

CAN CONGRESSIONAL FOREIGN AFFAIRS POWER JUSTIFY A JUVENILE DEATH PENALTY PROHIBITION IN THE UNITED STATES?

*Serri Miller**

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I. INTRODUCTION

In the United States federalist model, constituent states haven't much opportunity to irritate foreign nations. They cannot declare war, nor make treaties, nor assist or prevent immigration, nor offer or deny amnesty, nor pass legislation that unduly burdens international trade. In short, most state activity that could touch on foreign relations is insulated from international criticism by the Constitutional provisions committing such things to the federal government.

One thing states may do, however, is execute criminal offenders who are under the age of eighteen. This practice puts the states of the United States into a very small minority on a global scale, and it has drawn the ire of the international community.

While no pending congressional legislation compels U.S. constituent states to abolish their death penalties, at least one proposal provides for the federal government to "urge" states to do so. In 2001, Wisconsin Democrat Senator Russell Feingold introduced two bills in the United States Senate.¹ The first (S.191) sought to abolish the Federal death penalty² and the second (S.233) to impose "a moratorium on executions by the Federal Government and urge the States to do the same, while a National Commission on the **Death Penalty** reviews the fairness of the imposition of the death penalty."³ This National Death Penalty Moratorium Act (NDPMA) requested the appointment of a federal Commission to study the federal death penalty policy.⁴ On June 13, 2001, it was referred to the Judiciary Committee's Subcommittee on Constitution, Federalism, and Property Rights for hearings.⁵

In light of the September 11th, 2001 attacks on the United States (with foreign relations issues much on Congress's mind), one might posit that Congress could pass an Act *forbidding* states to carry out the death penalty for fear of the backlash this United States policy invites from the international community.

When Congress is silent, the United States Supreme Court crafts federal common law to either approve a state practice by finding it constitutional— as

1. This is not the first time Congress has ruminated upon Senator Feingold's proposals for a ban on the death penalty. See, for example, the Federal Death Penalty Abolition Act of 1999, available at <http://feingold.senate.gov/issuearea/abolitionbill.html> (last visited Oct. 12, 2002) (introduced in the first session of the 106th Congress as S. 1917) and the National Death Penalty Moratorium Act of 2000, which was referred to the Senate Judiciary Committee in April 2000. The 2000 bill's status is available on the Library of Congress' *Bill Summary and Status for the 106th Congress*, linked at <http://thomas.loc.gov/> (last visited Oct. 12, 2002).

2. 147 CONG. REC. S581 (daily ed. Jan. 25, 2001) (bill number S.191).

3. 147 CONG. REC. S923 (daily ed. Jan. 31, 2001) (bill number S.233).

4. 147 CONG. REC. S923 (daily ed. Jan. 31, 2001) (bill number S.233).

5. Library of Congress, *Bill Summary & Status for the 106th Congress*, at <http://thomas.loc.gov/bss/d106query.html> (last visited Oct. 12, 2002) (retrieve updates by bill number).

it has done to date in the juvenile death penalty⁶— or sanction a state practice by finding it unconstitutional, as it did in *Brown v. Board of Education*.⁷ Although the Supreme Court has decided a few such cases during and since the Cold War,⁸ the Court usually abstains from meddling in foreign affairs by way of federal common law, preferring to leave such matters to Congress.⁹

When Congress is vague, the Supreme Court can interpret federal statutes to incorporate international law standards into a federal common law that overrides states' domestic policies.¹⁰ In so doing, the Court tries to avoid policy conflicts with other branches' foreign affairs activities: "[o]ne reason so few questions of foreign relations federalism get answered is because the Court has chastened itself to avoid constitutional grounds for decision, including by construing statutes in order to avoid them."¹¹

But when Congress clearly speaks (in our hypothetical, to say "you must strike the juvenile death penalty from your state law"), a statutory pre-emption inquiry attaches: "The Constitution enables the Federal Government to preempt state regulation [that is] contrary to federal interests."¹² A valid congressional Act trumps state law every time, so a state that wants to retain its juvenile death penalty laws must attack the Act on grounds that Congress did not have power to pass such an Act, i.e., that the federal government's interest

6. Erica Templeton, Note, *Killing Kids: The Impact of Domingues v. Nevada on the Juvenile Death Penalty as a Violation of International Law*, 41 B.C. L. REV. 1175, 1184-85 (2000) (citing *Stanford v. Kentucky*, 492 U.S. 361 (1989)).

7. *Brown v. Board of Education*, 349 U.S. 294 (1955). See also *infra* note 114 for scholarly commentary. But see Edward T. Swaine, *The Undersea World of Foreign Relations Federalism*, 2 CHI. J. INT'L L. 337, 352 (2001) ("Congress should be given the opportunity to override state activities with which it would disagree; at the same time, if a fully informed Congress elects not to preempt the relevant activities, it seems inappropriate to presume that they are incompatible with the national interest.").

8. For a detailed discussion, see Swaine, *supra* note 7, at 339, n.6 (citing at n.6 *Zschemig v. Miller*, 389 U.S. 429 (1968), in which the Supreme Court

held unconstitutional, as applied, an Oregon intestacy statute that imposed conditions discriminating against East Germans. The Court was famously unclear as to the precise basis for its concern-- the effect of the state courts' polemical decisions abroad, their potential for embarrassing the executive branch, or the fact that the state was attempting to conduct foreign relations-- and why doing any of those things would be unconstitutional.

9. Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 454, n.361 (1998) (citing, at n.361, *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 331 (1994) and *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 259 (1991) as examples of cases where the Supreme Court abstained from creating federal common law foreign policy, instead deferring to Congress to draft or amend appropriate legislation).

10. See *id.* at 449. See also *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (standing for the proposition that international law standards, when adopted by the United States Supreme Court as federal common law standards, become the supreme law of the land).

11. Swaine, *supra* note 7, at 342. See also the cases Bradley examines, *supra* note 9.

12. *New York v. United States*, 505 U.S. 144, 188 (1992).

is insufficient to pre-empt state legislation. This paper will explore whether federal foreign affairs concern justifies a juvenile death penalty prohibition and evaluate the likely fate of states' challenges to the constitutionality of such an Act.

II. INTERNATIONAL SCRUTINY OF THE JUVENILE DEATH PENALTY

A. *The ICCPR and the United Nations Position*

The International Covenant on Civil and Political Rights (ICCPR)¹³ is an international human rights treaty, entered into by the Executive and ratified by the United States Senate.¹⁴ The ICCPR provides that “[s]entence 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.”¹⁵

The United States does not comply with this ICCPR provision; it took a reservation to this part of the ICCPR during treaty ratification.¹⁶ As of early 2001, the United States is one of only six nations in the world that executes citizens under the age of eighteen years.¹⁷ Amnesty International reported in 1998 that the United States had executed nine persons between 1990 and 1998, all of whom were age seventeen at the time of offense.¹⁸

As of 2000, eleven nations “filed complaints [against the United States] with the Human Rights Commission (the commission in charge of monitoring compliance with the terms of the ICCPR)” protesting the United States’s ICCPR reservation and the U.S. constituent states’ policy of permitting juvenile executions.¹⁹ Amnesty International has likewise criticized the United States’ ICCPR reservation.²⁰ In 1997, the United Nations Commission on Human Rights itself also obliquely chastised the United States for its ICCPR

13. G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966), available at <http://www.hrweb.org/legal/cpr.html> (last visited Oct. 12, 2002) [hereinafter ICCPR].

14. John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 806-807 (2001).

15. ICCPR, *supra* note 13, Part III, art. 6, ¶ 5.

16. See, e.g., Templeton, *supra* note 6, at 1192 (citing William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT’L L. 277 (1995)).

17. AMNESTY INTERNATIONAL, JUVENILES AND THE DEATH PENALTY—EXECUTIONS WORLDWIDE SINCE 1990, at 3 (Nov. 1998) (Amnesty International Index No. ACT 50/11/98). See also 147 CONG. REC. S582 (daily ed. Jan. 25, 2001) (statement of Sen. Feingold) (“The others are Iran, Pakistan, Nigeria, Saudi Arabia and Yemen.”).

