (norm-setting charters and institutions); Formal Horizontal (norm portals, procedural gateways); and Informal

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[45] *Id.* at 760–61.

[46] *See* Janet Koven Levit, Sanchez-Llamas v. Oregon: *The Glass is Half-Full*, 11 LEWIS & CLARK L. REV. 29, 30 (2007).

Horizontal (political and social interactions, acculturation). [47] Each of the four types of norm integration was at play in the transnational efforts to chip away at the death penalty through enforcement of the VCCR, including bringing cases to supranational courts. The 1999 advisory opinion issued by the Inter-American Court of Human Rights (IACtHR) against the United States at the request of Mexico[48] and the cases brought against the United States by Paraguay, Germany and Mexico before the ICJ—*Breard* (1998),[49] *LaGrand*[50] (2000) and *Avena* (2004),[51] respectively—contributed to shifting practice on the ground in the United States. All of these cases were brought on behalf of foreign nationals facing the death penalty in the United States, and were thus about the death penalty.[52] They succeeded in contributing to a shift in death penalty practice even without constitutionalizing the right to consular notification and assistance or succeeding in enforcement by the U.S. Supreme Court of ICJ interim measures and rulings. Instead, these formal vertical processes assisted in integration by serving to announce the norms to legal and, most important, political actors in the United States.

The IACtHR decision elaborated rights and obligations under the VCCR that had not, up to that time, been the subject of judicial interpretation, concluding that consular notification and assistance under Article 36 of the VCCR served to complement the procedural due process protections of the International Covenant on Civil and Political Rights.[53] The cumulative effect of these decisions was the announcement of an enhanced international standard of treatment for foreign nationals facing the death penalty in the U.S.[54] Criminal defense lawyers and abolitionist advocates in the U.S. invoked the new norm as

[47] *See* McGuinness, *supra* note 15, at 762–73 (describing the ways in which the predictive and explanatory accounts represented by liberal theory, constructivism and socio-legal theory—including transnational legal process, and governmental network theory—can be mapped against these four types of norm integration).

[48] The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16 (Oct. 1, 1999) [hereinafter Right to Information on Consular Assistance]. For a discussion of the case, see McGuinness, *supra* note 15, at 814–17.

[49] Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 258 (Apr. 9).

[50] LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 514–16 (June 27).

[51] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 17 (Mar. 31).

[52] William Schabas noted about *LaGrand*:

> The judges—and the German government—may have sought to avoid the issue of capital punishment. And yet like Basil Fawlty who, in a notorious comic sketch, is warned by his shrewish wife not to "talk about the war," the issue of the death penalty in *LaGrand* is simply unavoidable. Even if the Court did so inadvertently, the decision has effectively advanced the protection of individuals facing capital punishment.

See William A. Schabas, *The ICJ Ruling Against the United States: Is It Really About the Death Penalty?*, 27 YALE J. INT'L L. 445, 452 (2002).

[53] Right to Information on Consular Assistance, *supra* note 48.

[54] *See* McGuinness, *supra* note 15, at 814–24.

the basis for challenging the standards for treatment of foreign nationals, in court, in discussions with prosecutors, and in political advocacy.[55]

To be sure, the Supreme Court's rejection of the ICJ rulings in *Breard* [56] and *LaGrand* [57] represented a strong judicial assertion of exceptionalism. However, that assertion of exceptionalism merely slowed, but did not stop, the norm shift on the death penalty.[58] That is because supranational adjudication and domestic judicial incorporation of supranational courts represent only one method of integration. This norm internalization on the death penalty—and the effect it has had generally on increasing compliance with consular notification and assistance—is taking place and will continue to take place regardless of the outcome in *Sanchez-Llamas*. As I argue below, the Court's failure to constitutionalize the notification and assistance right in *Sanchez-Llamas* provides neither additional support for nor an additional obstacle to continued norm internalization. Indeed, alternative methods of integration may take on a more important role where the Court's action enforces exceptionalism.

III. *SANCHEZ-LLAMAS* AND THE STRANDS OF EXCEPTIONALISM

Neither of the petitioners in *Sanchez-Llamas* faced the death penalty. Nor had they been the subject of any of the ICJ petitions in *Breard*, *LaGrand* and *Avena*. Instead, their cases arose out of an environment where defense lawyers—encouraged by some successes in the death penalty VCCR cases, but unsatisfied with the rejection of the ICJ opinions in *Breard* and *LaGrand*—seized on the VCCR as a means to provide an additional avenue of attack on convictions of foreign nationals. In non-capital cases, there is not the same coalescing force behind an "external norm" as there is in regulation of the death penalty.[59] Rather, the VCCR was adopted here by the defendants to appeal to enforcement of an obligation that the United States readily accepts (consular notification and assistance) for the purposes of accessing and enforcing existing and available domestic remedies (suppression of evidence, waiver of procedural bar rule).

