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THE TREATY POWER AND AMERICAN FEDERALISM

*Curtis A. Bradley**

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INTRODUCTION

For much of this century, American foreign affairs law has assumed that there is a sharp distinction between what is foreign and what is domestic, between what is external and what is internal. This assumption underlies a dual regime of constitutional law, in which federal regulation of foreign affairs is subject to a different, and generally more relaxed, set of constitutional restraints than federal regulation of domestic affairs. In what is perhaps its most famous endorsement of this proposition, the Supreme Court stated in 1936 that "the federal power over external affairs [is] in origin and essential character different from that over internal affairs."¹ For a variety of reasons, however, the distinction between domestic and foreign affairs has been eroding in recent years, and this trend is likely to continue.² As a result, there will be an increasing need to reexamine the differential treatment of federal foreign affairs powers.

This Article reexamines one example of such differential treatment — the purported immunity of the treaty power from federalism limitations. The Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."³ Since the adoption of the Constitution, the President has exercised this power to commit the United States to hundreds of international obligations. The President also has committed the United States to thousands of additional obligations without going through the Article II process, by means of so-called "executive agreements."⁴ The treaties entered into by the President are deemed by the Constitution to be part of the supreme law of the land,⁵ and the Supreme Court has construed this supremacy to ex-

1. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

2. See THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 8-9 (1992); Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1442 (1994); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1670-77, 1714-15 (1997).

3. U.S. CONST. art. II, § 2, cl. 2.

4. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 215 (2d ed. 1996) (noting that "[s]ince our national beginnings Presidents have made some 1600 treaties with the consent of the Senate" and that Presidents "have made many thousands of other international agreements without seeking Senate consent"). For a recent list of the many treaties and executive agreements to which the United States is currently a party, see OFFICE OF THE LEGAL ADVISOR, U.S. DEPT. OF STATE, PUB. NO. 8732, *TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JAN. 1, 1997* (1997).

5. See U.S. CONST. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ."). The Supreme

tend to executive agreements as well.⁶ This means, among other things, that treaties and executive agreements preempt inconsistent state law.⁷ Because of the supremacy of treaty law over state law, the treaty power implicates important issues concerning this country's federal system of government.

A central principle underlying American federalism, often recited by the Supreme Court, is that the national government is one of limited, enumerated powers.⁸ A corollary of this principle is that when the federal government makes supreme federal law, it is restrained in what it can do either by inherent limits in the scope of its delegated powers, or by the Tenth Amendment's reservation of powers to the states, or both.⁹ To be sure, these restraints are not nearly as strong as they once were, and the Supreme Court's willingness to police these restraints has varied throughout U.S. history.¹⁰ Nevertheless, neither the Court nor most commentators deny the *existence* of such restraints. Even in the *Garcia* decision, the low point of judicial protection of federalism, the Court acknowledged that there are "limitation[s] on federal authority inherent in the delegated nature of Congress' Article I powers" and that

Court has held that this supremacy applies only to treaties that are "self-executing." See, e.g., *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). See generally Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INTL. L. 695 (1995) (discussing the self-execution requirement). The automatic supremacy of some treaties in the U.S. system distinguishes this country from many other countries, such as Great Britain, where treaties become domestic law only after they are implemented by the legislature. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 47-48 (4th ed. 1990) (describing the practice in Great Britain).

6. See *infra* note 36 and accompanying text.

7. For an early confirmation of the supremacy of treaties over state law, see *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-37 (1796) (Chase, J.). The other principal form of international law — customary international law — is not mentioned in the Supremacy Clause, and its domestic-law status is less certain. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (questioning the proposition that customary international law has the status of federal common law).

8. For recent statements by the Court to this effect, see, for example, *City of Boerne v. Flores*, 117 S. Ct. 2157, 2162 (1997); *United States v. Lopez*, 514 U.S. 549, 552 (1995); and *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). For earlier statements, see cases cited *infra* note 162.

9. See *New York v. United States*, 505 U.S. 144, 155-56 (1992). When I refer to the Tenth Amendment, I am referring, like the modern Supreme Court, to "any implied constitutional limitation on [the federal government's] authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution." *South Carolina v. Baker*, 485 U.S. 505, 511 n.5 (1988); see also *Printz v. United States*, 117 S. Ct. 2365, 2379 n.13 (1997) ("Our system of dual sovereignty is reflected in numerous constitutional provisions . . . and not only those, like the Tenth Amendment, that speak to the point explicitly.") (citation omitted).

10. See *infra* text accompanying notes 41-52, 263-65.

"[t]he States unquestionably do 'retai[n] a significant measure of sovereign authority.'"¹¹

This is not the conventional wisdom, however, with respect to the treaty power. Although the treaty power is understood as being subject to the individual rights protections of the Constitution,¹² and perhaps also to separation of powers restrictions,¹³ treaties and executive agreements are *not* thought to be limited either by subject matter or by the Tenth Amendment's reservation of powers to the states. As Professor Lori Damrosch has stated, "our constitutional law is clear: the treaty-makers may make supreme law binding on the states as to any subject, and notions of states' rights should not be asserted as impediments to the full implementation of treaty obligations."¹⁴ For the sake of convenience, I will refer to this conventional wisdom as the "nationalist view." The nationalist view has been endorsed by a number of prominent foreign affairs commentators,¹⁵ as well as by the influential *Restatement (Third) of the Foreign Relations Law of the United States*.¹⁶

As suggested by Professor Damrosch, the nationalist view of the treaty power has two components. First, largely on the basis of the Supreme Court's decision in *Missouri v. Holland*,¹⁷ it generally is understood today that "the Tenth Amendment, reserving to the several States the powers not delegated to the United States, does

11. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549-50 (1985) (quoting *EEOC v. Wyoming*, 460 U.S. 226, 269 (1983) (Powell, J., dissenting)); see also *Garcia*, 469 U.S. at 547 ("What has proved problematic is not the perception that the Constitution's federal structure imposes limitations on the Commerce Clause, but rather the nature and content of those limitations.").

12. See *Boos v. Barry*, 485 U.S. 312, 324 (1988); *Reid v. Covert*, 354 U.S. 1, 16-19 (1957) (plurality opinion).

13. See, e.g., HENKIN, *supra* note 4, at 195. Some commentators contend, for example, that an international agreement cannot be self-executing if it "would achieve what lies within the exclusive law-making power of Congress under the Constitution." See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. i (1987) [hereinafter RESTATEMENT (THIRD)]; but cf. RESTATEMENT (THIRD), *supra* reporters' note 6 (noting that "[t]here is no definitive authority" for such a rule). Some commentators also suggest that the treaty power is subject to the prohibitions in Article I, Section 9, such as the prohibition on granting titles of nobility. See RESTATEMENT (THIRD), *supra* § 302 cmt. b.

14. Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 530 (1991).

15. In addition to Professor Damrosch, see, for example, HENKIN, *supra* note 4, at 191, 197; Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENTARY 33, 34, 46-47 (1997).

16. See RESTATEMENT (THIRD), *supra* note 13, § 302 cmts. c-d; RESTATEMENT (THIRD), *supra* note 13, § 302 reporters' notes 2-3; RESTATEMENT (THIRD), *supra* note 13, § 303 cmt. b.

17. 252 U.S. 416 (1920). In *Holland*, the Court upheld a migratory bird protection statute as a valid implementation of a treaty with Great Britain, notwithstanding the argument (plausible at the time) that the statute exceeded Congress's domestic lawmaking powers. For a discussion of *Holland*, see *infra* text accompanying notes 185-94.

not limit the power to make treaties or other agreements.”¹⁸ Second, while it “was once widely accepted” that treaties could be made only with respect to matters of “international concern,”¹⁹ most commentators today either disagree with such a limitation or assume that it is insignificant, given that most matters upon which treaties are likely to be concluded can plausibly be characterized as of international concern.²⁰

In this Article, I question the nationalist view. As I explain, the two components of the nationalist view have developed in isolation. While either component might seem relatively unproblematic by itself, when considered together they violate the principle of limited, enumerated powers. The treaty power in our Constitution is a power to make supreme federal law. If such law can be made on any subject, without regard to the rights of the states, then the treaty power gives the federal government essentially plenary power vis-à-vis the states. Such plenary power, however, is exactly what American federalism denies. This inconsistency between the nationalist view and American federalism is particularly significant today, in light of the Supreme Court’s renewed commitment to protecting federalism and the rapidly expanding nature of this country’s treaty commitments.²¹

I should make clear at the outset the nature of my argument. I am not defending here the value of federalism, or judicial review of federalism, subjects that have generated enormous literature.²² My argument is simply that *if* federalism is to be the subject of judicial protection — as the current Supreme Court appears to believe — there is no justification for giving the treaty power special immunity from such protection. My argument is one against treaty power exceptionalism, not necessarily one in favor of federalism. In addition, I am not assuming here the legitimacy of any particular method of constitutional interpretation, such as originalism or textualism. Instead, I consider all the standard interpretive materials, including text, history, structure, and changed circumstances, and I

18. See RESTATEMENT (THIRD), *supra* note 13, § 302 cmt. d.

19. HENKIN, *supra* note 4, at 197.

20. See *infra* text accompanying notes 247-55.

21. See *infra* Part I.

22. For a recent survey of arguments for and against federalism, see DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995); see also Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484 (1987) (book review). For a useful discussion of various models of federalism protection, see Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563 (1994).

conclude that none of these materials justifies giving the treaty power special immunity from federalism limitations.

This Article proceeds in five parts. Part I describes why the relationship between the treaty power and American federalism is particularly significant today, in light of recent changes in the nature of treaty-making, as well as the recent federalism jurisprudence of the Supreme Court. Part II examines materials from the Founding period and the nineteenth century and concludes that, contrary to claims by its proponents, the nationalist view lacks substantial support in history. Part III recounts how the nationalist view became orthodoxy, beginning with the Supreme Court's 1920 decision in *Holland* and followed by the eventual academic repudiation of a subject matter limitation on the treaty power. Part IV then sets forth a critique of the nationalist view. In particular, it questions the three principal justifications for the nationalist view: that the treaty power is immune from federalism restrictions because that power has been exclusively delegated to the federal government; that federalism limitations are unnecessary because the political process is sufficient to protect states' rights; and that imposing federalism limitations on the treaty power would unduly interfere with the ability of the federal government to speak with one voice in foreign affairs. Part V argues that, while it may not be feasible to limit the treaty power by subject matter, this power should at least be subject to the same federalism limitations as Congress's legislative powers. To the extent that this conclusion would require overruling *Holland*, this Part argues that the justifications for stare decisis are weak in this context, given the substantial changes in both the nature of treaty-making and the scope of permissible federal legislation.

I. CONTEMPORARY SIGNIFICANCE OF THE FEDERALISM ISSUE

The relationship between the treaty power and American federalism is not a new issue. It has been a matter of controversy since the Founding of the Constitution. It also was the subject of substantial academic and official attention during both the early part of this century and the 1950s.²³ During the last several decades, however, it seems largely to have receded from view. In this Part, I explain why this issue is likely to come back into focus, and why it deserves our attention.

23. See *infra* text accompanying notes 177-81, 210-13.

A. *Changes in Treaty-Making*

To those unfamiliar with international law, it might seem that the treaty power would be an unlikely threat to federalism. Treaties, after all, concern the relations among nations, whereas federalism concerns the relationship between the national government and the constituent states. To put it differently, treaties concern *inter*-national relations whereas federalism concerns *intra*-national relations.

This dichotomy might have been accurate at one time in American history, when treaties were generally bilateral and regulated matters such as diplomatic immunity, military neutrality, and removal of trade barriers.²⁴ The nature of treaty-making, however, has undergone a radical transformation, especially in the years since World War II. As the *Restatement (Third) of Foreign Relations Law* explains, “[u]ntil recently, international law was essentially customary law: agreements made particular arrangements between particular parties, but were not ordinarily used for general law-making for states.”²⁵ During the latter part of this century, however, there has been a proliferation of treaties, such that treaty-making has now eclipsed custom as the primary mode of international law-making.²⁶ Moreover, many of these treaties take the form of detailed multilateral instruments negotiated and drafted at international conferences. These treaties resemble and are designed to operate as international “legislation” binding on much of the world.²⁷

Even more significant than these structural changes is the change in the *content* of modern treaty-making. While many treaties continue to concern matters traditionally viewed as *inter*-national in nature, numerous others concern matters that in the past countries would have addressed wholly domestically. This change in treaty-making is most evident in the area of international human rights law, which purports to regulate the relationship between nations and their own citizens. There is now general agreement “that how a state treats individual human beings, including its own citizens, in respect of their human rights, is not the state’s own business

24. See generally RALSTON HAYDEN, *THE SENATE AND TREATIES 1789-1817* (1920); ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS*, chs. V, VI (1947).

25. RESTATEMENT (THIRD), *supra* note 13, pt. I, introductory note, at 18.

26. See RESTATEMENT (THIRD), *supra* note 13, pt. I, introductory note, at 18; see also RESTATEMENT (THIRD), *supra* note 13, pt. III, introductory note, at 144.

27. See RESTATEMENT (THIRD), *supra* note 13, pt. III, introductory note, at 144; HENKIN, *supra* note 4, at 176; LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 42 (1995).

alone . . . but is a matter of international concern and a proper subject for regulation by international law.”²⁸ As a result, there are today a host of multilateral human rights treaties that purport to confer a variety of rights that individuals can assert against their own governments. These treaties address issues such as racial and gender equality, criminal procedure and punishment, and religious freedom.²⁹

This transformation in treaty-making is so fundamental that it alters the very essence of international commitments. As Professor Henkin has explained, “[h]uman rights law has shaken the sources of international law, reshaped its character, enlarged its domain.”³⁰ Because treaties now regulate matters that countries traditionally have considered internal, there is an increasing likelihood of overlap, and conflict, with domestic law. This is particularly so, given that “in certain important respects, international human rights norms are more rights-protective than the corresponding domestic law standards.”³¹ In a federalist system like the United States, this means that some of the overlap and conflict is likely to occur at the state level.

28. RESTATEMENT (THIRD), *supra* note 13, pt. VII, introductory note, at 144-45.

29. The most prominent human rights treaties include the Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448 [hereinafter *CRC*]; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85; the Convention on the Elimination of All Forms of Discrimination Against Women, S. EXEC. REP. NO. 103-38 (1994), 1249 U.N.T.S. 13, [hereinafter *CEDAW*]; the International Covenant on Civil and Political Rights, Dec. 19, 1966, S. EXEC. DOC. E, 95-2, (1978), 999 U.N.T.S. 171 [hereinafter *ICCPR*]; the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. EXEC. DOC. D, 95-2, (1978), 993 U.N.T.S. 3; the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. C, 95-2, (1978), 660 U.N.T.S. 195; and the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277. For a discussion of these and other human rights treaties, see generally RICHARD B. LILICH & HURST HANNUM, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* (3d ed. 1995).

30. Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INTL. & COMP. L. 31, 36 (1995-96); see also John P. Humphrey, *The Revolution in the Law of Human Rights*, 4 HUM. RTS. 205, 208 (1975) (describing this change as the most “radical development in the whole history of international law”). For discussions of how this new international law developed, see Louis Henkin, *Introduction to THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 1-31 (1981); and Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1 (1982).

31. Nadine Strossen, *United States Ratification of the International Bill of Rights: A Fitting Celebration of the Bicentennial of the U.S. Bill of Rights*, 24 U. TOL. L. REV. 203, 204 (1992); see also Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 567 (1997) (“The human rights movement is now turning its attention to conditions in the United States, and it is increasingly finding instances in which such practices fall short of international standards.”).

Another important development during this period has been the increasing use by the President of executive agreements. Executive agreements are, quite simply, international agreements concluded by the President without the two-thirds senatorial advice and consent specified in Article II of the Constitution.³² Executive agreements approved in advance or after the fact by a majority of both houses of Congress are referred to as "congressional-executive agreements."³³ Executive agreements concluded by the President alone are referred to as "sole executive agreements."³⁴ The Supreme Court has endorsed the constitutional legitimacy of executive agreements,³⁵ and it has held that even sole executive agreements are supreme federal law and thus supersede inconsistent state law.³⁶ The Court has not addressed the permissible scope of executive agreements, but the prevailing view today is that at least congressional-executive agreements are fully interchangeable with treaties and thus may be used any time that a treaty would be proper.³⁷

While executive agreements were relatively infrequent during the nineteenth and early twentieth centuries, the vast majority of international agreements concluded by the President in the latter half of this century have been in the form of executive agreements rather than Article II treaties.³⁸ Commentators have debated at various times the constitutional legitimacy of such agreements,³⁹

32. See RESTATEMENT (THIRD), *supra* note 13, § 303 cmt. a.

33. See RESTATEMENT (THIRD), *supra* note 13, § 303 cmt. e.

34. See RESTATEMENT (THIRD), *supra* note 13, § 303 cmt. g.

35. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 675-88 (1981) (upholding sole executive agreement suspending state-law-based claims against Iran); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (including in the list of the President's unenumerated powers "the power to make such international agreements as do not constitute treaties in the constitutional sense").