18. AMNESTY INTERNATIONAL, *supra* note 17, at 5.

19. Templeton, *supra* note 6, at 1186.

20. AMNESTY INTERNATIONAL, 1999 UN COMMISSION ON HUMAN RIGHTS—MAKING HUMAN RIGHTS WORK: TIME TO STRENGTHEN THE SPECIAL PROCEDURES, at 3 (Nov. 1998) (Amnesty International Index No. IOR 41/01/99).

reservation: the Commission “[urged] all States that still maintain the death penalty to comply fully with their obligations under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, notably not to impose the death penalty . . . for crimes committed by persons below eighteen years of age”²¹ The United Nations Sub-Commission on Human Rights “Condemns unequivocally the imposition and execution of the death penalty on those aged under 18 at the time of the commission of the offence Calls upon also States . . . to abolish by law as soon as possible the death penalty for those aged under 18 at the time of the commission of the offence and, in the meantime, to remind their judges that the imposition of the death penalty against such offenders is in violation of international law”²²

B. U.S. Supreme Court Approval of U.S. State Law

An impressive body of scholarly debate has coalesced around the question of whether the United States Supreme Court should give the international community’s standards of conduct the force of United States law.²³ Historical federal cases such as *Chisholm v. Georgia*²⁴ and modern ones such as *Filartiga v. Pena-Irala*²⁵ support the proposition that the United States Supreme Court is legally bound by the tenets of customary international law.²⁶ Scholars also argue that older piracy cases indicate that the United States Supreme Court’s concern for international law standards is specifically recognized in context of human rights.²⁷

The Supreme Court, however, does not consider itself bound by standards of international conduct with regard to the juvenile death penalty. During the late 1980s, the Court set schizophrenic precedent on the issue of whether international standards should play any role in analyzing whether the juvenile death penalty passes an Eighth Amendment “cruel and unusual punishment” challenge. In 1988’s *Thompson v. Oklahoma*,²⁸ the Court comfortably

21. E.S.C. Res. 1997/12, U.N. ESCOR, Human Rts. Comm., 53d Sess., 36th mtg., Supp. No. 3, at 70, U.N. Doc. E/CN.4/1997/150 (Apr. 3, 1997).

22. E.S.C. Res. 2000/17, U.N. ESCOR, Human Rts. Comm., Sub-Comm. on Human Rts., 56th Sess., 26th mtg., at 50, U.N. Doc. E/CN.4/SUB.2/RES/2000/17 (Aug. 17, 2000) (emphasis in original).

23. Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825-26 (1998) [hereinafter Koh, *State Law*].

24. *Chisholm v. Georgia*, 2 U.S. 419, 2 Dall. 419, 1 L.Ed 440 (1793).

25. 630 F.2d 876 (2d Cir. 1980).

26. Koh, *State Law*, *supra* note 23, at 1825-26, n.8-10 (1998). Koh also provides an excellent capsule summary of the United States Supreme Court’s history of incorporating international law standards into federal common law.

27. *Id.* at 1826 (citing G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT’L L. 727 (1989)).

28. 487 U.S. 815 (1988).

integrated the international community's majority standard into its opinion. Thompson, age fifteen at the time of offense, "was convicted of first-degree murder and sentenced to death."²⁹ The Oklahoma statute at issue provided that a "'Child' means any person under eighteen (18) years of age, except for any person sixteen (16) or seventeen (17) years of age who is charged with murder."³⁰ The trial court, after a hearing, determined that Thompson could be tried as an adult.³¹ This decision was perhaps due to the fact that Thompson acted in concert with others, as well as due to the evidence surrounding the victim's death: "The evidence disclosed that the victim had been shot twice, and that his throat, chest, and abdomen had been cut. He also had multiple bruises and a broken leg. His body had been chained to a concrete block and thrown into a river. . . ."³² "We have previously recognized," said the Court, "the relevance of the views of the international community in determining whether a punishment is cruel and unusual."³³ The Court surveyed the policies of several international States to conclude that "it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense."³⁴

The following year, in *Stanford v. Kentucky*,³⁵ the Supreme Court eroded its *Thompson* holding to announce that "in the United States, the juvenile death penalty is constitutional as applied to sixteen and seventeen-year-old defendants."³⁶ *Stanford* was a consolidated case. Petitioner Stanford was just over seventeen when he and an accomplice "repeatedly raped and sodomized [a gas station attendant] . . . during and after their commission of a robbery They then drove her to a secluded area near the station, where Stanford shot her point-blank in the face and then in the back of her head"³⁷ The second petitioner, Wilkins, was just over sixteen when he and an accomplice robbed a convenience store.³⁸ He stabbed the attendant eight times on three separate occasions, leaving her to die on the floor.³⁹ Both Kentucky and Missouri

29. *Id.* at 818.

30. *Id.* at n.2 (citing OKLA. STAT., Tit. 10, § 1101(1) (Supp. 1987)).

31. *Id.* at 819-20.

32. *Id.* at 819.

33. *Thompson*, 487 U.S. at n.31

34. *Id.* at 830. See also Templeton, *supra* note 6, at 1183-84 (citing *Thompson v. Oklahoma*, 487 U.S. 815 (1988)) (noting that the Supreme Court "emphasized that the views of the international community are relevant in determining whether punishment is cruel and unusual" under the United States Constitution's Eighth Amendment.).

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

36. Templeton, *supra* note 6, at 1184-85 (citing *Stanford v. Kentucky*, 492 U.S. 361 (1989)).

37. *Stanford*, 492 U.S. at 365.

38. *Id.* at 366.

39. *Id.*

allowed the petitioners to be tried as adults because of the gravity of the crimes.⁴⁰

Considering an Eighth Amendment challenge that the punishment was too cruel and unusual to pass constitutional muster, the Court noted that execution of young people was probably not prohibited in the Framers' time because "the common law set the rebuttable presumption of incapacity to commit any felony at the age of 14, and theoretically permitted capital punishment to be imposed on anyone over the age of 7."⁴¹ The Court then said any Eighth Amendment violation would arise from a violation of decency as defined by the values "of modern American society as a whole."⁴² Affirming these two convictions, the Court specifically rejected *Thompson's* reliance on international standards: "We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant."⁴³

Thus, as law of the land exists today, Congress stands silent; the ICCPR is non-binding; and no other treaty provisions prevent U.S. constituent states from enforcing their juvenile death penalties. To the contrary, the United States Supreme Court has formulated a "federal common law" that finds the death penalty a constitutional punishment when imposed by states on a person under age eighteen at the time of offense.⁴⁴ Under *Stanford's* reasoning, the international "community's conceptions of decency" matter not at all.⁴⁵

III. THE CONCEPT OF INTERNALIZATION

Where the Supreme Court closes a door, Congress and the Executive may open windows. In the United States, any of the government's three branches may legally internalize international norms, making them binding on federal courts.⁴⁶ "Sometimes, as in the case of the United Nations Convention on the Law of the Sea, the executive branch takes the lead Sometimes Congress takes the lead, spurred by nongovernmental organizations . . . [and] in recent human rights cases, federal courts have taken the lead, but only with the express

40. *Id.* at 365-66.

41. *Id.* at 368.

42. *Stanford*, 492 U.S. at 369.

43. *Id.* at n.1.

44. *See, e.g., id.* But see Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1639-1641 (1997) (asserting that customary international law guides most federal courts in human rights decisions). *See also id.* at 1713 ("[T]hese customary international human rights norms are based almost exclusively on the very treaties that the political branches have taken pains to exclude from the domain of federal law.").

45. *See Stanford*, 492 U.S. at n.1.

46. Koh, *State Law*, *supra* note 22, at 1860.

congressional directives in the ATCA [Alien Tort Claims Act] and the TVPA [Torture Victims Protection Act].⁴⁷

Harold Hongju Koh, in discussing the ways in which a State internalizes international standards of conduct, suggests four steps along a spectrum of compliance, drawing a distinction “among four relationships between stated norms and observed conduct: coincidence, conformity, compliance, and obedience.”⁴⁸ A State can move toward “willing compliance” with one or more internal tactics: a State socially internalizes “international human rights norms” when “a given standard of conduct acquires so much public legitimacy that there is widespread general obedience to it.”⁴⁹ A State legally internalizes an international standard of conduct when the standard is “incorporated into the domestic legal system through executive action, judicial interpretation, legislative action, or some combination of the three.”⁵⁰ Finally, a state politically internalizes an international standard of conduct “when political elites accept an international norm, and adopt it as a matter of government policy.”⁵¹ Koh does not specify whether this governmental policymaking is consistently formal (legislation) or informal (consistent political practice), but one may posit that either would qualify.