Sanchez-Llamas can thus be seen as a detour from the VCCR norm portal function in the death penalty cases. Yet, in addressing the broad constitutional

[55] The most dramatic example was the gubernatorial clemency of Oswaldo Torres in Oklahoma following the *Avena* decision. For a discussion of that case and of the role of state courts more generally, see Janet Koven Levit, *A Tale of International Law in the Heartland:* Torres *and the Role of State Courts in the Transnational Legal Conversation*, 12 TULSA J. COMP. & INT'L L. 163 (2004).

[56] Breard v. Greene, 523 U.S. 371, 375 (1998).

[57] Fed. Republic of Germany v. United States, 526 U.S. 111 (1999).

[58] Domestic abolitionists in the U.S. played an important role in the transnational advocacy support networks. *See* McGuinness, *supra* note 15, at 808–12.

[59] This may be changing as criminal defense counsel and international human rights advocates begin a concerted effort to address the trend in the U.S. to hand down life sentences without parole to juvenile offenders, a practice which is increasingly viewed as a violation of international standards of due process. *See, e.g.*, HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES (2005), *available at* http://hrw.org/reports/2005/us1005/.

question of what effect to give the ICJ's interpretation of remedies for non-notification that were outline by the ICJ in *Avena*, the Court was presented with an opportunity to address—at least implicitly—its own attitude toward both "double standard" and "different labels" exceptionalism to supranational adjudication of human rights.[60]

A. "Respectful" Double Standards Exceptionalism

Chief Justice Roberts' opinion is not the extreme rebuke of internationalism that observers on both sides—sovereigntists who would like to see more judicial exceptionalism to international court opinions and internationalists who would prefer the ICJ's interpretation of the VCCR to be definitive—have posited.[61] Moreover, to the extent that the opinion can be viewed as a rebuke of the ICJ's opinions in *LaGrand* and *Avena*, it is less of a setback to integration of international human rights standards in the United States than some have described.[62] At most, Roberts' majority opinion reflects a kind of modified judicial exceptionalism that is consistent with the Court's traditional deference to the Executive Branch on questions of treaty interpretation and rejection of outside judicial interpretations of core constitutional rights.

Because the Court found it unnecessary to answer the question whether the notification and assistance provisions of Article 36 create judicially enforceable individual rights, as the ICJ had ruled in *Avena* and *LaGrand*, the Court also left unanswered the more general question whether self-executing treaties can create rights that are enforceable by individuals in domestic proceedings.[63] That

[60] The Court had earlier avoided these questions in *Medellin v. Dretke* when it dismissed the case on the grounds certiorari was improvidently granted, after the President announced in a memorandum that he would ensure state compliance with the Avena ruling. Medellin v. Dretke, 544 U.S. 660, 666–67 (2005). The Criminal Court of Texas found that the President acted unconstitutionally in asserted his power to issue such a statement to the State of Texas. *Ex parte Medellin*, No. AP-75207, 2006 WL 3302639, at *10 (Tex. Crim. App. 2006).

[61] Stephan, *supra* note 10, at 66. For a full discussion, *see* Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2007 SUP. CT. REV. (forthcoming 2007).

[62] Jennifer Koons, Reaction: Sanchez-Llamas v. Oregon/Bustillo v. Johnson (July 6, 2006), http://docket.medill.northwestern.edu/archives/003751.php; MICHAEL JOHN GARCIA & ANTHONY VIEUX, CONG. RESEARCH SERV., *SANCHEZ-LLAMAS V. OREGON*: RECENT DEVELOPMENTS CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS (2006), http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-9514. *See also* Levit, *supra* note 46, at 30.