36. See *United States v. Pink*, 315 U.S. 203, 230 (1942); *United States v. Belmont*, 301 U.S. 324, 331 (1937).

37. See RESTATEMENT (THIRD), *supra* note 13, § 303 cmt. e; HENKIN, *supra* note 4, at 217, 229; Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 805 (1995); see also RESTATEMENT (THIRD), *supra* note 13, § 302 cmt. d ("[T]he Tenth Amendment, reserving to the several States the powers not delegated to the United States, does not limit the power to make treaties or other agreements.") (emphasis added). But see Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998) (questioning the interchangeability of treaties and executive agreements). There is less agreement concerning the proper scope of sole executive agreements. See HENKIN, *supra* note 4, at 222.

38. See BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 204 (2d ed. 1995); LOCH K. JOHNSON, *THE MAKING OF INTERNATIONAL AGREEMENTS* 13 (1986); LAWRENCE MARGOLIS, *EXECUTIVE AGREEMENTS AND PRESIDENTIAL POWER IN FOREIGN POLICY* 30-31, 105-06 (1985).

39. For a debate during the 1940s, see Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (1944); Myres S. McDougal & Asher Lans, *Treaties and*

but the issue may be largely academic in light of the widespread and now longstanding nature of the practice and Congress's acquiescence to it. The rise of executive agreements is relevant to the federalism question because the two-thirds Senate consent requirement in Article II, which these agreements bypass, has long been thought to provide special protection of states' rights.⁴⁰

B. *Supreme Court's Renewed Commitment to Federalism*

As the above changes in treaty-making began to unfold after World War II, concerns were in fact raised regarding their potential impact on American federalism. These concerns were expressed most prominently in connection with debates in the 1950s over the proposed "Bricker Amendment" to the Constitution.⁴¹ This controversy died out, however, in part because of the Supreme Court's expanded reading of Congress's commerce and other powers, beginning in the New Deal era and continuing into the civil rights era.⁴² Once it became understood that the federal government had almost unlimited domestic lawmaking powers, the particular scope of the treaty power (or executive agreement power) became less relevant.⁴³ Although the Supreme Court did attempt to reinvigorate the Tenth Amendment in its 1976 *National League* decision,⁴⁴ this effort was short-lived, as a majority of the Court overruled that decision just nine years later in the *Garcia* case.⁴⁵ Thus, once again, the Court seemed to allow the federal government essentially unlimited lawmaking power vis-à-vis the states.⁴⁶

Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy (pts. 1 & 2), 54 YALE L.J. 181, 534 (1945); Edwin Borchard, *Treaties and Executive Agreements — A Reply*, 54 YALE L.J. 616 (1945). For a more recent debate, see Ackerman & Golove, *supra* note 37, and Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1223 (1995).

40. See *infra* text accompanying notes 118-22, 288-89.

41. See *infra* text accompanying notes 210-16.

42. See, e.g., *United States v. Darby*, 312 U.S. 100, 113-17 (1941); *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257-58 (1964); *Katzenbach v. Morgan*, 384 U.S. 641, 651-58 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438-44 (1968); see also Ackerman & Golove, *supra* note 37, at 857 (noting this point).

43. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 227 (2d ed. 1988); Ackerman & Golove, *supra* note 37, at 857, 898; Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 905 (1959).

44. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

45. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

46. Cf. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1487 (1994) (noting that *Garcia* made explicit what was implicit in the New Deal cases); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1311 (1997) (stating that "it was in *Garcia* that the Court announced that it no longer would examine the constitutionality of

During the 1990s, however, the Court has shown a willingness in a number of areas to limit the scope of Congress's domestic powers, and to enforce the rights of the states against federal regulation. For example, in *New York v. United States*, the Court invalidated a federal statute that in effect compelled state disposal of radioactive waste as "inconsistent with the federal structure of our Government established by the Constitution";⁴⁷ in *United States v. Lopez*, the Court invalidated a federal statute criminalizing the possession of firearms near school zones as exceeding Congress's powers under the Commerce Clause;⁴⁸ in *City of Boerne v. Flores*, the Court invalidated the Religious Freedom Restoration Act (RFRA)⁴⁹ on the ground that it exceeded Congress's powers under the Fourteenth Amendment;⁵⁰ and in *Printz v. United States*, the Court invalidated a federal statute requiring state law enforcement officials to conduct background checks on prospective handgun purchasers as "compromis[ing] the structural framework of dual sovereignty."⁵¹ The recent Court also has protected federalism in other, less direct ways — for example, by narrowing the situations in which Congress can override the states' Eleventh Amendment immunity from suit.⁵²

The Supreme Court's renewed commitment to protecting federalism is likely to increase the importance of the scope of the treaty power. If the treaty power is immune from federalism restrictions, as the nationalist view maintains, then it may be a vehicle for the enactment of legislative changes that fall outside of Congress's domestic lawmaking powers.⁵³ Indeed, commentators recently have begun to seize on this possibility.

federal legislation that threatened to violate the sovereignty of the states"). For additional discussion of *Garcia* and its reasoning, see *infra* text accompanying notes 292-93.

47. 505 U.S. 144, 177 (1992).

48. See 514 U.S. 549, 567-68 (1995).

49. 42 U.S.C. §§ 2000bb-2000bb-4 (1994). The statute disallowed federal or state regulations that substantially burdened the exercise of religion, absent a compelling government interest, and even then only if the least restrictive means were used. See 42 U.S.C. § 2000bb-1.

50. See 117 S. Ct. 2157, 2172 (1997). In light of *Lopez*, RFRA presumably could not be justified as an exercise of Congress's commerce powers. See Neuman, *supra* note 15, at 34; William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 303 n.33 (1996).

51. 117 S. Ct. 2365, 2383 (1997).

52. See *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114, 1131-32 (1996) (holding that the Commerce Clause does not give Congress the power to override Eleventh Amendment immunity).

53. It is well settled that Congress, under the Necessary and Proper Clause, has the power to implement valid treaties. See, e.g., *Missouri v. Holland*, 252 U.S. 416, 432, 435 (1920); *Neely v. Henkel*, 180 U.S. 109, 121 (1901); *United States v. Lue*, 134 F.3d 79, 82 (2d Cir.

Professor Gerald Neuman, for example, has argued that even if RFRA is not a valid exercise of Congress's domestic lawmaking powers, it can be justified constitutionally as part of this country's implementation of a treaty — the International Covenant on Civil and Political Rights (ICCPR).⁵⁴ The ICCPR, which the United States ratified in 1992, contains a long list of individual rights that cannot be infringed by member countries. One of these rights is a right "to freedom of thought, conscience and religion," which the Convention says includes a right "to manifest [one's] religion or belief in worship, observance, practice and teaching."⁵⁵ The Convention also says that the only limitations that may be imposed on this right are those "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."⁵⁶

Neuman makes the plausible argument that these provisions authorize Congress to grant religious freedom protection such as is reflected in the RFRA statute.⁵⁷ As for the federalism concerns associated with the statute, Neuman argues that "[t]he mere fact that the treaty may require the extension of religious exemptions within areas of traditional state regulation creates no obstacle to its validity" in light of the well-settled proposition that the treaty power is "free from any 'invisible radiation from the general terms of the Tenth Amendment.'"⁵⁸ In other words, even though the Supreme Court has declared the RFRA statute to be "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens,"⁵⁹ this intrusion is entirely proper, says Neuman, as long as it is enacted pursuant to a treaty. This is what the nationalist view entails, and Neuman has only scratched the surface.

1998); RESTATEMENT (THIRD), *supra* note 13, § 111 cmt. j; *see also* U.S. CONST. art. I, § 8, cl. 18 (giving Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

54. *See* Neuman, *supra* note 15, at 49-53.

55. ICCPR, *supra* note 29, art. 18(1).

56. *Id.* art. 18(3).

57. *But see* Daniel O. Conkle, *Congressional Alternatives in the Wake of City of Boerne v. Flores: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. ARK. LITTLE ROCK L.J. 633, 662 (1998) (arguing that "anything close to a verbatim reenactment of RFRA would appear to go well beyond what [the ICCPR] requires").

58. Neuman, *supra* note 15, at 46 (quoting *Missouri v. Holland*, 252 U.S. 416, 434 (1920)).

59. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2171 (1997).

C. Other Examples

The RFRA example is just one of many instances in which the treaty power might be used to overcome federalism restraints on domestic lawmaking. Below I consider a number of other examples, some actual and some speculative, where this issue might arise.

1. Human Rights Standards

There are numerous instances in which Congress might use human rights treaties to overcome federalism restraints on its law-making power. Consider, for example, the Convention on the Rights of the Child,⁶⁰ which became effective in 1990 and has now been ratified by almost every nation in the world. This treaty — which the United States has signed but has not yet ratified — contains a number of provisions that may be inconsistent with current U.S. family law.⁶¹ This inconsistency has prompted federalism concerns⁶² because family law is a subject that largely has been regulated in this country at the state rather than federal level.⁶³

60. CRC, *supra* note 29.

61. See Homer H. Clark, Jr., *Children and the Constitution*, 1992 U. ILL. L. REV. 1, 36-37; see also CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW (Cynthia Price Cohen & Howard A. Davidson eds., 1990) (discussing various aspects of the Convention). The Convention purports to give children both certain procedural rights as well as substantive rights concerning such things as expression, belief, association, privacy, education, and even a certain standard of living. See CRC, *supra* note 29, arts. 12-27.

62. See, e.g., Richard E. Crouch, *International Declaration/Convention Efforts and the Current Status of Children's Rights in the United States*, in THE FAMILY IN INTERNATIONAL LAW: SOME EMERGING PROBLEMS 19, 19-21 (Richard B. Lillich ed., 1981) (noting the potentially large impact the Convention could have on American federalism); Susan Kilbourne, *U.S. Failure to Ratify the U.N. Convention on the Rights of the Child: Playing Politics with Children's Rights*, 6 TRANSNATL. L. & CONTEMP. PROBS. 437, 440-56 (1996) (discussing various criticisms of the Convention, including those based on federalism); James J. Kilpatrick, *Treaty on Children Adds Up to Bad Law*, ST. PETERSBURG TIMES, May 18, 1991, at 21A (criticizing the Convention as creating "the prospect of one massive federal code on the care and feeding of children"). For a discussion of other ways in which family law is increasingly becoming the subject of international agreements, see Adair Dyer, *The Internationalization of Family Law*, 30 U.C. DAVIS L. REV. 625 (1997).

63. See, e.g., *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.") (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)). See generally Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1821-25 (1995) (explaining this point). This is not to say that family law is completely a matter of state law in this country. Indeed, in recent years, family law has come to be "very substantially affected by federal constitutional doctrine, by federal statutes and by private law decisions of the federal courts." HOMER H. CLARK, JR. & CAROL GLOWINSKY, *CASES AND PROBLEMS ON DOMESTIC RELATIONS* 2 (4th ed. 1990); see also Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1298 (1998) (challenging "the existence of an exclusively local tradition in family law").

Similar concerns have been raised with respect to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁶⁴ various sections of which “provide for the elimination of discrimination against women in areas of government that have historically been considered political functions of the several states, such as regulation of family relations and education.”⁶⁵ The Convention includes provisions addressing, among other things, discrimination “in recreational activities, sports and all aspects of cultural life,” as well as “in all matters relating to marriage and family relations.”⁶⁶ The United States has signed but has not yet ratified this Convention, although the Clinton administration has been pressing the Senate for approval.⁶⁷

Still another example is the relationship between international law and the controversial issue of affirmative action. Some states, such as California, have begun to cut back on race-based and other affirmative action programs.⁶⁸ In response, two scholars recently made the claim that such affirmative action, even if no longer required as a matter of U.S. domestic law, may be mandated by human rights treaties to which the United States is a party.⁶⁹

2. Criminal Law and Punishment

American criminal law, another area of law primarily regulated in this country at the state level, also has become the subject of treaty-making. For example, the statute implementing the Genocide Convention makes it a federal crime to kill or cause serious

64. CEDAW, *supra* note 29.

65. Julia Ernst, *U.S. Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 3 MICH. J. GENDER & LAW 299, 320 (1995); see also Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INTL. L. & ECON. 49 (1997) (discussing proposed U.S. reservations, understandings, and declarations regarding the Convention, including proposed federalism understanding); Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution be an Obstacle to Human Rights?*, 23 HASTINGS CONST. L.Q. 727 (1996) (describing federalism and other concerns that have been raised regarding the Convention).

66. CEDAW, *supra* note 29, arts. 13, 16.

67. See, e.g., Ann Scales, *Hillary Clinton, Madeleine Albright Push for Women's Pact Approval*, BOSTON GLOBE, Mar. 12, 1998, at A5.

68. See California Civil Rights Initiative, CAL. CONST. art. 1, § 31(a) (1996) (“The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”).

69. See Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423 (1997); Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 MICH. J. INTL. L. 659, 674 (1997); see also Editorial, *U.N. Convention Ties U.S. to Affirmative Action*, NATIONAL CATHOLIC REPORTER, Oct. 17, 1997, at 32 (arguing that treaties require racial and gender affirmative action).

bodily harm in this country "with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such."⁷⁰ A similar example is the recently-enacted statute implementing the Hostage Convention, which federalizes garden-variety kidnappings in this country whenever a foreign citizen is involved.⁷¹ It is possible that statutes such as these raise federalism concerns, given that, "[u]nder our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'"⁷²

Criminal punishment, especially the death penalty, presents an additional area of potential conflict between treaty law and federalism. Despite international criticism,⁷³ the United States is imposing the death penalty with increasing regularity, primarily at the state level. In light of recent Supreme Court precedent, it seems unlikely that the federal government has the power under either Article I or the Fourteenth Amendment to abolish state use of the death penalty, assuming states are not imposing it in a manner that violates the Eighth Amendment.⁷⁴ According to the nationalist view, however, this limitation on the federal government's power would disappear if the federal government entered into a treaty outlawing capital punishment.⁷⁵

70. 18 U.S.C. § 1091(a) (1994); *see also* *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995) (noting that the statute applies to private conduct "if the crime is committed within the United States or by a U.S. national").

71. *See* 18 U.S.C. § 1203 (1994). For a recent decision rejecting federalism challenges to this statute, *see United States v. Lue*, 134 F.3d 79 (2d Cir. 1998). *See also* *United States v. Lin*, 101 F.3d 760, 765-66 (D.C. Cir. 1996) (applying the statute even though the defendant's "actions took place entirely in the District of Columbia, did not constitute international acts of hostage-taking . . . did not involve the United States government" and "could as well have supported charges under local District of Columbia law"); *United States v. Lopez-Flores*, 63 F.3d 1468, 1470 (9th Cir. 1995) (holding that "the statute is constitutional as an exercise of Congress' plenary powers over aliens and foreign relations"). For a discussion of the *Lue* case, *see infra* text accompanying notes 362-67.

72. *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (quotation marks omitted))).

73. *See, e.g.*, David Stout, *Do as We Say, Not as We Do: U.S. Executions Draw Scorn from Abroad*, N.Y. TIMES, Apr. 26, 1998, § 4 at 4 (describing some of this criticism); Elizabeth Olson, *U.N. Report Criticizes U.S. for 'Racist' Use of Death Penalty*, N.Y. TIMES, Apr. 7, 1998, at A17 (same).

74. *See* Spiro, *supra* note 31, at 576 n.28.