Assuming *arguendo* that the forbearance to juvenile offenders is indeed an international standard of conduct (justified either by common practice or by *jus cogens*), any U.S. constituent state’s forbearance to do so is only coincidentally obedient to the international standard, because the Supreme Court of the United States has given the practice its stamp of approval.⁵² This places the United States at the far end of Koh’s spectrum because of the wide disparity between the “stated [international] norms and [the constituent states’] observed conduct.”⁵³

Senator Feingold’s NDPMA represents movement toward “conformity” or “compliance,” because it suggests a formal moratorium on the internationally questionable conduct.⁵⁴ Adopting Koh’s terminology, our hypothetical Juvenile

47. *Id.*. The Alien Tort Claims Act, codified at 28 U.S.C. § 1350, was amplified by the Torture Victims Protection Act (1992), which gives rise to private causes of action under 28 U.S.C. § 1350. *See* 28 U.S.C. § 1350 (2000); GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 48 (3d ed., Kluwer Law International 1996).

48. Harold Hongju Koh, *Review Essay: Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, n.3 (1999) (reviewing ABRAN CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995)) [hereinafter Koh, *Why Do Nations Obey*].

49. *Id.* at 2656.

50. *Id.* at 2657.

51. *Id.* at 2656-57.

52. *See generally* Stanford, 492 U.S. 361.

53. *See* Koh, *Why Do Nations Obey*, *supra* note 48, at n.3.

54. *See id.*

Death Penalty Prohibition Act would place the United States farther along the internalization spectrum: it would be a legally internalized obedience to the international standard of conduct.⁵⁵

IV. JUVENILE DEATH PENALTY PROHIBITION AS A FOREIGN COMMERCE REGULATION

The first way Congress could legally internalize a national juvenile death penalty prohibition is through a pre-emptive federal regulatory scheme enacted under congressional foreign commerce power. Removing from analysis for the moment the question of Congressional authority to legislate in support of executive treaty-making power (discussed in the next section), this section will explore whether Congress could defend a juvenile death penalty prohibition by claiming that constituent states' policies impermissibly burden foreign commerce.

A. Congressional Authority over Foreign Commerce

The United States Constitution textually authorizes Congress “[t]o regulate Commerce with foreign Nations”⁵⁶ This authority is characterized as Dormant Foreign Commerce Clause power when Congress uses it to limit state action.⁵⁷ When Congress acts pursuant to this plenary power, its authority is limited only by other checks and balances built into the Constitution’s text and, arguably, by the structure of the Constitution itself. Congress cannot, for example, legislate in “areas beyond the reach of the Commerce Clause,” nor may Congress “command[er] . . . the executive or legislative branches of the state governments, [nor] overrid[e] state sovereign immunity in either federal or state court”⁵⁸

In 2000, *Crosby v. National Foreign Trade Council*⁵⁹ laid out the latest federal pre-emption tests that apply when a state law allegedly burdens foreign commerce. No standard of international conduct comes into play; the analysis looks to domestic congressional intent. A state law is pre-empted if “Congress intends federal law to ‘occupy the field’ . . . in that area.”⁶⁰ Similarly, “state law is naturally preempted to the extent of any conflict with a federal statute,”⁶¹ with “conflict” defined as a situation “where it is impossible for a private party to

55. See *id.* at 2657.

56. U.S. CONST. art. I sec. 8.

57. See, e.g., Swaine, *supra* note 7. See also U.S. CONST. art. I sec. 8.

58. Yoo, *supra* note 14, at 763 (internal citations omitted; cases dated between 1995 and 2000). See *also id.* at 817-18 for more detailed discussion.

59. 530 U.S. 363 (2000).

60. *Id.* at 372 (internal citations omitted).

61. *Id.* (internal citations omitted).

comply with both state and federal law . . . [or] where [state legislation] stands as an obstacle to the accomplishment . . . of the full purposes and objectives of Congress.”⁶² To determine whether state law “stands as an-obstacle” to federal purposes, the Supreme Court will “examin[e] the federal statute as a whole” to identify the statute’s “purpose and intended effects.”⁶³

B. Congressional Concern: The Cost of Non-Compliance

Some human rights treaties, such as the American Convention on Human Rights (ACHR), provide by their terms that the treaties may affect member States’ internal economic affairs. For example, in the ACHR, member States voluntarily submit to the jurisdiction of the treaty-created Inter-American Court of Human Rights and agree to pay such judgments or sanctions as the that court may impose.⁶⁴ Although this is an economic concern, it is not necessarily a commercial concern in the sense of transnational monetary exchange.

The ICCPR, as a resolution of the United Nations general assembly, is subject to the United Nations’ charter-authorized enforcement procedures.⁶⁵ The United Nations generally eschews strong-arm enforcement tactics.⁶⁶ However, when a member State’s practice becomes truly offensive to the United Nations’ collective membership, the United Nations Security Council can and will authorize enforcement actions that may include both non-coercive tactics such as multinational agreements and coercive tactics such as authorized trade sanctions.⁶⁷

Although some scholars argue that because “none of the parties [to a human rights agreement] are exchanging rights or benefits . . . individual states have no coercive power,”⁶⁸ the United Nations recognizes that trade sanctions do impact States’ economies, sometimes to the extent that they interfere with

62. *Id.* at 372-73 (internal citations omitted).

63. *Id.* at 373 (internal citations omitted).

64. American Convention on Human Rights, O.A.S. Treaty Series No. 36, entered into force July 18, 1978, ch. VIII, sec. 3, art. 68(2), available at <http://www.oas.org/juridico/english/treaties.html> (last visited Oct. 12, 2002) (also known as the “Pact of San Josè, Costa Rica”) [hereinafter ACHR].

65. See UNITED NATIONS DEPT. OF PUBLIC INFORMATION, UN PEACEKEEPING, U.N. Doc. DPI/1851/Rev.9 (June 1999), available at <http://www.un.org/News/facts/peacefct.htm> (last visited Oct. 12, 2002) [hereinafter UN PEACEKEEPING].

66. See *id.*

67. See, e.g., UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, IMAGE AND REALITY—QUESTIONS AND ANSWERS ABOUT THE UNITED NATIONS (June 1999), at ch. 4, available at http://www.un.org/geninfo/ir/ch4/ch4_txt.htm#q2 (last visited Oct. 12, 2002) (chapter entitled “What Does the United Nations Do for Human Rights and Justice?”) (discussing the United Nations’s “sustained anti-apartheid campaign” against South Africa).

68. Templeton, *supra* note 6, at 1192 (citing William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT’L L. 277 (1995)).

States' overall economic development.⁶⁹ The United Nations has urged States to refrain from taking "unilateral measures . . . in particular those of a coercive nature with extraterritorial effects, which create obstacles to trade relations among [international] States . . . imped[e] the full realization of the rights set forth in . . . international human rights instruments."⁷⁰

Congress will argue that, if an international State imposed a unilateral trade sanction on the United States in protest to the federal government's failure to prohibit its constituent states from imposing a juvenile death penalty, the State's action would affect the United States' economy as a whole.⁷¹ Congress can easily identify the potential economic impact. The countries objecting to the United States' ICCPR reservation include some of "the United States' closest allies: France, Sweden, Belgium, Denmark, Finland, Germany, Italy, Netherlands, Norway, Portugal and Spain."⁷² These States are also major United States trading partners.⁷³ As of 1999, Western Europe accepted 22.5% of the United States' total exports, generating United States revenues of nearly \$153 billion.⁷⁴ Norway alone imported \$1.8 billion of United States goods during 2001.⁷⁵

C. *The Fate of a State Challenge*

To determine whether Congress can pre-empt the state's death penalty with this rationale, the Supreme Court, upon a challenge, will look to Congress' purpose: avoiding unilateral trade sanctions and preserving economic relationships with the identified trading partners.⁷⁶ A state could argue that a mere potential for trade sanctions—when no foreign State has yet imposed such sanctions nor threatened to do so—is not a sufficient federal concern to justify Congress in forbidding states to enforce their own criminal laws.

69. See Res. 2000/11, U.N. GAOR, Human Rts. Comm., 56th Sess., 52d mtg., U.N. Doc. E/CN.4/RES/2000/11 (Apr. 17, 2000).

70. *Id.*

71. Most NGO reporting in this area examines the effect on the United States economy of sanctions imposed by the United States on a foreign State—rather than *against* the United States as suggested here—but the import-export revenue numbers apply to either situation.