[63] The U.S. has maintained the self-executing nature of the VCCR since ratification. The gravamen of the U.S. position in the VCCR cases has consistently been that, notwithstanding that the VCCR is self-executing, it was not intended to create individually enforceable rights, only rights in the sending state. Brief for the United States, Sanchez-Llamas v. Oregon, *supra* note 29. The *Sanchez-Llamas* dissent endorsed the explicit view that the VCCR does create such rights and that generally, self-executing treaties that are silent on the question can be construed as creating judicially enforceable individual rights. Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2696 (2006).

the Court stopped short of ruling on this question can be seen as a defeat for the government's position throughout the VCCR litigations—that treaties are presumptively not enforceable by individuals[64]—just as plausibly as it can be seen to defeat the *amici* who supported an explicit ruling that treaties are enforceable by individuals.[65] It simply left that question to be answered another day.

In the portion of the opinion that can accurately be read as a rejection of an exclusive role for the ICJ in interpretation of U.S. treaty obligations, the Court noted that, while the ICJ opinions in *LaGrand* and *Avena* were to be accorded "respectful consideration," they would not be directly binding on the Court.[66] The difference between Roberts' majority opinion and Breyer's dissent was the content of "respectful consideration." Petitioner Bustillo had argued that in both *LaGrand* and *Avena* the ICJ held that the United States must "give effect" to the individual protections accorded by Article 36 by providing some sort of judicial remedy—notwithstanding the application of the procedural default rule. [67]

The rejection of the ICJ was more explicit in the case of the procedural default question. There, the ICJ had specifically held in *LaGrand* and *Avena* that procedural default could not be used to bar an effective remedy.[68] The ICJ did not proscribe a precise remedy, but made clear that procedural default could not be used to preclude a claim where the default resulted from "the failure of the American authorities to comply with their obligation under Article 36." Thus, the disagreement was how to give effect to a remedy for non-notification while still, in accordance with the general provisions of the VCCR, carrying out its obligations in accordance with domestic procedural rules.[69]

In answering that question, the Court discussed the unique nature of the consular notification provision which makes defining the content of the remedy different from other treaty obligations. First, consular notification is relatively meaningless without actual consular representation by the sending state and an accompanying commitment of consular assistance to the affected foreign national.[70] Second, the nature of post-conviction remedies that remain available following *Sanchez-Llamas* means that individuals have avenues to vindicate their claims under the VCCR.[71] In particular, the incorporation of failure to

[64] *See* Brief for the United States, Sanchez-Llamas v. Oregon, *supra* note 29.

[65] Brief for Professors of International Law et al., *supra* note 13.

[66] *Sanchez-Llamas*, 126 S. Ct. at 2683.

[67] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 49 (Mar. 31); LaGrand Case, (F.R.G. v. U.S.), 2001 I.C.J. 466, 497 (June 27).

[68] *See LaGrand*, 2001 I.C.J. at 496–97; *Avena*, 2004 I.C.J. at 49.

[69] Article 36(2) states that the rights "shall be exercised in conformity with the laws and regulations of the receiving state." Vienna Convention on Consular Relations, *supra* note 11, art. 36(2).

[70] *Sanchez-Llamas*, 126 S. Ct. at 2681.

[71] *Id*. at 2681–82.

raise non-notification into an ineffective assistance of counsel claim is not closed off by *Sanchez-Llamas* and is likely to gain traction.[72]

Importantly, Roberts' opinion implicitly views the external norm to be mediated by consular notification as no more expansive than that which already exists in the United States. As the Court noted, "Article 36 'adds little' to the Due Process Clause guarantees already afforded foreign nationals arrested in the United States."[73] The Court went so far as to say that the protections afforded under the U.S. Constitution "safeguard the same interests Sanchez-Llamas claims are advanced by Article 36."[74] The opinion, therefore, appears to adopt a "different labels" exceptionalism on the question of due process protections for foreign nationals. To the extent that the opinion can be read to create friction with the international human rights system it is not by rejecting the standard—*i.e.*, giving due consideration to the effect of notification on the ability of an individual detainee to defend himself in a foreign criminal justice system—but by steadfastly clinging to the American constitutional requirements that already give effect to that standard. The same argument, however, would be difficult to make in capital cases. Capital defendants have been able to demonstrate that consular notification and, perhaps more important, assistance, make the difference between a death sentence or no death sentence.[75]

The opinion may simply reflect judicial minimalism.[76] But the potential continued use of the VCCR as a norm portal was very much left open by the majority. Following *Sanchez-Llamas*, the available remedies arising from the non-notification claims will be largely decided by the states (which in turn will form the basis for federal habeas claims) and may include ineffective assistance of counsel claims, or civil remedies.[77] While it may only appear to be a crack in the door, it is an important one. As Carlos Vaszquez has noted,