75. There is no such treaty, and the likelihood of the United States ratifying such a treaty is probably small. Some specific applications of the death penalty, however, are already the subject of treaty. The International Covenant on Civil and Political Rights, which the United States has ratified, *see supra* text accompanying notes 54-56, provides, among other things, that the "[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." ICCPR, *supra* note 29, art. 6(5). In consenting to the treaty, the Senate stated that, "subject to its Constitutional constraints," the United States reserves the right "to impose capital punishment on any per-

Although involving a more traditional treaty, a recent incident dramatically illustrates the potential conflict between the treaty power and state authority to impose the death penalty. In April 1998, the International Court of Justice in The Hague (the "ICJ") ordered the United States to "take all measures at its disposal" to stay the execution in Virginia of Angel Breard, a Paraguayan national, while the Court considered a suit brought against the United States by Paraguay.⁷⁶ The suit alleged that Virginia had violated a multilateral treaty, the Vienna Convention on Consular Relations,⁷⁷ by failing to advise Breard of his right to contact and request assistance from the Paraguayan consulate, and that, as a result, Breard's conviction and sentence should be vacated.⁷⁸

In response to the ICJ's order, the State Department asked Virginia's governor voluntarily to stay the execution, but he refused to do so, stating that delaying the execution "would have the practical effect of transferring responsibility from the courts of the Commonwealth [of Virginia] and the United States to the International Court."⁷⁹ The U.S. Supreme Court also refused to stay the execution, concluding that "[i]f the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him."⁸⁰ The Justice Department, in a brief submitted to the Supreme Court, stated that even if the ICJ's order were binding, the federal government did not have the power to compel Virginia's compliance with it because "our federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States."⁸¹

son (other than a pregnant woman) . . . including such punishment for crimes committed by persons below eighteen years of age." 138 CONG. REC. 8070 (Apr. 2, 1992) (U.S. Senate resolution advising and consenting to ratification of the International Covenant on Civil and Political Rights). Cf. Michael H. Posner & Peter J. Spiro, *Adding Teeth to United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209, 1213 n.24 (1993) (noting that "federalism concerns would prove no bar to the preemption of state law" by these provisions in the International Covenant on Civil and Political Rights).

76. See Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 37 I.L.M. 810, 819 (Apr. 9, 1998) (order granting request for indication of provisional measures).

77. Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

78. See Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 37 I.L.M. 810, 814 (Apr. 9, 1998) (order granting request for indication of provisional measures).

79. Commonwealth of Virginia, Office of the Governor, Press Office, Statement by Governor Jim Gilmore Concerning the Execution of Angel Breard (Apr. 14, 1998).

80. Breard v. Greene, 118 S. Ct. 1352, 1356 (1998).

81. Brief for the United States as Amicus Curiae at 51, Breard v. Greene, 118 S. Ct. 1352 (1998) (No. 97-1390).

A number of commentators, by contrast, have argued that, in light of *Holland*, such federalism limits were not applicable.⁸²

3. Commerce and Trade

Commercial and other private law treaties also have the potential to intrude on traditional state prerogatives. As one commentator recently explained, "[a]t issue in the ratification process . . . is nothing less than federal arrogation of traditional state competence in the law governing private, and in particular commercial, relations."⁸³ The United States already is a party to the Convention on Contracts for the International Sale of Goods.⁸⁴ This Convention governs the sale of goods in a variety of international contract situations, although contracting parties are allowed to opt out of its provisions.⁸⁵ In this country, the Convention is considered a self-executing treaty, and thus, when it applies, it preempts inconsistent state law, including the Uniform Commercial Code.⁸⁶

Another sector of private law that may become the subject of a treaty is the enforcement of judgments. A number of countries, including the United States, currently are negotiating a proposed multilateral treaty, in connection with The Hague Conference on Private International Law, that would establish uniform standards for the recognition and enforcement of foreign judgments.⁸⁷ This is a subject that has been regulated in this country primarily by the states,⁸⁸ and commentators expressed concern as late as the 1950s that a treaty on this subject might exceed federal power.⁸⁹ A simi-

82. See, e.g., Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INTL. L. 679 (1998); Carlos Manuel Vazquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INTL. L. 683 (1998).

83. Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 690 (1998).

84. See United Nations Conference on Contracts for the International Sale of Goods, *opened for signature* Apr. 11, 1980, 19 I.L.M. 668 (1980) [hereinafter *Conference on Contracts*]. The United States became a party to this treaty in 1988.

85. See *Conference on Contracts*, *supra* note 84, at 671.

86. See, e.g., *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027-28 (2d Cir. 1995); *Filanto, S.p.A. v. Chlewich Intl. Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992), *appeal dismissed*, 984 F.2d 58 (2d Cir. 1993).

87. See generally Symposium, *Could a Treaty Trump Supreme Court Jurisdictional Doctrine?*, 61 ALBANY L. REV. 1159-1307 (1998) (discussing proposed multilateral convention governing jurisdiction and enforcement of judgments); Symposium, *Enforcing Judgments Abroad: The Global Challenge*, 24 BROOKLYN J. INTL. L. 1-220 (1998) (same).

88. See GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 938-39 (3d ed. 1996).

89. See Kurt H. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 U. PA. L. REV. 323, 359-60 (1954); see also Charles Evans Hughes, *The Outlook for Pan Americanism — Some Observations on the Sixth International Conference of American States*, 22 PROC. AM. SOC. INTL. L. 1, 12 (1928) (ex-

lar example is the Convention on the Law Applicable to Succession to the Estates of Deceased Persons,⁹⁰ which would establish choice of law rules concerning inheritance issues. This "Convention would seem to change hallowed rules of U.S. state law without the scrutiny that such a change would get in a state legislature."⁹¹

An additional example in commercial law is the protection of intellectual property, a subject increasingly regulated by treaty.⁹² Intellectual property protection is governed extensively in this country by federal law, but there are recognized limits to the scope of permissible federal protection.⁹³ This has prompted one commentator recently to wonder whether, in light of *Holland*, the federal government could by treaty confer stronger intellectual property rights than it would otherwise have the power to do pursuant to its domestic lawmaking powers.⁹⁴

Federalism concerns also exist with respect to the GATT and NAFTA trade agreements, which were concluded by the President by means of executive agreements rather than the Article II treaty process.⁹⁵ Both of these agreements contain provisions that affect

pressing doubts regarding the ability of the United States to enter into a treaty concerning private international law). *But cf.* HENKIN, *supra* note 4, at 471-72 n.87 ("Today, few would accept — on any theory — the conclusion . . . that the United States could not adhere to a convention establishing uniform principles of private international law.").

90. Convention on the Law Applicable to Succession to the Estates of Deceased Persons, Aug. 1, 1989, 28 I.L.M. 150.

91. CARTER & TRIMBLE, *supra* note 38, at 175; *see also* Jeffrey Schoenblum, *Choice of Law and Succession to Wealth: A Critical Analysis of the Ramifications of the Hague Convention on Succession to Decedent's Estates*, 32 VA. J. INTL. L. 82 (1991) (discussing and criticizing the Convention).

92. *See generally* Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INTL. L. 505, 546-49 (1997) (discussing some of the treaties in this area).

93. *See, e.g.*, *Feist Publications, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 345 (1991) (holding that, under the Copyright Clause, Congress has the power to confer copyright protection only on original works).

94. *See* Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INTL. L. 369, 422 n.302 (1997); *see also* Lawrence Lessig & Pamela Samuelson, *In Defiance of the Public Interest*, WASH. POST, July 13, 1998, at A21 (arguing that proposed implementing legislation for a recent intellectual property treaty "would throw this constitutional balance [between the need for encouraging creativity and the public interest in having access to knowledge and innovation] out of kilter"); *cf.* Michael B. Gerdes, Comment, *Getting Beyond Constitutionally Mandated Originality as a Prerequisite for Federal Copyright Protection*, 24 ARIZ. ST. L.J. 1461, 1465-68 (1992) (relying on *Holland* by analogy to argue that Congress can enact copyright legislation pursuant to its commerce powers that it could not enact pursuant to its Copyright Clause powers).

95. *See generally* George A. Bermann, *Constitutional Implications of U.S. Participation in Regional Integration*, 46 AM. J. COMP. L. 463, 466-67 (1998); Friedman, *supra* note 2, at 1453-60; David W. Leebron, *Implementation of the Uruguay Round Results in the United States*, in IMPLEMENTING THE URUGUAY ROUND 175 (John H. Jackson & Alan O. Sykes eds., 1997); Samuel C. Straight, Note, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216 (1995).

state regulatory authority.⁹⁶ Objections were made to the latest GATT agreement, for example, on the ground that it "impinged on matters that had been, and are generally, governed by state law, such as product-safety regulation, banking and insurance, and local 'tax breaks' and other subsidy practices."⁹⁷ Similarly, one commentator recently noted that the agreement may override state voter initiatives concerning the labeling of products.⁹⁸

4. *Environmental Protection*

The potential conflict between the treaty power and federalism is also evident in the area of environmental protection. The United States is a party to a number of treaties relating to the environment, some of which Congress has invoked or could invoke as a basis for its enactment of federal environmental legislation. In enacting the Endangered Species Act,⁹⁹ for example, Congress cited as a basis for its authority various treaties including the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere.¹⁰⁰ In light of the Supreme Court's decision in *United States v. Lopez*, it is arguable that some of these statutes, or at least certain applications of them, exceed Congress's powers under the commerce clause.¹⁰¹ If so, the constitutionality of these statutes may depend on the validity of the nationalist view of the treaty power.¹⁰²

96. See Friedman, *supra* note 2, at 1454-60.

97. HENKIN, *supra* note 4, at 168; see also William J. Aceves, *Lost Sovereignty?: The Implications of the Uruguay Round Agreements*, 19 FORDHAM INTL. L.J. 427, 469 (1995) (noting that "[t]he implications of [the latest GATT agreement] on state law are significant"); Friedman, *supra* note 2, at 1454 ("In sharp contrast to prior negotiations, the Uruguay Round of the GATT adopted rules in many areas that will affect state regulatory authority.").

98. See James T. O'Reilly, *Stop the World, We Want Our Own Labels: Treaties, State Voter Initiative Laws, and Federal Pre-emption*, 18 U. PA. J. INTL. ECON. L. 617 (1997). The NAFTA and GATT implementing statutes do take account of federalism concerns to some extent, in that they provide for a federal-state consultation process and allow only the federal government to challenge a state law as being in violation of the agreements. See 19 U.S.C. § 3312 (1994) (NAFTA); 19 U.S.C. § 3512 (1994) (GATT).

99. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. § 1531-44 (1994)).

100. See 16 U.S.C. § 1531(a); S. REP. NO. 93-307 (1973), reprinted in 1973 U.S.C.C.A.N. 2989, 2994. Another example is the statute at issue in *Holland* — the Migratory Bird Treaty Act — which implements the Convention for the Protection of Migratory Birds. See *infra* text accompanying notes 187-88.

101. To date, however, courts generally have rejected commerce clause challenges to federal environmental statutes. See, e.g., *National Assn. of Home Builders v. Babbitt*, 130 F.3d 1041, 1057 (D.C. Cir. 1997) (upholding provision in Endangered Species Act); *United States v. Olin Corp.*, 107 F.3d 1506, 1511 (11th Cir. 1997) (upholding application of the Comprehensive Environmental Response, Compensation, and Liability Act); *United States v. Bramble*, 103 F.3d 1475, 1480-82 (9th Cir. 1996) (upholding Eagle Protection Act).

102. See generally Gavin R. Villareal, Note, *One Leg to Stand On: The Treaty Power and Congressional Authority for the Endangered Species Act After United States v. Lopez*, 76

5. *Commandeering of State Governments*

Finally, consider the “commandeering” regulations invalidated by the Supreme Court in *New York v. United States*¹⁰³ and *Printz v. United States*.¹⁰⁴ It is not inconceivable that the federal government would conclude treaties addressing the subject matter of those cases — disposal of radioactive waste and background checks for handgun ownership. Indeed, although not directly on point, the United States recently signed a treaty that provides that the parties to it “shall adopt the necessary legislative or other measures to establish as criminal offenses under their domestic law the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials.”¹⁰⁵ According to the nationalist view, the ratification of relevant treaties presumably would allow Congress to re-enact the provisions invalidated in *New York* and *Printz*, notwithstanding the Supreme Court’s determination that they intruded too deeply on state sovereignty.¹⁰⁶

* * *

I do not mean to suggest that any of these examples necessarily should be viewed as an improper exercise of the treaty power. I mention them rather because they highlight the increasing tension between international law and this country’s federalist system. In light of this tension, the relationship between the treaty power and American federalism merits reexamination.

II. HISTORICAL UNDERSTANDING OF THE TREATY POWER

Proponents of the nationalist view of the treaty power sometimes rely on history to support their claims. In particular, they argue that the Founders did not intend either a states’-rights or a subject matter limitation on the treaty power and that the Supreme Court repeatedly rejected such limitations during the nineteenth

TEXAS L. REV. 1125 (1998) (arguing that the treaty power is currently the strongest source of authority supporting the constitutionality of the Endangered Species Act).

103. 505 U.S. 144 (1992).

104. 117 S. Ct. 2365 (1997).

105. Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials, *adopted* Nov. 14, 1997, art. IV, para. 1, 37 I.L.M. 143, 146 (1998); *see also* Raymond Bonner, *U.N. Panel May Approve Limit on Guns Despite N.R.A. Pleas*, N.Y. TIMES, Apr. 30, 1998, at A9 (describing a United Nations proposal to reduce trade in firearms).

106. *See, e.g.*, Neuman, *supra* note 15, at 52; Leebron, *supra* note 95, at 225 n.193; *cf.* Tribe, *supra* note 39, at 1260. *But see* HENKIN, *supra* note 4, at 467 n.75 (assuming, without explanation, that this could not be done by treaty).

century.¹⁰⁷ In fact, the historical record reveals a fairly consistent understanding that the treaty power was limited either by subject matter, states' rights, or both. This historical record may not by itself require contemporary rejection of the nationalist view, but it does undermine any strong historical claims for that view.

A. *Founding Period*

In the materials relating to the drafting and ratification of the Constitution, the only substantial discussions of the scope of the treaty power are contained in the records of the Virginia Ratifying Convention. Neither the records of the Federal Convention nor the *Federalist Papers* contain much discussion of this issue. Rather, the references to treaties in these materials primarily concern the process by which the federal government would conclude treaties and the proper governmental actors to be involved in this process.¹⁰⁸ Thus, for example, there was debate over whether to include the House of Representatives in the treaty process and over what proportion of the Senate should be required to approve a treaty.¹⁰⁹

Several general themes do emerge even from these materials, however, that may be relevant to the scope of the treaty power. First, the Founders believed that treaties should be difficult to make. As Professor Henkin explains, "the prevailing mood at the Convention was that it should not be too easy to make treaties. Even the 'nationalists' among the Framers neither desired nor expected many treaties."¹¹⁰ Thus, Gouverneur Morris observed that "[t]he more difficulty in making treaties, the more value will be set

107. See, e.g., HENKIN, *supra* note 4, at 189-94.

108. See generally Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties — The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1, 79-132 (1979); Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, 1 PERSP. AM. HIST. (n.s.) 233, 241-43 (1984); Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 253-68 (1990); see also Shackelford Miller, *The Treaty Making Power*, 41 AM. L. REV. 527, 529 (1907) ("At no time . . . did the convention discuss the scope or extent of the power; it merely considered the question as to where the power should be lodged — who should exercise it. The same is true as to the 'Federalist' . . ."); L.L. Thompson, *State Sovereignty and the Treaty-Making Power*, 11 CAL. L. REV. 242, 250 (1923) ("The members of the Constitutional Convention seem to have been concerned primarily with the question of who would exercise the treaty-making power.").

109. See, e.g., DEBATES IN THE FEDERAL CONVENTION OF 1787 [hereinafter DEBATES], reprinted in 5 ELLIOT'S DEBATES 469, 470 (Jonathan Elliot ed., 2d ed. 1888); Notes of James Madison (Aug. 23, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 392-93 (Max Farrand ed., rev. ed. 1937); Notes of James Madison (Sept. 7, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 538; SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION 262 (James H. Hutson ed. 1987) [hereinafter SUPPLEMENT]; see generally Bestor, *supra* note 108, at 93, 97-98, 109-10.