72. Templeton, *supra* note 6, at n.98.

73. See, e.g., CONGRESSIONAL BUDGET OFFICE, THE DOMESTIC COSTS OF SANCTIONS ON FOREIGN COMMERCE 30 (Mar. 1999).

74. *Id.* See also *id.* at 39 *et seq.* (discussing and providing statistics on additional "trickle-down" economic effects of trade restrictions).

75. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2002 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 316 (2002) (section entitled "Country Reports: Norway").

76. See *Crosby*, 530 U.S. at n.17 (implying that the Supreme Court's recognition of a general Congressional desire to maintain cooperative relationships with allies is a valid rationale for federal legislation). See also *id.* at 390 (Scalia, J., concurring) ("It is perfectly obvious from the record . . . that the inflexibility produced by the Massachusetts statute has in fact caused difficulties with our allies.").

If the state was arguing that the juvenile death penalty does not pose a domestic interstate commerce burden, this argument might succeed. “[S]anctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used.”⁷⁷ Domestic commerce power requires Congress to show some actual effect on interstate commerce, an effect that is not *de minimis*. *United States v. Lopez*⁷⁸ overturned a congressional gun control act because the Act was not sufficiently related to interstate commerce concerns. The government argued that handguns in schools engendered violent crime and interfered with the “learning environment,” and that both endangered the economy by threatening interstate travel and economic participation.⁷⁹ The Court held that Congress’s regulatory power under the domestic Commerce Clause was limited to concerns with a “substantial effect” on interstate commerce.⁸⁰

In domestic commerce clause legislation “Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce,”⁸¹ but the *Lopez* Court refused “to pile inference upon inference” to find a commerce link where Congress had provided no record to aid the court in evaluating a commerce effect.⁸² The Court affirmed this reasoning in *Jones v. United States*,⁸³ holding that arson of a private home could not be prosecuted under federal criminal law. The mere fact that the home was used to secure an interstate loan and received natural gas from outside the state did not establish a sufficient interstate commerce relationship to trigger federal jurisdiction.⁸⁴

If Congress passed a national juvenile death penalty prohibition based solely upon its speculation that economic sanctions *might* be imposed, the *Lopez* and *Jones* precedents would allow— although they would not compel— the Supreme Court to find that the state legislation should stand until and unless Congress shows that the state law actually affects international economic relations.

However, the dormant foreign commerce clause analysis is different, and the scrutiny of state action “more rigorous.”⁸⁵ First, the test for a state’s foreign

77. Koh, *Why Do Nations Obey*, *supra* note 48, at 2635-36 (quoting ABRAN CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995)).

78. 514 U.S. 549 (1994).

79. *Id.* at 563-64.

80. *Id.* at 556-57, 559.

81. *Id.* at 562.

82. *Id.* at 567. *See also id.* at 563 (discussing lack of evidence in congressional record).

83. 529 U.S. 848 (2000).

84. *See generally id.*

85. *Reeves, Inc. v. Stake*, 447 U.S. 429, n.9 (1980). *See also Swaine, supra* note 7, at 345 (discussing a “market participant exception” to the dormant foreign commerce clause).

commerce burden is more broad and more vague than the domestic commerce power. If the federal legislative scheme seeks to achieve uniformity in foreign commerce relations, it receives judicial deference when it conflicts with a state statute.⁸⁶ Second, although the pre-emption rules for matters touching on foreign commerce are the same as those used in a domestic pre-emption analysis,⁸⁷ the foreign and domestic inquiries diverge when the Supreme Court begins to examine Congressional purpose and the effect of the federal statutory scheme.

In 2000, *Crosby v. National Foreign Trade Council*⁸⁸ illustrated this divergence. *Crosby* analyzed foreign commerce clause pre-emption to find that a Massachusetts law restricting state businesses' trade with the State of Burma (now Myanmar) was pre-empted by the federal Foreign Operations, Export Financing, and Related Programs Appropriations Act (hereinafter the "Foreign Operations Act"), which also regulated trade with Burma.⁸⁹ Even to the extent that Massachusetts's law did not directly conflict with the Foreign Operations Act, the Supreme Court found that the law kept the Executive from "working together with other nations in hopes of reaching common policy and 'comprehensive' strategy" with regard to Burma relations, a power granted to the Executive by the Foreign Operations Act.⁹⁰ *Crosby* did not examine whether the Massachusetts law had an actual impact on foreign commerce, nor did it ask the extent of such impact if indeed it existed.⁹¹ The mere potential of state interference with the bargaining power conferred upon the Executive by the Foreign Operations Act was sufficient to pre-empt the state's statute.⁹² As compared to the "show us some record" *Lopez* test for domestic commerce power, the "if you can imagine it, you can pre-empt it" *Crosby* test illustrates that Congress' foreign commerce legislation receives a higher level of judicial deference.

Crosby does offer slight hope for states with language implying that a state regulation that merely "complicates" diplomatic relations might not present the same danger as a state regulation that substantively restricts federal economic

86. See, e.g., *Crosby*, 530 U.S. at 381. See also *Japan Line Ltd., et al. v. County of Los Angeles et al.*, 441 U.S. 434 (1979) (invalidating California's *ad valorem* property tax levied against ships of Japanese nationality, when the ships were owned by a Japanese shipping line, subject to property tax in Japan, and solely used for interstate commerce).

87. See, e.g., *Pacific Gas & Electric Co. et al. v. State Energy Resources Conservation and D'vmt Comm'n et al.*, 461 U.S. 190, 203-04 (1983) (setting forth a domestic pre-emption analysis); compare *Crosby*, 530 U.S. at 372-73 (applying the same analysis in a foreign commerce analysis).

88. 530 U.S. 363 (2000).

89. *Id.* at 389.

90. *Id.* at 382.

91. See generally *id.*

92. See *id.* at 382.

bargaining power.⁹³ Congress has also been known to indulge U.S. constituent states' foreign commerce goals by recognizing states' wishes and custom-tailoring international trade agreements.⁹⁴ However, in light of *Crosby's* deferential standard and federal courts' general reluctance to countermand any congressional foreign policy goal,⁹⁵ these are dangerously flimsy hooks on which to hang a state challenge against federal foreign commerce pre-emption.

V. JUVENILE DEATH PENALTY PROHIBITION AS ARTICLE II LEGISLATION

The second way Congress could legally internalize a national juvenile death penalty prohibition is by passing legislation to execute the terms of treaties and agreements adopted by the Executive.⁹⁶ In this scenario, Congressional "Article II" power is precipitated by Executive power.⁹⁷ The Executive cooperates with other international States to formulate United States international policy, and Congress is charged with promulgating domestic legislation that supports those policy goals.⁹⁸

A. *The Domestically Intrusive Nature of Human Rights Treaties*

The ICCPR, and similar human rights treaties,⁹⁹ represent an emerging trend toward international agreements specifically designed to influence the member States' domestic laws.¹⁰⁰ As international States become more economically and socially interdependent, international treaties and agreements begin to "resemble domestic legislation in directly mandating norms of public and private conduct . . . [and] the treaty power . . . threatens to supplant the domestic lawmaking process."¹⁰¹ Two treaties similar to the ICCPR illustrate this claim; the United States has ratified neither of them.¹⁰²

93. *Crosby*, 530 U.S. at 381.

94. Swaine, *supra* note 7, at 344 (discussing United States negotiations for the World Trade Organization's 1994 Agreement on Government Procurement and noting that "the US wound up permitting substantial variation among state commitments, even excluding more than a dozen states from any obligation.").

95. See *supra* notes 8, 9. See also Swaine, *supra* note 7, at 338 (discussing and citing *Miami Light Proj. v. Miami-Dade County*, 97 F Supp 2d 1174 (S.D. Fla. 2000); *Gerling Global Reins Corp. v. Quackenbush*, 2000 U.S. Dist LEXIS 8815 (E.D. Cal. 2000); and *Gerling Global* on appeal at 240 F3d 739 (9th Cir. 2001)).