> [T]he Court recognized that state courts are required to provide remedies that are required by treaties "either [expressly] or implicitly." The apparent recognition that treaty remedies can be "implicit" in a treaty

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[72] Carlos Vaszquez has suggested that

> [c]ounsel for foreign nationals should thus routinely inquire whether the notification required by the VCCR was given, and, if it was not, should consult with their client about whether to raise a VCCR claim at or before trial. If they decide not to, they will have no basis for escaping state procedural default rules. If counsel does not raise the issue with his client and prejudice results, then the client will have a strong basis for a Sixth Amendment claim and should be able to obtain relief, assuming the courts hold that the VCCR confers judicially enforceable rights.

Carlos Vaszquez, Opinio Juris, Vaszquez on Sanchez-Llamas and Bustillo (June 28, 2006), http://www.opiniojuris.org/posts/1151531781.shtml.

[73] *Sanchez-Llamas*, 126 S. Ct. at 2682.

[74] *Id.*

[75] *See* McGuinness, *supra* note 15, at 818–19.

[76] *See* Leading Cases, *Enforceability of Treaties in Domestic Courts—Vienna Convention on Consular Relations*, 120 HARV. L. REV. 303, 308–09 (2006) (arguing that Sanchez-Llamas falls within Cass Sunstein's definition of "judicial minimalism" of deciding cases rather than setting down broad rules).

[77] Levit, *supra* note 46, at 32.

> appears to be a rejection of the argument—based on recent implied right of action cases—that only express remedies are available for treaty violations.[78]

State court judges have already demonstrated that they are receptive to the value of anti-exceptionalism on the question of remedies for treaty breaches, particularly where exceptionalism appears harmful to the interests of the U.S. or U.S. citizens because of the presence of reciprocal treaty obligation.[79]

B. "Different Labels" and Pragmatic Transnational Engagement

Justice Ginsburg's concurrence reflects modest transnational engagement, which implicitly accepts the VCCR as a one-way norm mediator. First, she joins with Justice Breyer's dissent in finding that "Article 36 of the Vienna Convention grants rights that may be invoked by an individual in a judicial proceeding."[80] She concurs, however, with the majority on the question of available remedies because, on the facts of the two cases, consular notification and assistance would not have resulted in any expansion of the protections available to the defendants.[81]

On the question whether suppression of statements made to police prior to consular notification was appropriate in the *Sanchez-Llamas* case, Ginsburg emphasized the fact that Sanchez-Llamas received full *Miranda* warnings in both English and Spanish, and that he indicated to police he fully understood those warnings.[82] He "scarcely resembles the uncomprehending detainee imagined by Justice Breyer [in his dissent]" and "would have little need to invoke the Vienna Convention, for *Miranda* warnings a defendant is unable to comprehend give the police no green light for interrogation."[83] She nonetheless agreed with the Court that an Article 36 claim might be brought "as part of a broader challenge to the voluntariness of [a detainee's] statements to police."[84] And in recognizing such claims, U.S. courts could, consistent with the ICJ's opinion in *Avena*, give "full effect" to "Article 36 in a manner consistent with U.S. rules and regulations."[85]

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[78] Vaszquez, *supra* note 72 (citing *Sanchez-Llamas*, 126 S.Ct. at 2680).

[79] The strength of the pragmatic reciprocity argument is evident in some state court cases applying the VCCR. *See, e.g.*, Alexander v. State, 827 N.E.2d 552, 557–58 (Ind. Ct. App. 2005) (Mathias, J., concurring) (noting that an American citizen's belief that he/she will be treated fairly if he/she becomes involved with the criminal justice system of another country is "unwarranted if we as a nation do not set an example in our treatment of foreign nationals under similar circumstances in United States courts.").

[80] *Sanchez-Llamas*, 126 S. Ct. at 2688 (Ginsburg, J., concurring).

[81] In so doing, Ginsburg's concurrence rebukes Breyer's dissent for "veering away from the two cases here for review, imagining other situations unlike those at hand." *Id.*

[82] *Id.*

[83] *Id.* (citations omitted).

[84] *Id.* at 2689 (citations omitted).