110. HENKIN, *supra* note 4, at 442 n.2.

on them,"¹¹¹ and James Madison noted that it had been too easy to make treaties under the Articles of Confederation.¹¹² This theme was echoed in the state ratification debates. During the Pennsylvania Convention, James Wilson, in commenting on the likely workload of the Senate, stated that the treaty power "should be very seldom exercised — . . . it will be but once in a number of years, that a single treaty will come before the senate."¹¹³

Second, the Founders contemplated that treaties would govern truly *inter-national* relations. The categories of treaties mentioned by the Founders concerned issues such as "war, peace, and commerce."¹¹⁴ Even Alexander Hamilton, who was no great defender of states' rights, emphasized in *The Federalist* that treaties are "not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign."¹¹⁵ This understanding was a natural adjunct of the Founders' belief that there was a clear distinction between domestic and foreign affairs. Indeed, it is this distinction that helped ensure, in the Founders' minds, that the national government's power would be limited and, correspondingly, that states' rights would be protected.¹¹⁶ As Professor Zechariah Chafee has explained: "The vital distinction between foreign affairs and domestic matters was taken for granted throughout [the drafting of the Constitution]. Indeed, this distinction was ingrained in their minds long before they met in Philadelphia."¹¹⁷

111. Notes of James Madison (Aug. 23, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 109, at 393.

112. See Notes of James Madison (Sept. 8, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 109, at 548; see also Quincy Wright, *The Constitutionality of Treaties*, 13 AM. J. INTL. L. 242, 242 (1919) ("The framers of the American Constitution did not anticipate or desire the conclusion of many treaties.").

113. James Wilson, Summation and Final Rebuttal (Dec. 11, 1787), in 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 831, 851 (Bernard Bailyn ed., 1993); accord Letter from Thomas Jefferson to Philip Mazzei (July 18, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON 38-39 (Andrew A. Lipscomb ed., 1905) ("On the subject of treaties, our system is to have none with any nation, as far as can be avoided.").

114. THE FEDERALIST NO. 64, at 390 (John Jay) (Clinton Rossiter ed., 1961); see also, e.g., THE FEDERALIST, *supra*, NO. 42 (James Madison), at 265 (referring to the "power of making commercial treaties"); 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 109, at 392-93 (references to treaties of alliance).

115. THE FEDERALIST, *supra* note 114, NO. 75 (Alexander Hamilton), at 450-51.

116. See, e.g., THE FEDERALIST, *supra* note 114, NO. 45 (James Madison), at 292 (stating that the national government's powers "will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce").

117. Zechariah Chafee, Jr., *Amending the Constitution to Cripple Treaties*, 12 LA. L. REV. 345, 368 (1952).

Third, the Founders placed substantial emphasis on the role of the Senate in protecting states' rights.¹¹⁸ Among other things, they noted that each state was to have equal representation in the Senate and that the senators would be elected by state legislatures.¹¹⁹ Based on this, they reasoned that state interests would be safeguarded in the treaty process by assigning the treaty power to the Senate.¹²⁰ In carrying out its state-protecting role, the Founders envisioned that the Senate would be actively involved with the President in the process of negotiating and concluding treaties.¹²¹ Indeed, the Founders envisioned that the Senate would act as "a council-like body in direct and continuous consultation with the Executive on matters of foreign policy."¹²²

Fourth, supporters of the Constitution repeatedly expressed the view that the Constitution delegated only limited powers to the national government. Perhaps most famously, Madison stated in *Federalist No. 45* that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."¹²³ The Federalist proponents of the Constitution thought this proposition so evident that it precluded the need for a Bill of Rights.¹²⁴ There is no evidence that the Founders believed the treaty power to be exempt from this general proposition.

118. See, e.g., Notes of James Madison (Aug. 23, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 109, at 392; DEBATES, *supra* note 109, at 137-38.

119. See, e.g., DEBATES, *supra* note 109, at 507; THE FEDERALIST, *supra* note 114, No. 64 (John Jay), at 395; THE FEDERALIST, *supra* note 114, No. 45 (James Madison), at 291; see generally Rakove, *supra* note 108, at 257.

120. See, e.g., THE FEDERALIST, *supra* note 114, No. 64 (John Jay), at 395; see generally Solomon Slonim, *Congressional-Executive Agreements*, 14 COLUM. J. TRANSNATL. L. 434 (1975) (discussing and documenting this point).

121. See THE DEBATES IN THE CONVENTION OF THE STATE OF PENNSYLVANIA, *reprinted* in 2 ELLIOT'S DEBATES, *supra* note 109, at 415, 507; THE FEDERALIST, *supra* note 114, No. 64 (John Jay), at 392-93; see generally HENKIN, *supra* note 4, at 177; JACK N. RAKOVE, ORIGINAL MEANINGS 266 (1996); Rakove, *supra* note 108, at 257.

122. Arthur Bestor, "Advice" from the Very Beginning, "Consent" When the End is Achieved, 83 AM. J. INTL. L. 718, 726 (1989); see also HENKIN, *supra* note 4, at 177 (making similar point). In response to concerns that the treaty process would be *too* dominated by the states, the Founders emphasized that state influence over treaties would be counterbalanced by the President's role in the treaty process and by the role of the House of Representatives in implementing and appropriating money for treaties. See John Yoo, Some Notes on the Framing of the Treaty Clause (unpublished manuscript, on file with author).

123. THE FEDERALIST, *supra* note 114, No. 45 (James Madison), at 292; see also RAKOVE, *supra* note 121, at 242 ("It was crucial to the formulation of the Federalist position that the objects of national legislation were at once vital but limited — that is, that they embraced the most important *res publica* while leaving the mundane affairs that preoccupied most Americans to the states.").

124. See RAKOVE, *supra* note 121, ch. X; CHARLES PINCKNEY, SPEECH IN SOUTH CAROLINA HOUSE OF REPRESENTATIVES (1788), *reprinted* in 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 109, at 256; THE FEDERALIST, *supra* note 114, No. 84 (Alexander

In addition to reiterating these general themes, the records of the Virginia Ratifying Convention contain specific discussions of the scope of the treaty power.¹²⁵ These discussions confirm that the Founders did in fact envision limitations on the treaty power. During the Virginia convention, Anti-Federalists like Patrick Henry charged that under the proposed Constitution, the treaty-makers could “make any treaty. . . . as they please.”¹²⁶ In response, Federalist defenders of the Constitution strenuously denied that the treaty power was unlimited. Madison stated, for example: “The exercise of the power must be consistent with the object of the delegation. . . . The object of treaties is the regulation of intercourse with foreign nations, and is external.”¹²⁷ He further explained that the Founders had not specified the proper subject matters of treaties in order to preserve flexibility, not because the power was unlimited.¹²⁸ Consistent with this view, Edmund Randolph remarked that “neither the life nor property of any citizen, nor the particular right of any state, can be affected by a treaty.”¹²⁹ And, perhaps most broadly, George Nicholas stated that no treaty could be made “which shall be repugnant to the spirit of the Constitution, *or inconsistent with the delegated powers*.”¹³⁰ Thus, when the question of the treaty power’s scope was specifically discussed, the Founders did express the view that it was subject to constitutional limitations. As Charles Lofgren has explained, “[t]hose Virginia Federalists who

Hamilton); *see also* Kramer, *supra* note 46, at 1495 (“[T]here does seem to have been wide consensus on a few issues, among them that the powers of the national government were to be limited and that courts would play a role in policing the limits.”).

125. Statements made during the state ratifying conventions are important evidence of the original understanding of the Constitution — perhaps an even more important source of original meaning than the statements made during the Constitutional Convention. *See* RAKOVE, *supra* note 121, at 16-18; *see also* James Madison, Speech on the Jay Treaty (April 4, 1796), in VI THE WRITINGS OF JAMES MADISON 263, 272 (Gaillard Hunt ed., 1906) (“If we were to look . . . for the meaning of the [Constitution] beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.”).

126. THE DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF VIRGINIA, *reprinted in* 3 ELLIOT’S DEBATES, *supra* note 109, at 513 [hereinafter VIRGINIA DEBATES]; *see also, e.g., id.* at 509 (“The President and Senate can make any treaty whatsoever.”) (statement of George Mason). There were similar Anti-Federalist statements in the press. *See, e.g.,* LETTER IV FROM THE FEDERAL FARMER, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 113, at 276 (asserting that the treaty power is “absolute”).

127. VIRGINIA DEBATES, *supra* note 126, at 514.

128. *See id.* at 514-15; *see also* ABRAHAM BALDWIN IN THE HOUSE OF REPRESENTATIVES (March 14, 1796), *reprinted in* 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 109, at 370 (explaining that the Founders purposely left the treaty clause “a little ambiguous and uncertain”).

129. VIRGINIA DEBATES, *supra* note 126, at 504.

130. *Id.* at 507 (emphasis added).

discussed the issue thus perceived constitutional limits to treaties beyond the minimal requirements that they be properly made.”¹³¹

Statements made shortly after the ratification period, although not technically part of the original understanding, may nevertheless shed light on that understanding. It is significant, therefore, that the views expressed by the Federalists during the Virginia Convention were reiterated in the subsequent debates in 1796 over whether the House of Representatives had the power to inquire into the making of the Jay Treaty. This treaty — the first adopted by the United States after ratification of the Constitution — was between the United States and Great Britain and was negotiated by John Jay while he was serving concurrently as Minister to Great Britain and Chief Justice of the United States.¹³² The treaty addressed, among other things, the withdrawal of military forces from American and British territories, indemnification of war-time creditors, and certain boundary disputes. The treaty was extremely controversial in the United States because, among other things, it was perceived by many people as being too conciliatory to the British. In 1796, President Washington asked the House of Representatives to appropriate funds to implement the Treaty. In response, the Republicans in the House introduced a resolution asking the President to provide the House with the executive papers reflecting the negotiating history of the treaty.¹³³

During the debates over this resolution, numerous representatives expressed the view that the treaty power was limited in scope. James Hillhouse, for example, stated that a treaty must relate “to objects within the province of the Treaty-making power, a power

131. CHARLES A. LOFGREN, “GOVERNMENT FROM REFLECTION AND CHOICE” 151 (1986); *see also id.* (noting that the Virginia ratification debates reflected “the view that treaties would be restricted to foreign objects (but with recognition that this was an expansive category)”). This is not to say that the Federalists were all of one mind on this issue. Hamilton, in particular, seems to have had a very expansive (although not unlimited) view of the treaty power. In a letter to George Washington in 1795, he stated: “A treaty cannot be made which alters the constitutions of the country, or which infringes any express exceptions to the power of the Constitution of the United States. But it is difficult to assign any other bounds to the power.” Letter from Alexander Hamilton to George Washington (July 9, 1795), *in* 5 THE WORKS OF ALEXANDER HAMILTON 158-59 (Henry Cabot Lodge ed., 1904).

132. *See* Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116.

133. After substantial debate, the resolution passed 62-37. Washington nevertheless refused to turn over the papers. *See* Message from George Washington to the House of Representatives of the United States (Mar. 30, 1796), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 187 (James D. Richardson ed., 1897). For an excellent discussion of the negotiation of the Jay Treaty and the House debates, *see* STANLEY M. ELKINS & ERIC L. MCKITTRICK, THE AGE OF FEDERALISM, ch. IX (1993); *see also* SAMUEL F. BEMIS, JAY’S TREATY: A STUDY IN COMMERCE AND DIPLOMACY (rev. ed. 1962); JERALD A. COMBS, THE JAY TREATY: POLITICAL BACKGROUND OF THE FOUNDING FATHERS (1970).

which is not unlimited.”¹³⁴ He further stated that “[t]he objects upon which it can operate are understood and well defined, and if the Treaty-making power were to embrace other objects, their doings would have no more binding force than if the Legislature were to assume and exercise judicial powers under the name of legislation.”¹³⁵ Other representatives making similar statements included Daniel Buck,¹³⁶ James Madison,¹³⁷ Theodore Sedgwick,¹³⁸ and Samuel Smith.¹³⁹ Importantly, Madison observed that a “candid and collected view” of the state ratification debates made clear that the treaty-making power had been understood as being limited in scope.¹⁴⁰

Restrictions on the treaty power also were made a part of the Senate’s Manual of Parliamentary Procedure, drafted by Thomas Jefferson between 1797 and 1801, when he was Vice-President (and thus President of the Senate).¹⁴¹ In the Manual, Jefferson noted that the Constitution did not define “[t]o what subject this power extends” and that the Founders were not “entirely agreed among ourselves” on this issue.¹⁴² He explained that the treaty power was nevertheless impliedly limited in at least four ways. First, it had to “concern the foreign nation party to the contract.”¹⁴³ Second, it covered “only those subjects which are usually regulated by treaty.”¹⁴⁴ Third, it did not cover “the rights reserved to the states; for surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way.”¹⁴⁵ Fourth, it did not apply to “those subjects of legislation in which [the Con-

134. 5 ANNALS OF CONGRESS 660 (1796).

135. *Id.*

136. *See id.* at 432 (“[I]f the PRESIDENT has assumed powers not delegated to him by the people in making and proclaiming this Treaty, it is void in itself . . .”).

137. *See id.* at 671 (stating that “it is a sound rule of construction that what is forbidden to be done by all the branches of Government conjointly, cannot be done by one or more of them separately”).

138. *See id.* at 516 (“The power of treating between independent nations might be classed under the following heads: 1. To compose and adjust differences, whether to terminate or to prevent war. 2. To form contracts for mutual security or defence; or to make Treaties, offensive or defensive. 3. To regulate an intercourse for mutual benefit, or to form Treaties of commerce.”).

139. *See id.* at 597 (“The Treaty power is in its nature limited.”).

140. *See id.* at 777.

141. *See* THOMAS JEFFERSON, *A Manual of Parliamentary Practice: For the Use of the Senate of the United States*, in JEFFERSON’S PARLIAMENTARY WRITINGS 420, 420 (Wilbur S. Howell ed., 1988).

142. *Id.* at 420.

143. *Id.*

144. *Id.* at 420-21.

145. *Id.* at 421.

stitution] gave a participation to the House of Representatives.”¹⁴⁶ Jefferson’s fourth suggested limitation — that the treaty power did not apply to matters that could otherwise be regulated by Congress — “has been consistently rejected.”¹⁴⁷ But both the subject matter and federalism limitations he suggested appear to have been consistent with the prevailing views of the time.¹⁴⁸

Early opinions of the Attorney General also suggested limitations on the treaty power. An 1819 opinion from the Attorney General, for example, stated that the federal government could not alter by treaty state inheritance law concerning real property.¹⁴⁹ And an 1831 opinion stated that the federal government is “under a constitutional obligation to respect [the reserved powers of the states] in the formation of treaties.”¹⁵⁰ Other government officials, by contrast, endorsed a subject matter rather than states’-rights limitation on the treaty power. John Calhoun, for example, stated in 1816 (while he was a member of the House of Representatives) that treaties were proper as long as they “concern[] our foreign relations.”¹⁵¹

The belief that there were subject matter or federalism limitations on the treaty power also was reflected in the views of early constitutional scholars. William Rawle stated that the treaty power was appropriate only for those subjects “which properly arise from intercourse with foreign nations,” and he listed those subjects as “peace, alliance, commerce, neutrality, and others of a similar nature.”¹⁵² Joseph Story stated in his constitutional law treatise that, “though the [treaty] power is thus general and unrestricted, it is not to be so construed, as to destroy the fundamental laws of the state”

146. *Id.*

147. Ackerman & Golove, *supra* note 37, at 813; *see also* QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 102-03 (1922). It is possible, however, that John Calhoun agreed with Jefferson on this point. *See infra* note 151. *But see* HENKIN, *supra* note 4, at 397 (arguing that Calhoun simply meant to say “that treaties cannot legislate directly”).

148. *See* George A. Finch, *The Need to Restrain the Treaty-Making Power of the United States Within Constitutional Limits*, 48 AM. J. INTL. L. 57, 61 (1954) (“Jefferson’s views undoubtedly represented the consensus of the Founding Fathers.”).

149. *See* 1 Op. Atty. Gen. 275 (1819). Contrast this with the Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons, discussed *supra* text accompanying notes 90-91.

150. 2 Op. Atty. Gen. 437 (1831).

151. 29 ANNALS OF CONGRESS 531 (1816). Calhoun also stated, perhaps echoing Jefferson, that “[a] treaty never can legitimately do that which can be done by law.” *Id.* at 532. Calhoun later went on to serve as Secretary of War under President Monroe, Vice-President under Presidents John Quincy Adams and Andrew Jackson, U.S. Senator, and Secretary of State under President Tyler.

152. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES* 57-58 (1825).

and "cannot supersede, or interfere with any other of [the Constitution's] fundamental provisions."¹⁵³ Subsequent nineteenth-century constitutional scholars echoed these comments.¹⁵⁴ As some of these scholars explained, the Founders did not enumerate subject matter limitations on the treaty power in order to preserve flexibility, not because they thought the power unlimited.¹⁵⁵

In sum, although the primary focus of the Founders' attention was on the treaty process rather than on the scope of the treaty power, when they addressed that issue the Founders, as well as early scholars and government officials, made clear that the treaty power was not unlimited in scope. In particular, there appears to have been an understanding that the treaty power was limited either by subject matter, by the reserved powers of the states, or both. It could hardly have been otherwise, for, as noted above, the Constitution was viewed as delegating *limited* powers to the federal government.¹⁵⁶ Without subject matter or federalism restrictions on the treaty power, the federal government would have had essentially unrestricted authority vis-à-vis the states, thereby contradicting one of the core assumptions of the Founders.¹⁵⁷

153. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1502 (1833). By "state," Story appears to have been referring to the U.S. *nation-state* rather than the constituent U.S. states. See EDWARD S. CORWIN, NATIONAL SUPREMACY: TREATY POWER VS. STATE POWER 97 (1913). Nevertheless, his belief that the treaty power was limited by the "fundamental laws" of this country and the "fundamental provisions" of the Constitution presumably included a belief that the treaty power was limited by states' rights. This belief would be consistent with Story's view of the Constitution as "an instrument of limited and enumerated powers." 3 STORY, *supra*, § 1900.

154. See, e.g., THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 117 (3d ed. 1898) (stating that the treaty power "is subject to the implied restriction that nothing can be done under it which changes the constitution of the country, or robs a department of the government or any of the States of its constitutional authority"); 1 JAMES BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW 373 n.1 (1895) (noting that the treaty power is subject to those limitations "arising from the nature of the government itself and of that of the States"); 2 JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES 727 (1899) (arguing that the treaty power does not allow regulation of the "internal concerns of the country"); HERMANN VON HOLST, THE CONSTITUTIONAL LAW OF THE UNITED STATES OF AMERICA 202-03 (Alfred Bishop Mason trans. 1887) ("As to the extent of the treaty-power, the constitution says nothing, but it evidently cannot be unlimited. . . . It is certain that no authority granted by the constitution to any of the factors of government can be withdrawn from it by treaty.").

155. See, e.g., RAWLE, *supra* note 152, at 57-58; see also WILLIAM ALEXANDER DUER, OUTLINES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES 136 (1833).

156. See *supra* text accompanying notes 123-24.

157. Several early twentieth-century commentators stated this point well. See HENRY ST. GEORGE TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER UNDER THE CONSTITUTION OF THE UNITED STATES § 123, at 140 (1915) ("The argument is irresistible that if the whole scheme and genius of the Constitution was to save the ungranted powers of the States from interference by the Federal Government, that the Framers of the Constitution would not have secured these against the ravages of all departments of the Government, and then quietly bestowed upon one of its branches, the treaty-power, the power to absorb them all.");

B. Nineteenth-Century Understanding

Proponents of a broad view of the treaty power sometimes also rely on nineteenth-century Supreme Court decisions. They argue that, even if the Founding materials might support limitations on the treaty power, the Supreme Court repudiated such limitations during the nineteenth century. Professor Henkin, for example, asserts that any federalism limitation on the treaty power was "repeatedly rejected by the Supreme Court" in the nineteenth century.¹⁵⁸ In fact, while it is true that the Supreme Court in the nineteenth century upheld the validity of a number of treaties, the Court frequently expressed the view that the treaty power was limited either by subject matter, states' rights, or both. In addition, this assumption appears to have been shared by the treaty makers themselves.

The Supreme Court never held in the nineteenth century that the treaty power was immune from federalism limitations. It did emphasize, as Henkin and others have pointed out, that treaties are supreme over state law.¹⁵⁹ This proposition is, of course, evident from the constitutional text.¹⁶⁰ To say that treaties are supreme federal law, however, is not to say that the treaty power is unlimited in scope. As one early twentieth-century scholar explained: "[W]hile many of the decisions contain broad general statements to

1 WESTEL WOODBURY WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 67 (1910) ("To accept [a plenary treaty power] would be at once to overturn the long line of decisions that have held the United States Government to be one of limited, enumerated powers."); William E. Mikell, *The Extent of the Treaty-Making Power of the President and Senate of the United States* (pt. 2), 57 U. PA. L. REV. 528, 536 (1909) (arguing that it makes no sense to conclude that the states reserved rights against the exercise of legislative power — which is done by the House, Senate, and President combined — "while at the same time surrendering their most vital powers of self-government to two of the same three departments of the same government").

158. HENKIN, *supra* note 4, at 190; *see also, e.g.*, 2 CHARLES HENRY BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* 6-62 (1902); CORWIN, *supra* note 153, at 131-32; John B. Whitton & J. Edward Fowler, *Bricker Amendment — Fallacies and Dangers*, 48 AM. J. INTL. L. 23, 34 (1954).

159. *See, e.g.*, *Hauenstein v. Lynham*, 100 U.S. 483, 483-89 (1879); *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454, 457-58 (1806); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-37 (1796) (Chase, J.).

160. *See* U.S. CONST. art. VI, cl. 2 ("[A]ll treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ."). Moreover, the drafting history of the Constitution makes clear that the Founders envisioned that, under the new Constitution, treaties would be binding on the states. *See, e.g.*, *THE FEDERALIST*, *supra* note 114, No. 22 (Alexander Hamilton), at 151; *THE FEDERALIST*, *supra* note 114, No. 3 (John Jay), at 43-44; *THE FEDERALIST*, *supra* note 114, No. 38 (James Madison), at 238. Indeed, "[t]he inability of the central government under the Articles of Confederation to secure compliance by the states with the nation's treaty obligations was among the principal animating causes of the Framers' decision to establish a new government under a new Constitution, rather than simply amend the Articles of Confederation." Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1102 (1992).

the effect that treaties are the supreme law of the land, there is always the accompanying qualification that it must be a *constitutional treaty*, in order to be so considered.”¹⁶¹ Indeed, such a limitation was essential given the Court’s repeated reaffirmation during this period, both before and after the Civil War, that the powers of the federal government are limited and enumerated.¹⁶²

Consistent with this proposition, the Court in numerous cases stated that the treaty power was limited in scope. Some of the Court’s decisions suggest a subject matter limitation on the treaty power. Thus, for example, the Court stated in several decisions that treaties must concern “proper subjects of negotiation.”¹⁶³ In other decisions, the Court suggested a states’-rights limitation. Perhaps the best example is the Court’s decision in *New Orleans v. United States*.¹⁶⁴ In that case, the United States had by treaty acquired the province of Louisiana from France, which had in turn acquired it from Spain. Prior to the treaty, the King of Spain had held certain public properties in the City of New Orleans in trust for the City. The issue was whether, pursuant to the treaty, the federal government had acquired similar trust rights over the properties, or whether the properties instead were now fully in the control of the City. In holding that the City had control, the Court explained that the federal government “is one of limited powers” and that its authority cannot be “enlarged under the treaty-making power.”¹⁶⁵ The Court concluded that the Commerce Clause did not encompass the trust power that had been exercised by the King of Spain and that “the treaty cannot give this power to the federal government.”¹⁶⁶

Similar statements, albeit often in dicta, are found in other Supreme Court decisions during this period.¹⁶⁷ Moreover, a

161. Miller, *supra* note 108, at 544; see also, e.g., *Hauenstein*, 100 U.S. at 490 (acknowledging that “[t]here are doubtless limitations of this power”).

162. See *United States v. Harris*, 106 U.S. 629, 636 (1882); *Loan Assn. v. Topeka*, 87 U.S. (20 Wall.) 655, 663 (1874); *New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

163. *In re Ross*, 140 U.S. 453, 463 (1890); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1889); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 243 (1872).

164. 35 U.S. (10 Pet.) 662.

165. 35 U.S. (10 Pet.) at 736.

166. 35 U.S. (10 Pet.) at 737.

167. See, e.g., *Geofroy v. Riggs*, 133 U.S. at 267 (noting that the treaty power is subject to those limitations “arising from the nature of the government itself and of that of the States”); *Prevost v. Grenaux*, 60 U.S. (19 How.) 1, 7 (1856) (“[C]ertainly a treaty . . . could not divest rights of property already vested in the State.”); *The Passenger Cases*, 48 U.S. (7 How.) 283, 466 (1849) (Taney, C.J., dissenting) (“[A]ny treaty or law of Congress invading [a power

number of decisions during this period suggested both a subject matter *and* a states'-rights limitation on the treaty power. In a case involving the power of a state to extradite a person to a foreign country, for example, the Court stated that the treaty power covers "all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty; and which are consistent with the nature of our institutions, *and the distribution of powers between the general and state governments*."¹⁶⁸ Similarly, in a case involving a land treaty with the Cherokee Indians, the Court stated that treaties may deal with "all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government *and the relation between the States and the United States*."¹⁶⁹

Despite this language, proponents of a broad view of the treaty power point out that the Court upheld treaties during this period that concerned matters typically regulated by the states. Most notably, the Court upheld a number of treaties giving foreigners certain property rights equal to those enjoyed by citizens.¹⁷⁰ These treaties did intrude to some extent on state regulation of property ownership, and federalism concerns sometimes were invoked in opposition to these treaties.¹⁷¹ But the treaties did not purport to regulate the relationship between states and their own citizens, or even citizens from other states in the nation. They regulated only the treatment of aliens, in return for similar treatment of U.S. citizens residing abroad. In that sense, the treaties were quite naturally viewed as regulating this country's *inter-national* relations. As one court explained, after reviewing these cases: "If there is one object more than another which belongs to our political relations, and which ought to be the subject of treaty regulations, it is the extension of this comity which is so highly favored by the liberal spirit of the age, and so conducive in its tendency to the peace and amity of nations."¹⁷²

reserved by the States] . . . would be a usurpation of power."); *The License Cases*, 46 U.S. (5 How.) 504, 613 (1847) (Daniel, J., concurring) ("Treaties, to be valid, must be made within the scope of the [delegated] powers.").

168. *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840) (emphasis added).

169. *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 243 (1872) (emphasis added).

170. See, e.g., *Carneal v. Banks*, 23 U.S. (10 Wheat.) 181, 189 (1825); *Hughes v. Edwards*, 22 U.S. (9 Wheat.) 489, 489 (1824); *Orr v. Hodgson*, 17 U.S. (4 Wheat.) 453, 453 (1819); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 262 (1817).

171. See *infra* text accompanying notes 173-76.

172. *People v. Gerke*, 5 Cal. 381, 384-85 (1855).

Even in the context of these treaties, the U.S. treaty makers expressed concern regarding states' rights, and in a number of instances acted to protect such rights. Ralston Hayden has documented how, between 1830 and 1860, "the Senate and the executive entertained grave and increasing doubts concerning their authority to make treaties" concerning rights to real property and how "in every particular instance in which conflict arose the treaty in question was amended to bring it more nearly into accord with the states' rights theory."¹⁷³ Thus, for example, he explains that, when President Fillmore submitted a proposed treaty between the United States and Switzerland to the Senate in 1850, he asked for and obtained amendments from the Senate to protect the reserved powers of the States.¹⁷⁴ William Mikell similarly has documented several instances in the nineteenth century when the treaty makers made treaties contingent on state agreement.¹⁷⁵ He describes, for example, an 1853 Consular Convention with France, in which the provision giving a property right to French citizens was made contingent on state laws permitting such a right. As for those states that did not permit such a right, "the President engage[d] to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right."¹⁷⁶

In the early part of the twentieth century, perhaps prompted by the increasingly active role of the United States in international trade and international politics, there was substantial debate over whether the treaty power was limited by the reserved powers of the states. Scholars lined up on both sides of this issue. The most prominent supporters of the states'-rights view included Henry St. George Tucker, John Bassett Moore, and William Mikell.¹⁷⁷ The most prominent opponents of this view included Charles Butler, Edward Corwin, and Quincy Wright.¹⁷⁸ Few of the opponents of

173. Ralston Hayden, *The States' Rights Doctrine and the Treaty-Making Power*, 22 AM. HIST. REV. 566, 585 (1917).

174. *See id.* at 575-76.

175. *See* Mikell, *supra* note 157, at 555-56.

176. CONSULAR CONVENTION OF 1853, art. VII, *reprinted in* 1 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS 528, 531 (William M. Malloy ed., 1910); *see also* TUCKER, *supra* note 157, § 19, at 20-21 (quoting letter from John Hay in the Department of State noting that a treaty with Great Britain concerning treatment of foreign insurance companies would not be feasible because of domestic concerns relating to the invasion of state prerogatives).

177. *See* 5 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 736, at 166 (1906); TUCKER, *supra* note 157, § 297, at 339; Mikell, *supra* note 157, at 557-58.

178. *See* 1 BUTLER, *supra* note 158, at 6; CORWIN, *supra* note 153, at 296; WRIGHT, *supra* note 147, at 89. Charles Butler was the first scholar to directly challenge the view that the treaty power was limited by the reserved powers of the states. *See* G. Edward White, *The*

the states'-rights view, however, embraced the other component of the nationalist view — that the treaty power also is unlimited by subject matter.¹⁷⁹ And other constitutional scholars in this period expressed the view that the treaty power was in fact limited by subject matter.¹⁸⁰ Moreover, U.S. *officials* continued to express the view that the United States could not regulate by treaty matters reserved to the states.¹⁸¹

In sum, although the Supreme Court upheld a number of treaties in the nineteenth century, it did not suggest that the treaty power was unlimited. Indeed, in many of these cases the Court expressly stated that the power was limited by subject matter, states' rights, or both. Such limitations also were reflected, as noted above, in the views of the treaty makers themselves. The states'-rights issue became highly contested in the academic community in the early twentieth century, but even then many commentators appeared to assume at least a subject matter limitation.

III. REJECTION OF TENTH AMENDMENT AND SUBJECT MATTER LIMITATIONS

In this Part, I explain how each of the two components of the nationalist view of the treaty power became orthodoxy. I first discuss the rejection of Tenth Amendment limitations on the scope of the treaty power, and I then discuss the rejection of any meaningful

Transformation of the Constitutional Regime of Foreign Relations, 85 VA. L. REV. (forthcoming Feb. 1999).

179. See, e.g., CHARLES H. BURR, *THE TREATY MAKING POWER OF THE UNITED STATES* 285 (1912) (noting that "treaties must only contain provisions which in the usual and normal intercourse of nations should properly become the subject of treaties" and that the treaty-making power does not allow for "the accomplishment of an internal change in the government of one sovereign party to a treaty"); CORWIN, *supra* note 153, at 18 (stating that the treaty power "must be confined to its proper business"); NICHOLAS PENDLETON MITCHELL, *STATE INTERESTS IN AMERICAN TREATIES* 154 (1936) (concluding that reserved power limitations "may be ignored, so long as the subject of negotiation is a proved national interest, and properly a matter for international treatment"); Wright, *supra* note 112, at 258 ("The immunity from treaty interference of certain State powers can only be sustained by showing that they cover a subject-matter inherently inappropriate for treaty negotiations. That there are matters within State legislative competence thus excluded from treaty making is doubtless true."); see also Arthur Littleton, Note, *The Treaty Power and the Tenth Amendment*, 68 U. PA. L. REV. 160, 162 (1919) ("[E]ven those who would grant the widest limits to the treaty-making power do not on that account assert that the President and the Senate have a limitless field of subjects about which to negotiate with foreign countries.").

180. See, e.g., WILLOUGHBY, *supra* note 157, § 216 (noting that the subject matter of treaties must be of "international concern"); cf. ROBERT T. DEVLIN, *THE TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES* § 143, at 141 (1908) (stating that "it cannot be said that the treaty-making power is unlimited," but also noting that "[w]hat the limits are, no one can correctly state").

181. See HAROLD W. STOKES, *THE FOREIGN RELATIONS OF THE FEDERAL STATE* 61, 113 (1931) (describing U.S. objections to labor conventions).

subject matter limitation on the treaty power. As I explain, these two components of the nationalist view have developed largely in isolation, and there has been little attempt to consider the implications for American federalism of combining them.