96. See U.S. CONST. art. II; U.S. CONST. art. I sec. 8.

97. Bradley, *supra* note 9, at 444-45 (noting also the effect of *Missouri v. Holland*).

98. *Id.*

99. For a list of treaties see Bradley, *supra* note 9, at n.29.

100. Bradley, *supra* note 9, at 396-97.

101. Yoo, *supra* note 14, at 760.

102. Templeton, *supra* note 6, at 1187; Yoo, *supra* note 14, at 807 (discussing treaties that the Clinton Administration had not ratified at the time of publication).

The Convention on the Rights of the Child (CRC),¹⁰³ for example, provides that “1. States Parties recognize that every child has the inherent right to life . . . 2. States Parties shall ensure to the maximum extent possible the survival and development of the child,”¹⁰⁴ and that “[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offences [sic] committed by persons below eighteen years of age”¹⁰⁵ Member States agree to submit regular compliance reports “to [a] Committee, through the Secretary-General of the United Nations.”¹⁰⁶ Although the CRC creates no specialized international court and does not textually require member States to change their constituent states’ domestic laws, this Convention “contains a number of provisions that may be inconsistent with current U.S. [constituent states’] family law.”¹⁰⁷

Like the CRC, the ACHR also forbids capital punishment for people under age eighteen at the time of offense.¹⁰⁸ The ACHR is more legislatively robust than the CRC, featuring a “Federal States” section that specifically provides for intrusion into member States’ domestic policymaking: “Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.”¹⁰⁹ The ACHR also admits that a federalist system might struggle with Constitutional limitations, and it allows—in fact compels—such a State’s federal government to exercise upon its “constituent units” all persuasive power it can leverage: “[T]he national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.”¹¹⁰

B. Executive as Lawmaker: Sole Executive Agreements

Provisions such as these give the Executive a *de facto* lawmaking role if they appear in Sole Executive Agreements. The President, acting alone, enters into a Sole Executive Agreement,¹¹¹ which “generally has the same legal effects

103. Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2 1990 [hereinafter CRC].

104. *Id.* at Part I, art. 6(1)-(2).

105. *Id.* at Part I, art. 37(a).

106. *Id.* at Part II, art. 44(1)(a)-(b).

107. Bradley, *supra* note 9, at 402.

108. ACHR, *supra* note 64, ch. II, art. 4(5).

109. *Id.* at ch. III, art. 28(1).

110. *Id.*

111. BORN, *supra* note 47, at 20.

as a treaty.”¹¹² A Sole Executive Agreement can “trump inconsistent state law” as long as it is enacted on subject matter that the Constitution commits to Presidential authority.¹¹³ As discussed in the state challenge section below, this “invisible lawmaking” begs an inquiry into the proper exercise of Executive power if such power is used to override U.S. constituent states’ sovereignty.¹¹⁴

C. Congress as Lawmaker: Enabling Treaties and Agreements

In contrast to a Sole Executive Agreement, a “treaty” is an agreement approved by both the Executive and by two-thirds of the Senate.¹¹⁵ Self-executing treaties made by the Executive are direct exercises of a constitutionally authorized Executive power.¹¹⁶ When the Executive acts, self-executing treaties become the law of the land, but non-self-executing treaties need enabling legislation from Congress before they bind United States courts.¹¹⁷

A Congressional-Executive Agreement is not a “treaty” under the United States Constitution,¹¹⁸ because it is “approved by . . . the President and a majority of each House of Congress.”¹¹⁹ However, like treaties, these Agreements may also be self-executing or non-self-executing.¹²⁰ They are generally considered to have the same legal force as a treaty.¹²¹ The North American Free Trade and World Trade Organization Agreements, for example, are Congressional-Executive agreements.¹²²

In treaties and Congressional-Executive agreements, most of the lawmaking role remains with Congress; the Necessary and Proper Clause authorizes Congress to pass enabling legislation for non-self-executing treaties and to further the goals of other agreements made by the Executive.¹²³ Some

112. *Id.* (citing RESTATEMENT [THIRD] OF FOREIGN RELATIONS LAW § 303(4) and Reporter’s Note 11 (1987); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff’d on other grounds*, 348 U.S. 296 (1955)).

113. Yoo, *supra* note 14, at 778.

114. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (finding unconstitutional an executive order to nationalize private steel mills in support of the United States’ war effort).

115. *See, e.g.*, BORN, *supra* note 47, at 19. *See also* U.S. CONST. art. II sec. 2.

116. U.S. CONST. art. II sec. 2.

117. *See, e.g.*, BORN, *supra* note 47, at 19-20. *See also* U.S. CONST. art. VI.

118. *See* U.S. CONST. art. II sec. 2.

119. BORN, *supra* note 47, at 20 (citing RESTATEMENT [THIRD] OF FOREIGN RELATIONS LAW § 303 (1987); *United States v. Belmont*, 301 U.S. 324 (1937); *B. Altman Co. v. United States*, 224 U.S. 583 (1912)).

120. *Id.* at 20, n.105.

121. Yoo, *supra* note 14, at 759.

122. *Id.* at 758-59. *See also* Bradley, *supra* note 9, at 444 (discussing “federalism concerns” in the context of NAFTA and the General Agreement on Tariffs and Trade (GATT)).

123. “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States,

also argue that the Senate also retains a significant policymaking role even when the Executive exercises plenary treaty-making power: “Congressional interests are often directly represented at the negotiating table. Even when Members of Congress are not allowed to participate directly in such treaty negotiations, the knowledge that any negotiated agreement must return to Congress for ratification necessarily pervades the executive branch’s negotiating position.”¹²⁴ On the other hand, although the Senate has the power to refuse ratification, it “has little freedom to modify [a treaty’s] substantive provisions” when the treaty is presented for ratification.¹²⁵ In either scenario, Article II authority allows both House and Senate to legislate in areas traditionally reserved to states’ domestic policy when furthering the policy goals of a Sole Executive Agreement, a treaty, or a Congressional-Executive Agreement.¹²⁶

D. Congressional Concern: Policy Implications of Human Rights Treaties

1. Concern for Cohesive Human Rights Agenda

In defending a juvenile death penalty prohibition enacted as part of an Article II policy initiative, Congress will argue that the prohibition must be federally enforced against U.S. constituent states, because an international State simply cannot advance a human rights policy agenda without interfering with actions historically considered domestic.¹²⁷ “Human rights violations usually take place within a nation’s territory and usually involve a nation’s own citizens. But as these purely ‘domestic’ acts take on international legal and political significance, they too implicate foreign relations.”¹²⁸ Congress will argue that a human rights policy agenda— as opposed to, for instance, an economic policy agenda— necessarily controls the treatment of individuals, and to the extent that such control used to rest in the hands of constituent states, it must now become federal control to further a greater good.¹²⁹ “The usual explanation for the federal privilege is that national power is required to resolve collective action problems. Foreign policy often looks like a public good”¹³⁰

or in any Department or Officer thereof.” U.S. CONST. art. I sec. 8.

124. Koh, *State Law*, *supra* note 23, at 1854 (internal citations omitted).

125. Yoo, *supra* note 14, at 847.

126. Bradley, *supra* note 9, at 444-45 (noting also the effect of *Missouri v. Holland*).

127. *See id.* at 453 (discussing a “demonstrable need” for transnational cooperation in setting standards for human rights).

128. Goldsmith, *supra* note 44, at 1673.

129. *See id.*

130. Swaine, *supra* note 7, at 343.

2. Concern for International Public Opinion

Senator Feingold's arguments in support of federal death penalty abolition included low deterrent value, potential for equal protection violation, risk of erroneous execution, and—germane to this section—concern over international public opinion and the United States's global reputation.¹³¹ Decrying the death penalty in general, Senator Feingold expressed special concern over the international public reaction to the United States' juvenile death penalty:

Courtesy of the Internet and CNN International, the world observes, perplexed and sometimes horrified, the violence in our nation Even China--the country that many members of Congress, including myself, have criticized for its human rights abuses--apparently has the decency not to execute its children. This is embarrassing. Is this the kind of company we want to keep? Is this the kind of world leader we want to be? . . . [N]o one can reasonably argue that . . . executing child offenders is a normal or acceptable practice in the world community. And I don't think we should be proud of the fact that the United States is the world leader in the execution of child offenders.¹³²

When all entities involved in creating a standard accept that standard, the entity that "defies" the norm loses face in the eyes of its peers.¹³³ Templeton asserts that if the United States continues to allow the juvenile death penalty, "[c]osts to the United States will include loss of leadership and prestige . . . [and] disrespect for international law"¹³⁴ Specifically, if the United States shows no intention of enforcing treaties such as the ICCPR against its own states, it will be hard-pressed to explain why its initial participation in the human rights treaty-making process is anything more than *pro forma* ink-spreading.¹³⁵ At best, this could make other negotiations uncomfortable for the

131. See generally 147 CONG. REC. S581 *et seq.* (daily ed. Jan. 25, 2001) (statement of Sen. Feingold).

132. 147 CONG. REC. S582 (daily ed. Jan. 25, 2001) (statement of Sen. Feingold).