[85] *Id.* Ginsburg further agrees with the majority's "friction-reducing" rationale in support of the Court's refraining from holding the states to a higher procedural default standards than the federal courts for VCCR claims. *See id.* ("In my view, it would be unseemly, to say the least, for this Court to command state courts to relax their identical, or

On the question of procedural default raised by Bustillo, Ginsburg similarly relied on the actual prejudicial effect of the failure of timely Article 36 notification and assistance in the case. Again, she attempted to give effect to the individualized right created under Article 36 by applying the procedural remedy available. She concludes that "it would be extraordinary to hold that defendants, unaware of their *Miranda* rights because the police failed to convey the required warnings, would be subject to a State's procedural default rules, but defendants not told of Article 36 rights would face no such hindrance."[86] Moreover, Bustillo conceded that his "attorney at trial was aware of his client's rights under the Vienna Convention" but nonetheless failed to raise the claim.[87] This fact distinguished Bustillo's case from the ICJ's concern that procedural default rules not be used to "bar assertion of a Convention violation claim 'where it has been the failure of the United States [or of a State] itself to inform that may have precluded [the raising of the claim at trial].'"[88]

Ginsburg concluded that "if there are some times when a Convention violation, standing alone, might warrant suppression, or the displacement of a State's ordinarily applicable procedural default rules, neither Sanchez-Llamas' case nor Bustillo's belongs in that category."[89] Implicit in that conclusion is the factual finding that consular assistance would not have materially altered the result *in these cases*. This stands in sharp contrast to the death penalty cases where notification and assistance has made the difference between life and death for foreign national defendants.[90]

By recognizing that the treaty creates a judicially cognizable individual right, Ginsburg cements her status—along with Breyer—as one of the internationalists of the Court. Implicit in Ginsburg's concurrence, however, is the idea that judicial importation of outside norms is appropriate or necessary only where they are rights-expanding for criminal defendants.[91] One could view the Ginsburg concurrence then as merely a "different labels" form of judicial exceptionalism. But there is something more inclusive and pragmatic in her internationalism. She is open to engaging norms and standards outside the United States, and to drawing from them where they tend to expand notions of due process. Where, however, the outside norm adds no additional protection

even less stringent procedural default rules, while federal courts operate without constraint in this regard.").

[86] *Id.*

[87] *Id.*

[88] *Id.* at 2700 (citing Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31)).

[89] *Id.* at 2691.

[90] *See* McGuinness, *supra* note 15, at 818.

[91] Consistent with that position, Ginsburg was in the majority in *Roper v. Simmons*, 543 U.S. 551 (2005) (outlawing the juvenile death penalty and discussing, in dicta, international and foreign abolition of the juvenile death penalty). Also consistent with that position, Ginsburg has embraced discussion of external norms in *Lawrence v. Texas*, 539 U.S. 558 (2003) (looking to foreign legal trends in finding Texas sodomy statute unconstitutional) and *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (discussing international human rights law in support of affirmative action).

beyond what is already constitutionally provided to a criminal defendant, and where importation may create friction between the state and federal courts, she is content to retain the "different label" on those rights. In this case, she underscored that, although she would have held the treaty to create an individually cognizable right, no other treaty party nor any jurisdiction had found it necessary to provide the remedy defendants sought.[92] This is neither internationalism for the sake of internationalism nor exceptionalism for the sake of exceptionalism.

As federal states in the United States continue to expand the ways in which they carry out foreign policies, we can expect them to increasingly take the lead in internalizing external human rights norms.[93] That is not to suggest that it will be a smooth, linear progression from American political and judicial exceptionalism to adoption of international standards. The persistence of the death penalty and the current U.S. administration's attitude toward the Geneva Conventions and customary international law governing detainee treatment demonstrate that significant backsliding from higher international standards can occur. Nonetheless, because the United States gains more than it loses from participation in the international human rights system, and because disengagement from the rest of the world is not a viable option, political and even judicial convergence toward the international standard is likely to occur.[94] The recent softening of the U.S. toward the International Criminal Court may be some evidence of a shift away from exceptionalism, or at least acquiescence in the face of international developments. As this convergence toward international standards proceeds, we can expect the Court to become increasingly involved in cases that contest American human rights exceptionalism. But, as the VCCR cases have shown, the Court will not always be the last word on exceptionalism.

[92] *Sanchez-Llamas*, 126 S. Ct. at 2689.

[93] *See* Levit, *supra* note 46, at 32. *See also* Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L. J. 2380, 2414 (2006).

[94] For a historical discussion of the ways in which federalism has permitted the integration of international human rights standards into the U.S. legal system, see Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1598–1606 (2006).