A. *Rejection of Tenth Amendment Limitations*

As discussed above, the existence of states'-rights limitations on the treaty power was assumed at various times during the nineteenth century.¹⁸² This assumption was reflected not only in Supreme Court decisions, but also in the statements and actions of the political branches.¹⁸³ The states'-rights issue then became the subject of substantial academic debate during the early part of the twentieth century, with leading commentators on both sides.¹⁸⁴

The conventional wisdom is that the death knell to the states'-rights view came in 1920, with the Supreme Court's decision in *Missouri v. Holland*.¹⁸⁵ The *Holland* case, "perhaps the most famous and most discussed case in the constitutional law of foreign affairs,"¹⁸⁶ involved the constitutionality of the Migratory Bird Treaty Act of 1918.¹⁸⁷ This Act implemented a 1916 treaty between the United States and Great Britain that was designed to protect birds migrating in the United States and Canada.¹⁸⁸ Among other things, the Act made it unlawful to hunt or capture any migratory birds covered by the terms of the Convention. The State of Missouri argued that the Act unconstitutionally interfered with states' rights in violation of the Tenth Amendment. Missouri pointed out that two district courts already had held a similar statute, which had been enacted before the treaty, to be beyond Congress's commerce powers.¹⁸⁹

182. See *supra* section II.B.

183. See *supra* text accompanying notes 173-76.

184. See *supra* text accompanying notes 177-78.

185. 252 U.S. 416 (1920). For an excellent discussion of this case, see LOFGREN, *supra* note 131, ch. 4.

186. HENKIN, *supra* note 4, at 190.

187. Migratory Bird Treaty Act, Aug. 16, 1916, ch. 128, 40 Stat. 755 (1918) (current version at 16 U.S.C. § 703 (1994) (amending the Act to include treaties with Mexico, Japan, and the U.S.S.R.)).

188. See Convention for the Protection of Migratory Birds, Aug. 16, 1916, U.S.-Gr. Brit., 39 Stat. 1702. Great Britain at that time handled Canada's foreign relations. See Jeffrey L. Friesen, Note, *The Distribution of Treaty-Implementing Powers in Constitutional Federations: Thoughts on the American and Canadian Models*, 94 COLUM. L. REV. 1415, 1428 (1994).

189. See Brief for Appellant at 42, *Missouri v. Holland*, 252 U.S. 416 (1919) (No. 609) (citing *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914); *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915)); see also *Holland*, 252 U.S. at 432 (referring to these decisions). The commerce power was perceived to be much narrower at the time of *Holland* than it is

In rejecting Missouri's argument, the Court, in an opinion by Justice Holmes, acknowledged that the Act might be outside the scope of the Commerce Clause.¹⁹⁰ The Court stated, however, that any limits on the treaty power "must be ascertained in a different way" from limits on domestic powers.¹⁹¹ The Court pointed out that the treaty in question did not "contravene any prohibitory words to be found in the Constitution" but rather was alleged to violate "some invisible radiation from the general terms of the Tenth Amendment."¹⁹² To show a violation of states' rights here, the Court said, "it is not enough to refer to the Tenth Amendment . . . because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States . . . are declared the supreme law of the land."¹⁹³ In concluding that there was no violation of states' rights, the Court observed that the treaty concerned "a national interest of very nearly the first magnitude" that could be protected "only by national action in concert with that of another power."¹⁹⁴

There was some concern after this decision that the treaty power might not be subject to *any* constitutional restraints, including the individual rights provisions of the Bill of Rights.¹⁹⁵ This concern was due in part to an observation by the Court, based on its reading of the Supremacy Clause, that "[a]cts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States."¹⁹⁶ As one commentator noted after the decision, the Court's "hint that there may be no other test to be applied than whether the treaty has been duly concluded indi-

today. Cf. *United States v. Bramble*, 103 F.3d 1475, 1480-82 (9th Cir. 1996) (upholding the Eagle Protection Act as a valid exercise of Congress's commerce power).

190. See *Holland*, 252 U.S. at 432-33.

191. See 252 U.S. at 433.

192. 252 U.S. at 433-34.

193. 252 U.S. at 432.

194. 252 U.S. at 435. Here, the Court was echoing the U.S. government's argument that the regulation in question "can be accomplished only by concert of action on the part of two or more States or countries." 252 U.S. at 428. Justices Van Devanter and Pitney dissented without opinion. See 252 U.S. at 435.

195. Decisions before *Holland* had indicated, however, that the treaty power was subject to constitutional restraints. See, e.g., *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) ("It would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids . . ."); *The Cherokee Tobacco Case*, 78 U.S. (11 Wall.) 616, 620 (1870) ("It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument."); *Doe v. Braden*, 57 U.S. (16 How.) 635, 657 (1853) (noting that courts are not to disregard the terms of treaties "unless they violate the Constitution of the United States").

196. *Holland*, 252 U.S. at 433.

cates that the court might hold that specific constitutional limitations in favor of individual liberty and property are not applicable to deprivations wrought by treaties."¹⁹⁷

This concern was partially alleviated by the Supreme Court in a 1957 decision, *Reid v. Covert*.¹⁹⁸ In the consolidated cases at issue,¹⁹⁹ military courts had convicted two wives of U.S. servicemen of murdering their husbands on foreign bases. Executive agreements between the United States and the host countries permitted U.S. military courts to exercise jurisdiction over the offenses. Nevertheless, the wives argued that their trials were unconstitutional because they were conducted without a grand jury indictment and a trial by jury. The Court agreed, with a plurality of the Court stating that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."²⁰⁰ The plurality distinguished *Holland*, noting that the treaty in *Holland* "was not inconsistent with any specific provision of the Constitution."²⁰¹ There had been no Tenth Amendment problem in *Holland*, explained the plurality, because "[t]o the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier."²⁰²

In distinguishing *Holland*, the plurality in *Reid* may have broadened it. The plurality read *Holland* as standing for the proposition that a valid treaty is not subject to *any* Tenth Amendment limitations. It was possible to read *Holland*, however, as holding simply that there are some actions that the federal government can take pursuant to the treaty power that it cannot take pursuant to the

197. Thomas Reed Powell, *Constitutional Law in 1919-20*, 19 MICH. L. REV. 1, 13 (1920); see also, e.g., Forrest Revere Black, *Missouri v. Holland — A Judicial Milestone on the Road to Absolutism*, 25 ILL. L. REV. 911, 914-16 (1931) (making the same point).

198. 354 U.S. 1 (1957).

199. The Court's decision addressed two consolidated cases, which were before the Court on rehearing. For the Court's original decisions in these cases, see *Kinsella v. Krueger*, 351 U.S. 470 (1956), and *Reid v. Covert*, 351 U.S. 487 (1956). In those decisions, the Court did not reach the issue of the scope of the treaty power.

200. *Reid*, 354 U.S. at 16. The Court explained that the reason the treaties referred to in Article VI "were not limited to those made in 'pursuance' of the Constitution was so that agreements made by the United States under the Articles of Confederation . . . would remain in effect." 354 U.S. at 16-17. Early historical materials appear to confirm this reading. See Notes of James Madison (Aug. 25, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 109, at 417; see also LOFGREN, *supra* note 131, at 148-55; RAWLE, *supra* note 152, at 60.

201. *Reid*, 354 U.S. at 18.

202. 354 U.S. at 18 (citing for that proposition *United States v. Darby*, 312 U.S. 100, 124-25 (1941), and the authorities collected there).

commerce power. In other words, the treaty power, far from conferring on the federal government unlimited power vis-à-vis the states, confers a *different* (and in some cases broader) power than that conferred pursuant to the Commerce Clause.²⁰³ The Court in *Holland* did, after all, note that “[w]e do not mean to imply that there are no qualifications to the treaty-making power,”²⁰⁴ and it also emphasized the national interest at stake in the treaty in question.²⁰⁵ Moreover, the Court stated that “[w]e must consider what this country has become in deciding what [the Tenth] Amendment has reserved,”²⁰⁶ perhaps suggesting that the Tenth Amendment’s restrictions had changed over time but were not irrelevant.²⁰⁷ Nevertheless, the construction of *Holland* by the *Reid* plurality is the one that has generally been accepted by lower courts²⁰⁸ and commentators,²⁰⁹ and the Supreme Court has yet to revisit the issue.

During the 1950s, there was a vigorous effort, led by Senator Bricker of Ohio and Frank Holman of the American Bar Association, to overturn *Holland* by means of a constitutional amendment.²¹⁰ There were numerous versions of the “Bricker

203. For one commentator who read *Holland* in this narrower way, see C.M. Micou, Comment, *The Treaty Making Power and the Constitution*, 6 CORNELL L.Q. 91, 95 (1921).

204. *Holland*, 252 U.S. at 433.

205. See 252 U.S. at 435; see also LOFGREN, *supra* note 131, at 138-40 (discussing the Court’s “national interest test”).

206. *Holland*, 252 U.S. at 434.

207. See LOFGREN, *supra* note 131, at 142; Jay Lloyd Jackson, *The Tenth Amendment Versus the Treaty-Making Power Under the Constitution of the United States* (pt. 2), 14 VA. L. REV. 441, 444 (1928).

208. See, e.g., *United States v. Lue*, 134 F.3d 79, 85 (2d Cir. 1998); *Palila v. Hawaii Dept. of Land & Natural Resources*, 471 F. Supp. 985, 994 (D. Haw. 1979); *Tokaji v. State Bd. of Equalization*, 67 P.2d 1082, 1084 (Cal. Ct. App. 1937); *People v. Jondreau*, 185 N.W.2d 375, 380 (Mich. 1971).

209. See HENKIN, *supra* note 4, at 191; 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 6.5, at 509 (2d ed. 1992); TRIBE, *supra* note 43, at 227; Damrosch, *supra* note 14, at 530; Posner & Spiro, *supra* note 75, at 1213 n.24. But see Conkle, *supra* note 57, at 664 (observing that “the Court [in *Holland*] did not reject the federalism argument out of hand” but rather “balanced the competing interests that were at stake”); Marci A. Hamilton, *Slouching Toward Globalization: Charting the Pitfalls in the Drive to Internationalize Religious Human Rights*, 46 EMORY L.J. 307, 317 (1997) (book review) (noting that the Court in *Holland* “did not . . . say that any time the President signs, and the Senate approves, a treaty the states’ rights are automatically controverted”). Some of the nationalist commentators do hold out the possibility that there are a few dramatic things that could not be done to the states by treaty, such as ceding a portion of a state’s territory to a foreign nation without the state’s consent or modifying the republican government of a state. See, e.g., HENKIN, *supra* note 4, at 193.

210. See generally NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE (1990); DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER’S POLITICAL LEADERSHIP (1988). Although the American Bar Association as an organization supported the amendment, its Section on International and Comparative Law opposed it. For the hearings on the proposed amendment, see *Treaties and Executive Agreements: Hearings on S.J. Res. 1 Before a Subcomm. of the Senate Comm. on the Judici-*

Amendment," one of which provided that "[a] treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty."²¹¹ The proposed amendment never received the approval of the Senate, although one version came close.²¹² During the time this amendment was being considered, there was, once again, substantial academic discussion of the proper scope of the treaty power.²¹³

The Bricker Amendment controversy died out for several reasons. First, the *Reid* decision, discussed above, addressed the concern expressed by some proponents of the amendment that the treaty power might not be subject even to the individual rights protections of the Constitution.²¹⁴ Second, during this period, the Supreme Court was increasingly recognizing expansive *domestic* federal power, including the power to regulate extensively in the human rights area.²¹⁵ Third, the treaty makers indicated that they would exercise substantial self-restraint with respect to overriding state prerogatives. Thus, for example, the Senate attached a reservation in 1951 to the U.S. ratification of the Charter of the Organization of American States stating that

none of its provisions shall be considered as enlarging the powers of the Federal Government of the United States or limiting the powers of the several states of the Federal Union with respect to any matters recognized under the Constitution as being within the reserved powers of the several states.²¹⁶

A similar example is the Senate's statement in connection with its consent in 1961 to the Convention on the Organization for Economic Cooperation and Development that "nothing in the conven-

ary, 84th Cong. (1955); *Treaties and Executive Agreements: Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong. (1953); *Treaties and Executive Agreements: Hearings on S.J. Res. 130 Before a Subcomm. of the Senate Comm. on the Judiciary*, 82d Cong. (1952).

211. S. REP. NO. 83-412, at 1 (1953). For the various major versions, see KAUFMAN, *supra* note 210, at 201-03.

212. See 100 CONG. REC. 2374-75 (1954) (recording a vote of 60-31, one vote short of the two-thirds requirement); see also TANANBAUM, *supra* note 210, at 180-81.

213. See, e.g., George A. Finch, *The Need to Restrain the Treaty-Making Power of the United States Within Constitutional Limits*, 48 AM. J. INTL. L. 57 (1954); Arthur E. Sutherland, Jr., *Restricting the Treaty Power*, 65 HARV. L. REV. 1305 (1952); Whitton & Fowler, *supra* note 158, at 23.

214. See TANANBAUM, *supra* note 210, at 213 (noting that the Court's decision in *Reid* "undermined the case for the Bricker amendment").

215. See *supra* text accompanying note 42.

216. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 2484, 119 U.N.T.S. 3 (U.S. ratified Dec. 27, 1951).

tion . . . confers any power on the Congress to take action in fields previously beyond the authority of Congress."²¹⁷

The approach of the federal government to human rights treaties has been even more restrictive. The Eisenhower administration, through Secretary of State John Foster Dulles, announced in 1953 that it had no intention of becoming a party to the then-proposed human rights treaties.²¹⁸ And for many years thereafter, the Senate refused to consent to any of the major human rights treaties submitted to it.²¹⁹ The Senate recently has begun to ratify some of these treaties, but only subject to a now-standard set of reservations, understandings, and declarations (RUDs) that limit the treaties' effect on domestic law. Among other things, these RUDs typically include a declaration that the treaty is non-self-executing, as well as a statement that the United States understands that the treaty shall be implemented by the federal government only to the extent that it possesses legislative and judicial power over the matters in question, and otherwise by the state and local governments.²²⁰ These RUDs reflect "a desire not to effec-

217. Convention on the Organization for Economic Cooperation and Development, Dec. 14, 1960, 12 U.S.T. 1728, 1751-52, 888 U.N.T.S. 179 (U.S. ratified Mar. 23, 1961).

218. See *Treaties and Executive Agreements: Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong. 825 (1953).

219. See HENKIN, *supra* note 4, at 477 n.101.

220. See, e.g., U.S. Senate Resolution of Advice and Consent to Ratification of the Convention on the Elimination of All Forms of Racial Discrimination, 140 CONG. REC. S7634 (daily ed. June 24, 1994); U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 CONG. REC. 8070 (Apr. 2, 1992); U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. S17492 (daily ed. Oct. 27, 1990). Thus, as Professor Henkin explains:

Senator Bricker lost the constitutional battle but perhaps not his political war. In large part because of "Brickerite" opposition, the United States long refused to adhere to human rights covenants and conventions. When, finally, the United States adhered to several of them, it did so subject to major reservations, understandings and declarations

....

HENKIN, *supra* note 4, at 193 n.**. Although the United States has not yet ratified the Convention on the Elimination of All Forms of Discrimination Against Women, federalism and non-self-execution conditions have been proposed in connection with that treaty as well. See STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 103D CONG., REPORT ON THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 10-11 (Comm. Print 1994). In consenting to the Genocide Convention, the Senate did not attach a non-self-execution condition, but it did declare that the President was not to deposit the instrument of ratification until implementing legislation was enacted. See U.S. Senate Resolution of Advice and Consent to Ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, 132 CONG. REC. S1378 (daily ed. Feb. 19, 1986). Furthermore, the implementing legislation eventually enacted by Congress neither preempts state law nor creates any rights against the states or the federal government. See 18 U.S.C. § 1092 (1994).

tuate changes to domestic law by means of the treaty-making power.”²²¹

A final reason that the federalism controversy died out was that many officials and commentators assumed that there was at least a subject matter limitation on the treaty power, which reduced concerns about its use to regulate internal matters.²²² As discussed below, this limitation too has now been rejected, at least in the academic community.

B. *Rejection of Subject Matter Limitation*

The second component of the nationalist view of the treaty power — that there is no meaningful subject matter limitation on that power — has become well accepted only recently. As discussed above, a subject matter limitation appears to have been assumed both during the Founding and at times during the nineteenth century.²²³ The Court in *Holland* also may have assumed the existence of a subject matter limitation.²²⁴ Other decisions from the early twentieth century further reflected a subject matter limitation (albeit a broad one),²²⁵ as did some of the academic commentary.²²⁶

The existence of a subject matter limitation on the treaty power was subsequently suggested in 1929 by Charles Evans Hughes.²²⁷ In a speech to the American Society of International Law,²²⁸ Hughes stated that the treaty power might be limited to matters of “international concern” and thus not allow for the regulation of matters “which normally and appropriately were within the local

221. David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1206 (1993) (referring to the RUDs attached to the Senate’s ratification of the International Covenant on Civil and Political Rights).