133. Koh, *Why Do Nations Obey*, *supra* note 48, at 2639 (discussing and citing ABRAN CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 120 (1995)).

134. Templeton, *supra* note 6, at 1215.

135. *Id.* at 1187 (noting that although the United States has actively participated in drafting both the Convention on the Rights of the Child and the American Convention on Human Rights, it has not yet ratified either treaty). See also Norman Dorsen, *Civil Liberties, National Security and Human Rights Treaties: A Snapshot in Context*, 3 U.C. DAVIS J. INT'L L. & POL'Y 143, 153 (1997) ("[T]he United States has not taken appropriate steps to ensure its own compliance with the international human rights treaties that it has ratified, and this diminishes its authority in speaking to others.").

Executive; at worst, it could result in a loss of allies' trust and an associated reluctance to enter into other agreements with the United States.¹³⁶

3. Concern for National Security

Congress could also characterize a national juvenile death penalty legislation as part of a national security agenda rather than—or in addition to—a human rights agenda that simply calls for “collective action.”¹³⁷

In the context of formal military security, it is difficult if not impossible to imagine the United Nations authorizing peacekeeping forces to convene on a Kentucky courthouse. Although the United Nations technically has authority to attempt such action, the imagination is further challenged in light of the facts that 1) United States contributions comprise twenty-five percent of the United Nations' annual budget,¹³⁸ 2) United States contributions comprise over thirty percent of the United Nations' peacekeeping budget,¹³⁹ and 3) as a permanent member of the United Nations Security Council, the United States can veto any proposed peacekeeping operation.¹⁴⁰

If official sanction by the United Nations is beyond the reach of reasonable imagination, however, terroristic retaliation by a rogue State certainly is not. “If one state's activities raise hackles in a foreign country, that country may retaliate in a way that affects other states.”¹⁴¹ “Costs to the United States will include . . . endangerment of U.S. citizens”¹⁴² In the wake of the September 11th, 2001 attacks on the United States, such claims hardly need the support of examples; “[e]ven the most exquisitely targeted retaliation has spillover effects.”¹⁴³ The 1995 United States Oklahoma City bombing took 168 lives, and insurance claims alone totaled an estimated \$125 million.¹⁴⁴ The insurance industry similarly reported a \$510 million impact from the 1993

136. See *supra* note 76 (discussing the Supreme Court's recognition in *Crosby* that a desire to preserve allied relationships is a valid Congressional concern).

137. Bradley, *supra* note 9, at 453.

138. UNITED NATIONS DEPT. OF PUBLIC INFORMATION, FACTS ABOUT THE UNITED NATIONS, U.N. Doc. DPI/1753/Rev.17 (June 1999), available at <http://www.un.org/News/facts/setting.htm> (last visited Oct. 12, 2002) (“The top seven contributors to the UN are the USA (25%); Japan (17.98%); Germany (9.63%); France (6.49%); Italy (5.39%); the United Kingdom (5.07%); and Russia (2.87%). Collectively, they account for more than 72% of the regular UN budget.”).

139. *Id.* But see UN PEACEKEEPING, *supra* note 65 (noting that the United States owes the United Nations over \$1 billion on its peacekeeping share assessment).

140. UN PEACEKEEPING, *supra* note 65.

141. Swaine, *supra* note 7, at 343.

142. Templeton, *supra* note 6, at 1215.

143. Swaine, *supra* note 7, at 344.

144. CNN.com Europe, *Insurance claims to reach billions*, Sept. 12, 2001, at <http://www.cnn.com/2001/BUSINESS/09/12/ins/> (last visited Oct. 12, 2002).

United States World Trade Center bombing.¹⁴⁵ From the September 2001 United States World Trade Center attacks, insurance claims are expected to exceed \$775 million for insurance companies in the United States and worldwide;¹⁴⁶ United States airlines anticipate an industry-wide loss of at least \$2 billion in consumer dollars;¹⁴⁷ and publicly traded stocks on every worldwide have struggled to regain their post-attack financial positions.¹⁴⁸

E. The Fate of a State Challenge

1. Attacks on Congress's Rational Basis

a. On the Need for a Cohesive Human Rights Agenda

A state can invoke precedent to argue that a mere Congressional preoccupation with “speaking with one voice” in foreign affairs policy does not override a Constitutional protection as fundamental as states’ rights to maintain their own criminal laws.¹⁴⁹ In the same vein, a state can note that the participation of all three federal branches in foreign affairs policymaking already counteracts the “speak with one voice” argument in favor of nationalizing all foreign relations.¹⁵⁰ However, Congress can counter-argue that these precedents primarily apply in pre-emption cases where Congress stands silent, and that when Congress has actively legislated, the “one voice” broadcasts at a much higher volume to override states’ domestic law.¹⁵¹

b. On Concern for International Public Opinion

If a state tries to challenge Congress’ concern for international public opinion as a legislative basis, it should note that the Supreme Court already believes that “public opinion [is] an appropriate factor” to consider in constitutional analysis.¹⁵² The only real argument a state could pose in this context is that Congress acted irrationally when considering international, rather

145. *Id.*

146. *Id.*

147. *Id.*

148. BBC News, *Markets return to pre-attack levels*, Oct. 12, 2001, at http://news.bbc.co.uk/hi/english/business/newsid_1594000/1594438.stm (last visited Oct. 12, 2002).

149. See Swaine, *supra* note 7, 338, n.1 (citing *Barclays Bank, PLC v. Franchise Tax Board*, 512 U.S. 298, 303 (1994) to observe that the “one voice” justification was not enough to trigger dormant foreign commerce clause pre-emption).

150. Bradley, *supra* note 9, at 444-45.

151. See *Crosby*, 530 U.S. at 381 (discussing uniformity when a Congressional Act has been passed). Compare *Japan Line*, 441 U.S. 434 (invalidating California’s *ad valorem* property tax with a “one voice” analysis).

152. James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 B.Y.U.L. REV. 1039, 1086 (1993) (discussing *Furman v. Georgia*, 408 U.S. 238 (1972)).

than domestic, public opinion. The state will cite in its support *Stanford*, wherein the Supreme Court clearly stated that it did not care to invite other countries' standards of morality into federal common law *vis-à-vis* the constitutionality of a juvenile death penalty.¹⁵³

However, *Stanford* merely reflected the Supreme Court's refusal to incorporate international "conceptions of decency"¹⁵⁴ into an Eighth Amendment analysis. *Stanford* does not indicate that the Supreme Court would find irrational a congressional record indicating that Congress has chosen to consider international public opinion. The Supreme Court holds no grudge against public opinion *per se*: it has itself weighed international public opinion, particularly during the Civil Rights era when federal *amicus* briefs argued that international disapproval of the United States' apartheid customs were interfering with the Executive Department's ability to conduct foreign affairs.¹⁵⁵

Further, nothing in Supreme Court precedent indicates that Congress would be considered irrational for relying on policy recommendations that come from scholars and sources outside United States borders.¹⁵⁶ United Nations authorities have made their opinions on the juvenile death penalty quite clear.¹⁵⁷ If Congress chooses to consider these standards and incorporate them against constituent U.S. states through legislative channels, the Supreme Court might well shrug at a state challenge and conclude *vox populi vox dei*.¹⁵⁸

c. On Concern for National Security

A state can argue that Congress is irrational to concern itself with the possibility of formal UN-authorized military action against the United States, simply because international political realities make that scenario so far-fetched. Similarly, a state can argue that while Congress is rational to concern itself with rogue state retaliation, such concessions would fly in the face of the United States very public commitment itself to a zero-tolerance policy for terroristic pressures.¹⁵⁹ These arguments are sound, but in light of Congress' reaction to

153. *Stanford*, 492 U.S. at n.1.