222. See *infra* text accompanying notes 223-41.

223. See *supra* Part II.

224. See *supra* text accompanying note 194.

225. See, e.g., *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (stating that the treaty power is “broad enough to cover all subjects that properly pertain to our foreign relations”); *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (noting that the treaty power “extend[s] to all proper subjects of negotiation between our government and other nations”).

226. See *supra* notes 179-80.

227. Hughes was a former Secretary of State, at the time a Judge on the Permanent Court of International Justice and the President of the American Society of International Law, and soon to be Chief Justice of the United States Supreme Court.

228. Although Hughes’s remarks were made extemporaneously, they presumably represented his fully-considered views on the subject. See WILLIAM W. BISHOP, JR., *INTERNATIONAL LAW: CASES AND MATERIALS* 99 n.12 (3d ed. 1971). Professor Henkin has stated, incorrectly in my view, that the idea of a subject matter limitation originated with Hughes. See Louis Henkin, “*International Concern*” and the Treaty Power of the United States, 63 AM. J. INTL. L. 272, 274 (1969).

jurisdiction of the States.”²²⁹ These remarks did not provoke substantial controversy at the time. Rather, as Professor Henkin notes, Hughes’s remarks were “accepted as authority.”²³⁰

Indeed, opponents of the Bricker Amendment during the 1950s invoked the subject matter limitation in support of their argument that the Amendment was unnecessary. Thus, for example, an American Bar Association committee that opposed the Amendment argued that it was unnecessary in part because of “the very fundamental limitation upon the extent to which a treaty can affect internal law in that it must concern a matter which is ‘properly the subject of negotiation with a foreign country.’”²³¹ Similarly, Secretary of State Dulles stated during the Bricker hearings that a treaty could not regulate matters “which do not essentially affect the actions of nations in relation to international affairs, but are purely internal.”²³²

The U.S. Court of Appeals for the D.C. Circuit came close to formally endorsing the Hughes view in 1957. In *Power Authority of New York v. Federal Power Commission*,²³³ the court considered the effect of a reservation attached by the Senate to its ratification of a treaty with Canada concerning use of the waters of the Niagara River. The reservation stated, among other things, that “no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress.”²³⁴ The court observed that enforcement of this reservation would raise a “constitutional concern”²³⁵ because the reservation “relate[d] to a matter of *purely domestic* concern.”²³⁶ The court avoided ruling on the constitutional question²³⁷ by construing the reservation as merely “an expression of the Senate’s desires and not

229. 1929 AM. SOC’Y. INT’L. L. PROC. 194, 194-96.

230. HENKIN, *supra* note 4, at 471 n.87.

231. ABA COMM. ON CONST. ASPECTS OF INT’L. AGREEMENTS, REPORT TO SECTION OF INTERNATIONAL LAW AND COMPARATIVE LAW ON SENATE JOINT RESOLUTION 1 AND THE KNOWLAND SUBSTITUTE AMENDMENT 19 (1953) (quoting *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890)); *see also id.* at 6 (“The scope of both treaties and executive agreements is subject, besides, to the overall limitation that they must treat subjects of proper international concern.”).

232. *Treaties and Executive Agreements: Hearings on S.J. Res. 1 Before a Subcomm. of the Senate Comm. on the Judiciary*, 84th Cong. 183 (1955).

233. 247 F.2d 538 (D.C. Cir.), *vacated as moot*, 355 U.S. 64 (1957).

234. 247 F.2d at 539 (quoting Treaty Between the United States and Canada Concerning Uses of the Waters of the Niagara River, Feb. 27, 1950, 1 U.S.T. 694, 699).

235. 247 F.2d at 543 (quoting *United States v. Witkovich*, 353 U.S. 194, 201 (1957)).

236. 247 F.2d at 543.

237. *See* 247 F.2d at 543.

a part of the treaty.”²³⁸ The court distinguished *Holland* as involving a treaty “related to a ‘national interest of very nearly the first magnitude’ which ‘can be protected only by national action in concert with that of another power.’”²³⁹

Although the position of the State Department on this issue varied to some extent during this period, it too appeared to agree that there was a subject matter limitation, at least as a matter of policy. Thus, for example, it stated in 1955 that “[t]reaties are not to be used as a device for the purpose of effecting internal social changes or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.”²⁴⁰ A number of commentators in this period also assumed that there was a subject matter limitation on the treaty power.²⁴¹

The notion of a subject matter restriction on the treaty power perhaps reached its highest level of acceptance in 1965, when the *Restatement (Second) of the Foreign Relations Law of the United States* expressly endorsed it. In its black-letter-law provisions, the *Restatement (Second)* provided that the treaty power is limited to matters “of international concern.”²⁴² The *Restatement (Second)* further stated, in its comments, that international agreements “must relate to the external concerns of the nation as distinguished from matters of a purely internal nature.”²⁴³ In support of this limitation, the *Restatement (Second)* noted, among other things, that “[n]o power granted to the United States by the Constitution is unlimited.”²⁴⁴ It also linked the purported subject matter limitation with the lack of a Tenth Amendment limitation on the treaty power,

238. 247 F.2d at 542.

239. 247 F.2d at 542 (quoting *Missouri v. Holland*, 252 U.S. 416, 435 (1920)). Even the dissenting judge, in arguing for the validity of the reservation, acknowledged that “[i]t may well be that, no matter how broad the power to make treaties, it is not without limits” 247 F.2d at 552 (Bastian, J., dissenting). For arguments in support of the validity of the reservation, see Louis Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 COLUM. L. REV. 1151 (1956).

240. DEPARTMENT OF STATE, CIRCULAR NO. 175 (1955), reprinted in 50 AM. J. INTL. L. 784, 785 (1956). By contrast, the State Department caused some alarm with its quite different (although perhaps prescient) statement in 1950 that “[t]here is no longer any real distinction between ‘domestic’ and ‘foreign’ affairs.” OFFICE OF PUBLIC AFFAIRS, U.S. DEPT. OF STATE, PUB. NO. 3972, OUR FOREIGN POLICY 4 (1950) (General Foreign Policy Series 26, 1950).

241. See, e.g., C.H. McLaughlin, *The Scope of the Treaty Power in the United States*, 42 MINN. L. REV. 709, 764 (1958); Randall H. Nelson, *The Subject-Matter Limitation on the Treaty-Making Power*, 11 J. PUB. L. 122, 155 (1962).

242. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 117(1)(a) (1965) [hereinafter RESTATEMENT (SECOND)].

243. RESTATEMENT (SECOND), *supra* note 242, § 117 cmt. b.

244. RESTATEMENT (SECOND), *supra* note 242, § 117 cmt. d.

noting that a treaty is constitutional, notwithstanding the reserved powers of the states, so long as "it deals with matters of international concern and is not in conflict with any express limitations on the powers of the government."²⁴⁵ The existence of a subject matter limitation on the treaty power was further supported in 1967 by the American Bar Association.²⁴⁶

After the publication of the *Restatement (Second)*, however, such a limitation also became the subject of academic criticism, most notably from Professor Henkin. Henkin criticized this idea in an article in the late 1960s,²⁴⁷ as well as in his famous 1972 book on foreign affairs law.²⁴⁸ Henkin argued that "every treaty, regardless of subject, serves the external purposes of the United States," and he questioned how one could in any event distinguish "external" from "internal" matters.²⁴⁹

The idea of a subject matter limitation was then expressly rejected in the *Restatement (Third) of Foreign Relations Law*, which was first published in draft form in 1980 and subsequently published in final form in 1987. The *Restatement (Third)*, for which Professor Henkin was the Chief Reporter, declares that, "[c]ontrary to what was once suggested, the Constitution does not require that an international agreement deal only with 'matters of international concern.'"²⁵⁰ The *Restatement (Third)* does not cite any intervening authority for this proposition,²⁵¹ and, indeed, the one decision on point between the *Restatement (Second)* and the *Restatement (Third)* — the *Power Authority* decision — had come out essentially the other way.²⁵²

In what has become a rather disturbing phenomenon in the development of American foreign affairs law, the new *Restatement (Third)* position, adopted without authority, is now being treated as

245. RESTATEMENT (SECOND), *supra* note 242, § 118 cmt. a.

246. See American Bar Association, *Report of the Standing Committee on Peace and Law Through United Nations: Human Rights Conventions and Recommendations*, 1 INTL. LAW. 600 (1967).

247. See Henkin, *supra* note 228.

248. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 154 (1972).

249. Henkin, *supra* note 228, at 276-77.

250. RESTATEMENT (THIRD), *supra* note 13, § 302 cmt. c.

251. See RESTATEMENT (THIRD), *supra* note 13, § 302 cmt. c; see also Louis Henkin, *Restatement of the Foreign Relations Law of the United States (Revised)*, 74 AM. J. INTL. L. 954, 957 (1980) (explaining the proposed change).

252. Professor Henkin briefly mentioned this change during the 1982 proceedings of the American Society of International Law, but there apparently was no public debate or discussion regarding the change. See Panel Discussion, *The Draft Restatement of the Foreign Relations Law of the United States (Revised)*, 76 AM. SOC. INTL. L. PROC. 184, 188-89 (1984).

if it were black-letter law. In his recent revision of his foreign affairs book, for example, Professor Henkin cites the *Restatement (Third)* for the proposition that the subject matter limitation has “now been authoritatively abandoned.”²⁵³ Unfortunately, this is not the only instance in which the *Restatement (Third)* has been used in this self-fulfilling manner.²⁵⁴ In any event, the *Restatement (Third)*’s rejection of a subject matter limitation on the treaty power now appears to be the accepted view, at least among academic commentators.²⁵⁵ Importantly, no one seems to have considered the implications of *combining* the lack of Tenth Amendment limitations with the lack of a subject matter limitation.

IV. CRITIQUE OF THE NATIONALIST VIEW

As we have seen, there are two components to the nationalist view of the treaty power — the lack of Tenth Amendment limitations, and the lack of any meaningful subject matter limitation. When combined, these components give the treaty-makers essentially unlimited power vis-à-vis the states. In our federalist system, which is premised on the principle of limited and enumerated powers, this result requires justification. In this Part, I examine the three principal justifications for the nationalist view and I find that, especially in light of recent developments, none of them is convincing.

253. HENKIN, *supra* note 4, at 474 n.89.

254. See Bradley & Goldsmith, *supra* note 7, at 834-37 (documenting how the *Restatement (Third)*’s position on the domestic status of customary international law lacked authority and yet was presented and accepted as settled law); David B. Massey, Note, *How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law*, 22 YALE J. INTL. L. 419 (1997) (describing how the *Restatement (Third)*’s position on the scope of prescriptive jurisdiction lacked authority and yet was presented and accepted as settled law). But see Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 377-80 (1997) (disputing the charge that the *Restatement (Third)* lacked authority for its claims regarding the domestic legal status of customary international law).

255. See, e.g., CARTER & TRIMBLE, *supra* note 38, at 166; Ackerman & Golove, *supra* note 37, at 843-44; Damrosch, *supra* note 14, at 530; Malvina Halberstam, *A Treaty is a Treaty*, 33 VA. J. INTL. L. 51, 57 n.29 (1992). Professor Tribe may be one of the few dissenters, in that he has stated that the treaty power “is legitimate only for international agreements fairly related to foreign relations.” Tribe, *supra* note 39, at 1261 n.133. Even he notes, however, that “[w]ith global interdependence reaching across an ever broadening spectrum of issues,” a subject matter restriction “seems unlikely to prove a serious limitation.” TRIBE, *supra* note 43, at 228.

A. *Delegation Argument*

The purported immunity of the treaty power from federalism limitations is often premised on what I will call the *delegation argument*. This argument is that, because the treaty power has been delegated to the federal government, exercises of that power do not implicate the Tenth Amendment's reservation of powers to the states. As Professor Henkin states, "[s]ince the Treaty Power was delegated to the federal government, whatever is within its scope is not reserved to the states: the Tenth Amendment is not material."²⁵⁶ This reasoning is reflected in both *Holland* and *Reid*. The Court in *Holland* stated that "it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly."²⁵⁷ Similarly, the plurality in *Reid* noted that, "[t]o the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier."²⁵⁸

The delegation argument has superficial appeal. The treaty power, after all, is expressly delegated to the national government, and the federal government's ratification of treaties therefore would seem to fall within the principle of limited and enumerated powers. Moreover, the language of the Tenth Amendment only purports to reserve to the states "[t]he powers not delegated to the United States by the Constitution."²⁵⁹ Relying on these and other points, Professor Henkin goes so far as to describe the delegation argument as "clear and indisputable."²⁶⁰

The fundamental flaw with the delegation argument, however, is that it fails to provide any reason for giving special Tenth Amendment immunity to the treaty power. Although it is true that the treaty power has been delegated to the federal government, this is true of *all* federal powers. The power to regulate interstate commerce, for example, also has been delegated to the federal government, but this, by itself, has not made it immune from Tenth Amendment scrutiny. And, indeed, notwithstanding this delegation, the Supreme Court has held in a number of cases, including

256. HENKIN, *supra* note 4, at 191; see also, e.g., CORWIN, *supra* note 153, at 5-6; Chandler P. Anderson, *The Extent and Limitations of the Treaty Power Under the Constitution*, 1 AM. J. INTL. L. 636, 657 (1907) (making this argument).

257. *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

258. *Reid v. Covert*, 354 U.S. 1, 18 (1957).

259. U.S. CONST. amend. X.

260. HENKIN, *supra* note 4, at 191.

cases decided near the time of *Holland*, that the Tenth Amendment operates as a substantive restraint.²⁶¹ In sum, the fact of delegation says nothing about the *scope* of the delegation, and it certainly does not establish that the delegation is *unlimited* in scope.²⁶²

Of course, the willingness of the Supreme Court to enforce the Tenth Amendment as an independent limitation on *any* federal power has varied. Although the Court has at times treated the Tenth Amendment as an independent restraint on delegated powers,²⁶³ at other times it has described the Tenth Amendment as stating "but a truism that all is retained which has not been surrendered."²⁶⁴ Under this analysis, states' rights are protected by policing the scope of the delegated powers, not by giving immunity to reserved state powers *per se*. The Court's current position on this issue is not entirely clear, although the Court appears to be treating the Tenth Amendment as an independent restraint.²⁶⁵ In any event, the key point here is that whatever limitations the Tenth Amendment does impose, it is not evident from the delegation argument why these limitations should not apply to the treaty power.

Some proponents of this aspect of the nationalist view have pointed out that, unlike its treatment of certain other delegated powers, the Constitution expressly denies states the power to enter

261. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 274-76 (1918) (invalidating statute designed to prevent interstate shipments of products made by child labor); *Kansas v. Colorado*, 206 U.S. 46, 85-92 (1907) (holding that Congress did not have the power to regulate state use of a river for the purpose of reclamation of arid lands). It would seem unlikely that the 7-2 majority in *Holland* thought it was implicitly overruling those earlier decisions. It is possible, however, that the author of the *Holland* decision, Justice Holmes, did intend such a holding, given his dissent in *Hammer*. See 247 U.S. at 277 (Holmes, J., dissenting).

262. See Mikell, *supra* note 157, at 539-40.

263. In addition to the decisions cited *supra* note 261, see, for example, *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976), where the Court justified its invalidation of federal statutory provisions "not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."

264. *United States v. Darby*, 312 U.S. 100, 124 (1941).