154. *Id.*

155. See, e.g., Wilson, *supra* note 152, at 1106-1107 (discussing *Brown v. Board of Education*, 349 U.S. 294 (1955)). See also PAUL BREST ET AL., *PROCESS OF CONSTITUTIONAL DECISIONMAKING—CASES AND MATERIALS* 739-40 (4th ed. 2000) (discussing the role of Cold War international public opinion in the *Brown* decision).

156. Wilson, *supra* note 152, at 1085 (discussing the treatment of scholarly work and legal commentary in *Weems v. United States*, 217 U.S. 349 (1910)).

157. See *supra* notes 21, 22.

158. See Wilson, *supra* note 152, at 1085 (discussing *Furman v. Georgia*, 408 U.S. 238 (1972) and quoting Justice Powell's dissent: "The assessment of popular opinion is essentially a legislative, not a judicial, function.").

159. See, e.g., UNITED STATES DEPT. OF STATE, *TERRORIST THREATS AGAINST AMERICA*,

the September 2001 attacks,¹⁶⁰ the current political climate, and the Supreme Court's history of deferring to Congress' national security legislation, the Supreme Court might not care to publicly agree that any Congressional legislation reflecting a national security concern is irrational. When Congress invokes "national security" as its rational basis for federal legislation, the Court may invoke standing, mootness, or ripeness concerns to justify abstention from decision.¹⁶¹ It may employ a "balancing test" that often balances in favor of the asserted national security concern.¹⁶² Or it may simply decline to examine the issue at all; the Supreme Court exercises a "virtually unlimited judicial deference to the government" in cases touching on national security.¹⁶³

2. Tenth Amendment State Sovereignty Argument

In 1920, the Supreme Court, in *Missouri v. Holland*,¹⁶⁴ set the tone for Congressional control of state action touching on international relations. "Prior to [*Missouri v. Holland*] . . . it was at least unclear whether the Tenth Amendment restricted the national government's treaty power,"¹⁶⁵ but the Supreme Court made the issue quite clear: the Tenth Amendment fell to federal foreign affairs interests.

The treaty in *Missouri v. Holland*, made between the United States and Britain, provided protection for migratory geese and "agreed that the two

(Ambassador Francis X. Taylor, Coordinator for Counterterrorism, Testimony to the Committee on International Relations, Washington, D.C.) (Sept. 25, 2001); UNITED STATES DEPT. OF STATE, PRESIDENT DISCUSSES WAR ON TERRORISM (President George W. Bush, Address to the Nation, World Congress Center, Atlanta, Georgia) (Nov. 8, 2001); United States Dept. of State Counterterrorism Office, *Talking About Terrorism*, at <http://www.state.gov/s/ct/> (last visited Oct. 12, 2002) (presenting the United States Counterterrorism Policy as:

First, make no concessions to terrorists and strike no deals; Second, bring terrorists to justice for their crimes; Third, isolate and apply pressure on states that sponsor terrorism to force them to change their behavior; and Fourth, bolster the counterterrorism capabilities of those countries that work with the U.S. and require assistance.

160. A representative sample of the 107th Congress post-attack Public Laws include the Public Safety Officer Benefits Bill (H.R. 2882); the Victims of Terrorism Relief Act of 2001 (H.R. 2884); the 2001 Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States (H.R. 2888); the Air Transportation Safety and System Stabilization Act (H.R. 2926); The "USA PATRIOT" Act (H.R. 3162); the National Defense Authorization Act for Fiscal Year 2002 (S. 1438); and the Aviation and Transportation Security Act (S. 1447). All these bills and public laws are available online from the Library of Congress, *Legislation Related to the Attack of September 11*, at <http://thomas.loc.gov/home/terrorleg.htm> (last visited Oct. 12, 2002).

161. Dorsen, *supra* note 135, at 147.

162. *Id.* at 146.

163. *Id.*

164. 252 U.S. 416 (1920).

165. Swaine, *supra* note 7, at 340.

powers would take or propose to their law-making bodies the necessary measures for carrying the treaty out.”¹⁶⁶ A Congressional Act recognizing the treaty’s terms authorized the Secretary of Agriculture to promulgate the enabling regulations.¹⁶⁷ The State of Missouri lodged a Tenth Amendment argument that its internal regulations governing migrating geese in Missouri airspace should take precedence over the federal treaty.¹⁶⁸ The Court concluded that, even though the federal treaty affected states’ rights to govern actions on state soil (or, in this case, state skies), states had no Tenth Amendment right to gainsay federal treaty power when the treaty sought to further “a national interest of very nearly the first magnitude.”¹⁶⁹

This power survives today: when Congress legislates pursuant to the Necessary and Proper Clause to enforce the Executive’s Article II power, Congress can override state sovereignty even in areas traditionally committed to states’ domestic policymaking.¹⁷⁰ And perhaps that was exactly what the Court in 1920 sought to achieve: “We might reasonably conclude . . . that the Court unwittingly created a nationalist monster. But the Court rendering *Holland* might also (perhaps even simultaneously) be dismayed by the blossoming of state-conducted international relations and their tension with national authority”¹⁷¹

A state could assert its Tenth Amendment rights against the broad *Missouri v. Holland* reasoning by arguing two rather esoteric points. First, a state could claim that in light of the political climate at the time of that decision,¹⁷² *Missouri v. Holland* contemplates a structural “subject matter limitation” on Congressional legislation, one that tracks the Executive’s subject matter limitation.¹⁷³ Swaine argues that “the President’s negotiating function . . . warrants the dormant preemption of state activities approximating the negotiation with foreign powers— but would not extend, for example, to state conduct concerning foreign private parties, or applying equally to foreign and domestic parties alike.”¹⁷⁴

If this is true, it logically follows that state conduct concerning *domestic* private parties would also fall outside of *Missouri v. Holland*, and Tenth

166. *Holland*, 252 U.S. at 431.

167. *Id.* at 431-32.

168. *Id.* at 431-34.

169. *Id.* at 433-34, 435. See also Swaine, *supra* note 7, at 340 (discussing *Missouri v. Holland*’s expansion of federal treaty power beyond “purely international matters”).

170. Bradley, *supra* note 9, at 444-45; Yoo, *supra* note 14, at 827.

171. Swaine, *supra* note 7, at 341.

172. See, e.g., Bradley, *supra* note 9, at 458-61 (arguing that the *Holland* decision was made in a different political context than that of modern-day foreign affairs).

173. Swaine, *supra* note 7, at 353; Bradley, *supra* note 9, at 451 (“*Holland* itself arguably assumed that there was such a limitation on the treaty power.”).

174. Swaine, *supra* note 7, at 353.

Amendment protections would still apply to state decisions to enforce the juvenile death penalty. "These [human rights] foreign relations issues are much more closely tied to traditional state prerogatives than traditional foreign relations issues, and decentralization of these matters often serves salutary ends."¹⁷⁵ Unfortunately, this theory is not widely accepted.¹⁷⁶

Second, the state could seek to distinguish *Missouri v. Holland* by asserting that geese are distinguishable from juvenile offenders. The Court in *Holland* made much of the fact that the treaty in question was designed to preserve geese, and if Missouri killed all the subject geese there would be little point in having a treaty at all.¹⁷⁷ The Court also noted that the geese were "only transitorily within [Missouri and had] no permanent habitat therein."¹⁷⁸

Holland is a brief opinion, drafted with an elegant economy of word and phrase. There is no reason to assume that these qualifying phrases are anything less than deliberate loopholes that allow a state to argue the fundamental Tenth Amendment principle "that a State's government will represent and remain accountable to its own citizens."¹⁷⁹ Constituent states that legislate and enforce the juvenile death penalty against their own citizens do not, by so doing, undermine the entire human rights agenda of the ICCPR and other treaties. Nor do the states seek to control with these criminal laws anything, or anyone, other than people properly subject to state jurisdiction.¹⁸⁰ Therefore, the state can argue, *Holland's* extension of Article II power simply was not meant to apply to every provision of every treaty that Congress seeks to enforce.

3. Structural Federalism Argument

a. Supreme Court Precedent

Assuming *arguendo* that neither argument works and that the Tenth Amendment lies crushed under the wheels of *Missouri v. Holland*, structural federalism itself protects states' rights to flirt with international disapproval by enforcing their own criminal laws.¹⁸¹ If Congress forbids such enforcement

175. Goldsmith, *supra* note 44, at 1714.

176. Bradley, *supra* note 9, at 451.

177. *Holland*, 252 U.S. at 435.

178. *Id.*

179. *Printz v. United States*, 521 U.S. 898, 920 (1996).

180. The jurisdictional and prudential questions surrounding enforcement of these laws against a citizens of foreign States who commit crimes in the United States are beyond the scope of this paper.

181. *See, e.g.,* Yoo, *supra* note 14, at 769-71 (rebutting the proposition that the Necessary and Proper Clause leaves Congress largely unchecked in this area with the proposition that state sovereignty curbs the constitutionality of legislation enacted pursuant to the Necessary and Proper Clause). *Cf. Swaine, supra* note 7, at 344 ("[T]he availability of plenary national foreign affairs authority substantially rebuts any such claim, since (so far as we know) it may be exercised without regard to limits on domestic authority.").

pursuant to the ICCPR or another ratified human rights treaty, the state will find itself arguing against the scope of plenary Executive power, because Congress is acting under the Necessary and Proper Clause to enforce the Executive's Article II prerogatives.¹⁸²

The state can argue that under a separation-of-powers doctrine (as distinguished from the "subject matter limitation" proposed in the Tenth Amendment analysis above), Congress may not use its Article II power to effect against states an action that the Executive alone could not effect.¹⁸³ This is a high hurdle to leap because of the Executive's broad foreign affairs power, but there is some helpful case law for the state.

First, dicta in the "Pentagon Papers" case implies that the Supreme Court finds some constitutional protections to be fundamental to "the very foundation of constitutional government."¹⁸⁴ The Court refused to enjoin newspapers from publishing government documents, even over government arguments of national security concerns: "The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment."¹⁸⁵ The state challenging a Congressional Act prohibiting the death penalty can argue that even if *Missouri v. Holland* overrides the Tenth Amendment, the Constitution's structure—i.e., the very fact that it provides for state sovereignty and a check-and-balance system—is at least as "fundamental" as the First Amendment. However, because the "Pentagon Papers" case is only a plurality decision, and because at least one Justice believed that Congressional legislation itself denied the Executive this injunctive power,¹⁸⁶ a state might not want to rely too heavily on this case when challenging a congressional Act.

*Youngstown Sheet & Tube*¹⁸⁷ gives a state better ammunition for its argument. There, the Supreme Court considered, and rejected as unconstitutional, an Executive Order that sought to nationalize steel mills in the interest of preventing a labor strike and ensuring a source of steel supply for the war effort.¹⁸⁸ The state can cite *Youngstown's* holding that "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."¹⁸⁹ The state can argue

182. *Holland*, 252 U.S. at 431.

183. See Wilson, *supra* note 152, at 1114 (discussing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). See also Yoo, *supra* note 14, at 839-840 (discussing the Framers' textual decision to enumerate certain powers in Article I and others in Article II, with the effect of restricting most lawmaking functions to Congress rather than the Executive, even when the Executive acts pursuant to plenary power).

184. *New York Times Co. v. United States*, 403 U.S. 713, 720 (1971) (Black, J., concurring) (quoting *DeJonge v. Oregon*, 299 U.S. 353, 365).

185. *Id.* at 719 (Black, J., concurring).

186. See *id.* at 744 (Marshall, J., concurring).

187. 343 U.S. 579 (1952).

188. *Id.* at 582-83.

189. *Id.* at 587.

that an Executive treaty that binds the federal government to promulgate certain federal laws and influence state laws— as does the ACHR, with its “Federal States” section— represents a lawmaking function, and one beyond Presidential power. If the Executive exceeded Article II power in signing the treaty, Congress’s enabling legislation for that same treaty is neither necessary nor proper.¹⁹⁰

Finally, a state can argue a compelling prudential consideration in favor of a structural federalism check: even if neither the Constitution nor precedent outright prohibits Congress from passing a national juvenile death penalty prohibition, the Supreme Court’s blessing on such an Act would open the door to a cascade of nationalist powers neither intended nor desired by the Framers. *Lopez* recognizes this possibility and firmly decides against such an expansion of federal power.¹⁹¹ *Jones*, while its language is not as compelling as that of *Lopez*,¹⁹² cements *Lopez* in Supreme Court jurisprudence by following its general anti-nationalist tone.

b. History of Congressional Deference

Although Congressional goodwill is not legally binding, a state can argue that Congress’ history of deference to states’ rights in the context of human rights treaties evinces a general belief among the political branches that the Constitution protects a state’s right to enforce its own criminal laws.¹⁹³ “Political branches . . . often choose to protect state interests over foreign relations interests when the two appear to clash . . . a variety of international human rights treaties . . . create numerous potential conflicts with state law.”¹⁹⁴

190. Congress could, however, authorize the President to sign such a treaty as part of the Congressional lawmaking function. See *id* at 585.

191. *Lopez*, 514 U.S. at 567-68

To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road . . . but we decline here to proceed any further. To do so would require us to conclude . . . that there never will be a distinction between what is truly national and what is truly local This we are unwilling to do.
(internal citations omitted).

192. *Jones*, 529 U.S. at 857-58 (following *Lopez* in its unwillingness to construe a Federal statute to criminalize state activity on basis of the Commerce power, but implying that if Congress had clearly spoken the result might be different).

193. See *Yoo*, *supra* note 14, at 807-08 (“Some human rights agreements have languished in the Senate for up to 30 years Senate leaders opposed several of these treaties because of the concern that they require more expansive individual rights than those in the Constitution.”).

194. Goldsmith, *supra* note 44, at 1675. See also Bradley, *supra* note 9, at 444 (discussing deference).

When the Senate ratifies treaties that affect domestic law, it usually attaches to the ratification a set of “reservations, understandings, and declarations . . . that limit the treaties’ effect on domestic law.”¹⁹⁵ Some human rights treaties invite legislative “overlap and conflict . . . at the state level.”¹⁹⁶ The ICCPR in particular triggers Congressional concern because its provisions seek to override state law.¹⁹⁷ The ACHR and CRC, as discussed above, threaten to do the same if ratified. When the United States established its reservation to the ICCPR, it clarified that part of its reason for doing so was to retain “the constitutional balance of authority between State and Federal governments.”¹⁹⁸ Although certainly the Senate can decide to ratify those treaties, the state can assert (albeit a bit hyperbolically) that rejecting this deference to states’ rights—a move that fundamentally calls into question the United States’ three-pronged governmental system as a whole—might harm the United States’ international image even more than would the irritating practice of executing juvenile offenders.

VI. CONCLUSION

If Congress adopts the international majority’s standard against executing juvenile offenders, internalizes that standard with an Act that enables a treaty or stands alone under Congressional foreign commerce power, and supports its decision with a congressional record that shows a rational basis for the Act, a state will have a hard time challenging such action on any clearly-established legal or constitutional grounds. The Supreme Court, considering such a challenge, can choose to follow one of two paths. It can find that that the United States federalist model must shift to accommodate the United States’ greater role as a global citizen-State. Under that rubric, the Supreme Court could easily decide that Congress’ reach in pursuit of that goal extends to tinkering with states’ criminal laws.

Conversely, the Court can support the state legislation in favor of a greater concern for states’ interest in promulgating their own criminal laws. Although the Constitution does commit most federal affairs to the nationalist agenda, “[p]erhaps states need to be recognized as not just the objects of customary international law, but also as its subjects, and acknowledged as potential contributors to its norms.”¹⁹⁹ And while “[s]tate initiatives to protect human

195. Bradley, *supra* note 9, at 428 (1998). See also Goldsmith, *supra* note 44, at 1675 (making the same point).

196. Bradley, *supra* note 9, at 397 (1998). See also Dorsen, *supra* note 135, at 152-53 (discussing the overlap in the context of individual civil rights).

197. See Goldsmith, *supra* note 44, at n.235.

198. *Id.* (quoting S. Rep. No. 102-23, at 18-19 (1992)).

199. Swaine, *supra* note 7, at 354.

rights in places like South Africa and Burma are striking in part because they seem unlikely,"²⁰⁰ that is no reason to exclude states-*qua*-states from the arena of international human rights initiatives. Perhaps U.S. constituent states are willing to become active and educated participants in the international juvenile death penalty debate. If so, a Supreme Court decision approving a Congressional fiat that not only extinguishes states' laws but also excludes states from further participation in the internalization process is both unnecessarily patriarchal and a dangerous precedent.

200. *Id.* at 343.