265. In *New York v. United States*, 505 U.S. 144, 156-57 (1992), the Court purported to treat the Tenth Amendment not as a restraint on delegated powers *per se*, but rather as a *reminder* that states' rights must be considered in determining the scope of delegated powers. At the same time, however, the Court appeared to acknowledge that its approach was functionally the same as applying the Tenth Amendment as an independent restraint on delegated powers. See 505 U.S. at 159. In a more recent decision, the Court used language suggesting that it viewed the Tenth Amendment as an independent limitation on delegated powers. See *Printz v. United States*, 117 S. Ct. 2365, 2379, 2383 (1997) (stating that the provisions in question "violate[] the principle of state sovereignty," are "not in accord with the Constitution," and "run afoul" of the rule that the federal government cannot commandeer state governments). The concurrence in that case by Justice O'Connor, the author of the earlier *New York* opinion, is even more explicit on this point. See 117 S. Ct. at 2385 (O'Connor, J., concurring) ("The Brady Act violates the Tenth Amendment . . .").

into treaties.²⁶⁶ They argue that, even if some delegated powers are subject to Tenth Amendment limitations, this should not be the case for delegated powers that, like the treaty power, are held exclusively by the federal government. This argument, however, is a non sequitur. While it is true that the states have not reserved the power *to enter into treaties*, this does not mean that they have not reserved other regulatory powers that might be infringed by certain exercises of the federal treaty power. In other words, the Constitution's denial of state power to enter into treaties "proves that the federal power to make treaties is *exclusive*, but it does not prove that it is *unlimited*, or that [it] is not limited by the tenth amendment."²⁶⁷ The exclusivity argument breaks down even further when it is remembered that the Constitution allows the states some ability to enter into international agreements,²⁶⁸ and that many international agreements made by the federal government today take the form of executive agreements rather than Article II treaties.²⁶⁹

266. See, e.g., HENKIN, *supra* note 4, at 189; Elihu Root, *The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution*, 1 AM. J. INTL. L. 273, 278 (1907); Wright, *supra* note 112, at 257.

267. Mikell, *supra* note 157, at 539-40; see also, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 274 (1918) ("The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution.").

268. See U.S. CONST. art. I, § 10, cl. 3 (allowing states to enter into "Agreement[s] or Compact[s]" with foreign nations with congressional consent); see generally Raymond S. Rodgers, *The Capacity of States of the Union to Conclude International Agreements: The Background and Some Recent Developments*, 61 AM. J. INTL. L. 1021 (1967). Some agreements between states and foreign nations may not even require congressional consent. The Supreme Court has held that states may enter into interstate agreements without congressional consent as long as the agreements do not "tend[] to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). Some state courts have applied this standard to agreements with foreign nations. See, e.g., *In re Manuel P.*, 263 Cal. Rptr. 447, 459 (1989) (upholding agreement between San Diego and Mexico to share information concerning juvenile offenders); *McHenry County v. Brady*, 163 N.W. 540, 544-47 (N.D. 1917) (upholding county's construction of a drainage ditch in cooperation with a Canadian town); see also RESTATEMENT (THIRD), *supra* note 13, § 302 cmt. f (noting that "agreements involving local transborder issues, such as agreements to curb a source of pollution, to coordinate police or sewage services, or to share an energy source, have been considered not to require Congressional consent").

269. On its face, this exclusivity argument might appear to be supported by the Supreme Court's approach to Congress's spending power. See U.S. CONST. art. I, § 8, cl. 1 (giving Congress the power "[t]o lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States"). The Court has suggested that the Spending Clause, unlike other Article I powers such as the power to regulate interstate commerce, may not be subject to Tenth Amendment restraints. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *United States v. Butler*, 297 U.S. 1, 66 (1935). The Court has based this suggestion, however, not on the ground that the spending power is exclusive, but rather on the ground that federal spending decisions are not themselves preemptive federal law. See *Dole*, 483 U.S. at 210; see also Merritt, *supra* note 22, at 1577. The treaty power, by contrast, does allow for the creation of supreme federal law. See U.S. CONST. art. VI. It is also worth noting that the Court has said that even the spending

The problematic nature of the delegation argument becomes further evident when its logic is applied in the context of separation of powers rather than federalism.²⁷⁰ One could argue that, like federalism restrictions, separation of powers restrictions do not apply to powers delegated exclusively to a branch of the federal government. This argument was accepted to some extent by the Supreme Court in a much-criticized decision, *United States v. Curtiss-Wright Export Corp.*²⁷¹ In that case, Congress by Joint Resolution purported to confer on the President the authority to implement a criminal prohibition on the sale of arms in the United States to countries engaged in a conflict in Latin America. In response to the argument that this constituted an unlawful delegation of legislative authority to the President, a plausible argument at that time in light of the Court's precedent,²⁷² the Court sharply distinguished between federal power over external affairs and federal power over internal affairs.

In particular, the Court observed that "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."²⁷³ The Court explained that, whereas the states had delegated certain limited powers over internal affairs to the federal government, this was not the case with respect to powers relating to external affairs: "Since the states severally never possessed interna-

power "is of course not unlimited," and that the Court has articulated several restrictions on the scope of that power, including two relating to subject matter. See *Dole*, 483 U.S. at 207-08. For an argument that the Court should impose more restrictions on the spending power given the Court's renewed commitment to federalism, see Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995); see also Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85 (criticizing *Dole*).

270. Of course, federalism and separation of powers are not unrelated issues. If the treaty power gives the federal government additional power vis-à-vis the states, it also gives the treaty makers additional power vis-à-vis the other branches of the federal government. See Goldsmith, *supra* note 2, at 1680-81 (discussing linkage between federalism and separation of powers).

271. 299 U.S. 304 (1936).

272. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-42 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421-30 (1934).

273. *Curtiss-Wright*, 199 U.S. at 315-16. This distinction between constitutional limitations with respect to external affairs and those with respect to internal affairs was one that the author of the *Curtiss-Wright* decision, Justice Sutherland, had made in earlier writings before coming to the Court. See GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 24-47 (1919); GEORGE SUTHERLAND, THE INTERNAL AND EXTERNAL POWERS OF THE NATIONAL GOVERNMENT, S. DOC. NO. 61-417 (1909), reprinted in 191 N. AM. REV. 373 (1910).

tional powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.”²⁷⁴ One such power is the “very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”²⁷⁵ The existence of this power, reasoned the Court, meant that the usual separation of powers limitations on delegations of authority to the executive branch do not apply with respect to foreign affairs matters.²⁷⁶

The reasoning in *Curtiss-Wright* is to some extent the separation of powers analogue to *Holland*. Just as the federalism restrictions operated differently with respect to external matters in *Holland*, so did the separation of powers restrictions in *Curtiss-Wright*. Moreover, in both decisions, the Court distinguished between internal matters, over which the states retained some sovereign authority, and external matters, over which the states did not. In assessing the validity of the delegation argument, it is therefore important to note that the reasoning of *Curtiss-Wright* has received “withering criticism” from commentators.²⁷⁷ Among other things, commentators have criticized the reasoning for “carv[ing] a broad exception to the historic conception, often reiterated, never questioned, and explicitly reaffirmed in the Tenth Amendment, that the federal government is one of enumerated powers only.”²⁷⁸

Moreover, the Supreme Court arguably has repudiated the logic of *Curtiss-Wright*. In *Youngstown Sheet & Tube Co. v. Sawyer*,²⁷⁹ the Court found a presidential order authorizing a seizure of the nation’s steel mills to be invalid, notwithstanding the President’s claim that the seizure was necessary for national defense given the ongoing conflict in Korea. The Court stated that “[t]he President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”²⁸⁰ In his famous concurrence in that case, Justice Jackson observed that much of the

274. *Curtiss-Wright*, 299 U.S. at 316.

275. 299 U.S. at 320.

276. *See* 299 U.S. at 320-22.

277. *See* HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 94 (1990). For examples of this criticism, *see* FRANCK, *supra* note 2, at 14-18; Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 *YALE J. INTL. L.* 5 (1988); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland’s Theory*, 55 *YALE L.J.* 467 (1946); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 *YALE L.J.* 1 (1973).

278. HENKIN, *supra* note 4, at 20.

279. 343 U.S. 579 (1952).

280. 343 U.S. at 585.

Court's opinion in *Curtiss-Wright* had been "dictum,"²⁸¹ and he reiterated the traditional view that "the executive branch, like the Federal Government as a whole, possesses only delegated powers."²⁸² In its subsequent decision in *Dames & Moore v. Regan*,²⁸³ a case involving a challenge to an executive agreement, the Court largely endorsed the *Youngstown* approach rather than the *Curtiss-Wright* approach.²⁸⁴

Given the criticism and erosion of the separation of powers reasoning in *Curtiss-Wright*, it is perhaps not surprising that proponents of the nationalist view do not argue that the treaty power is immune from implied limitations arising from separation of powers. Professor Henkin, for example, states that "[t]he Treaty Power . . . is not limited by the powers of Congress, but it is assumed to be subject to other radiations from the separation of powers."²⁸⁵ Indeed, notwithstanding *Curtiss-Wright*, Henkin notes specifically that "[i]t has been assumed that constitutional limitations on delegation of legislative power apply as well to delegation by treaty."²⁸⁶ These proponents fail to explain, however, why the implied limitations of separation of powers should govern when the implied limitations of federalism do not.²⁸⁷ The delegation argument does not provide such an explanation.

281. 343 U.S. at 635-36 n.2 (Jackson, J., concurring).

282. 343 U.S. at 640 (Jackson, J., concurring).

283. 453 U.S. 654 (1981).

284. See 453 U.S. at 668-69; see also Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1159, 1244-45 (1987) (discussing how *Youngstown* and *Dames & Moore* cut back on the broad reasoning of *Curtiss-Wright*).

285. HENKIN, *supra* note 4, at 195 (citations omitted).

286. *Id.* at 470 n.83.

287. Cf. TUCKER, *supra* note 157, at 412 ("If the treaty power may not invade the powers of Congress, or the Judiciary, or the President, would not the same prohibition apply to any other branch of the Federal Government as well as to those? Surely there is no peculiar sanctity that doth hedge Congress, the Judiciary, or the President, which should be denied to the States — as integral parts of the Federal Government."). This separation of powers issue, like the federalism issue, is becoming increasingly important. Consider, for example, the constitutional challenges recently made against the binational panel review process established in connection with the NAFTA trade agreement. It has been argued that this process, by delegating U.S. judicial authority to an international body, violates both the Appointments Clause and Article III. See *American Coalition for Competitive Trade v. Clinton*, 128 F.3d 761 (D.C. Cir. 1997) (upholding dismissal of these constitutional claims on standing and jurisdictional grounds); see also Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455 (1992) (arguing that the binational review process under the predecessor treaty to NAFTA was unconstitutional); cf. CORWIN, *supra* note 153, at 14 (describing how President Taft objected to a 1907 treaty establishing an international prize court on the ground that the Constitution does not allow transfer of federal judicial power to a non-U.S. court). Another example is the Chemical Weapons Convention, which was recently ratified by the United States. See Convention on the Prohibition of the Development,

B. Political Process Argument

In addition to making the delegation argument, proponents of the nationalist view typically advance the *political process argument*. This argument is that the political process provides sufficient protection of federalism, such that no substantive federalism restriction is necessary. Proponents of this view observe, for example, that two-thirds of the Senate must consent to treaties, and that the states have equal representation in the Senate.²⁸⁸ Although some proponents of this view correctly point out that the Founders placed significant emphasis on the process for concluding treaties as a protection for the states,²⁸⁹ they do not appear to claim that the Founders intended for this process protection to be exclusive, and any such claim likely would be unpersuasive given the Founding materials discussed above. Instead, they appear to make more of a *stare decisis* argument: there is no need to overturn the settled decision in *Holland* because states' rights are not in fact threatened by the treaty power.

This sort of argument is not, of course, unique to the treaty context. A similar political process argument was made by commentators, and eventually accepted by the Supreme Court, with respect to federal legislative power in general. The theory was first advanced in the 1950s by Herbert Wechsler,²⁹⁰ and then later more thoroughly developed by Jesse Choper.²⁹¹ Citing these writings, a 5-4 majority of the Supreme Court endorsed the political process theory in its 1985 *Garcia* decision.²⁹² The Court concluded that "the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of pro-

Production, Stockpiling, and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 103-21 (1993). One scholar has made the plausible argument that the federal government's delegation through the Convention of weapons inspection authority to an international body violates the Appointments Clause. See John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENTARY 87 (1998).

288. See, e.g., HENKIN, *supra* note 4, at 443-44 n.4; see also CORWIN, *supra* note 153, at 302-04; HENKIN, *supra* note 4, at 168, 189 n.**.

289. See, e.g., CORWIN, *supra* note 153, at 65-74; see also *supra* text accompanying notes 108-09, 118-122.

290. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

291. See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); Jesse H. Choper, *The Scope of the National Power Vis-a-Vis The States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977).

292. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 n.11 (1985). The Court also cited D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982).

cess rather than one of result,” and the Court said that “[a]ny substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a ‘sacred province of state autonomy.’”²⁹³

Despite the Court’s general endorsement of this theory in *Garcia*, there are several problems with relying on this argument today to support the nationalist view of the treaty power. First, the Supreme Court appears to have backed away from *Garcia* in recent years. Starting with its “clear statement” requirement in *Gregory v. Ashcroft*,²⁹⁴ through its latest “commandeering” decision, *Printz v. United States*,²⁹⁵ the Court has steadily chipped away at the proposition that federalism protections are to be left solely to the political process. As Professor John Yoo recently explained, “[i]n these cases, the Court has articulated its intention to establish areas of state control that are to remain immune from federal regulation, and it has suggested that these areas can be identified by policing Congress’ use of its enumerated powers.”²⁹⁶ The political process theory also has been the subject of substantial academic criticism in recent years.²⁹⁷ A number of these critics have examined the mechanics of our political process and have concluded that “[t]he structural protections identified by Wechsler, Choper, and company are marginal at best.”²⁹⁸ Professor Steven Calabresi has pointed out, for example, that the campaign finance system, with its national special interest groups and PACs, undercuts the representa-

293. *Garcia*, 469 U.S. at 554 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983)); see also *South Carolina v. Baker*, 485 U.S. 505, 512 (1988) (“*Garcia* holds that the [federalism] limits are structural, not substantive — i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.”).

294. 501 U.S. 452, 461 (1991).

295. 117 S. Ct. 2365 (1997).

296. Yoo, *supra* note 46, at 1312.

297. The most prominent critical works include Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752 (1995); McConnell, *supra* note 22, at 1485; Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); John C. Pittenger, *Garcia and the Political Safeguards of Federalism: Is There a Better Solution to the Conundrum of the Tenth Amendment?*, PUBLIUS, Winter 1992, at 1; Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341; Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1 (1987); and William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985). See also Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 362-63 (1997) (noting that “[n]umerous commentators have questioned the soundness of the Court’s reasoning” in *Garcia*).

298. Kramer, *supra* note 46, at 1520.

tion of state interests, and that the incentive structure for federal politicians favors the expansion of federal power rather than the protection of states' rights.²⁹⁹

Second, the political process argument can draw little, if any, support from the original intent of the Founders. Although the Founders did intend for the process of making treaties — especially the two-thirds Senate advice and consent requirement — to protect states' rights,³⁰⁰ there is no evidence that they intended this to be the *only* protection.³⁰¹ More importantly, several key assumptions of the Founders concerning the treaty process no longer hold true. The Founders envisioned direct state representation in the Senate, something that “basically evaporated with the adoption of the Seventeenth Amendment in 1913.”³⁰² The Founders also believed that the Senate would play a major role in advising the President regarding treaties, but its role fairly quickly became one merely of consent.³⁰³ An even more significant change is that the vast majority of international agreements concluded by the United States today are executive agreements rather than Article II treaties and thus do not depend on two-thirds Senate consent at all.³⁰⁴ Nevertheless, these agreements are widely considered to have equal status with Article II treaties, at least if they are approved in advance or after the fact by a majority of both houses of Congress.³⁰⁵

Third, it is arguable that the political process rationale is *less* persuasive in the treaty and executive agreement context than in the context of domestic legislation. As a number of commentators have pointed out, the treaty and executive agreement process is more opaque and less representative than the normal federal legislative process.³⁰⁶ Negotiations are typically conducted by the Exec-

299. See Calabresi, *supra* note 297, at 794-98.

300. See *supra* text accompanying notes 108-11.

301. Professor John Yoo recently conducted a detailed review of the Founding materials with regard to the protection of federalism in general and concluded that the Founders did not intend for the political process to be the only protection. See Yoo, *supra* note 46, at 1357-91.

302. Kramer, *supra* note 46, at 1508. The Constitution originally provided that Senators would be “chosen by the Legislature” of each state. See U.S. CONST. art. I, § 3, cl. 1 (amended 1913). The Seventeenth Amendment provides that Senators shall be elected “by the people” of each state. See U.S. CONST. amend. XVII.

303. See HENKIN, *supra* note 4, at 177.

304. See *supra* text accompanying notes 32-37.

305. See *supra* text accompanying note 37.

306. See, e.g., Friedman, *supra* note 2, at 1475-79; John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INTL. L. 310, 323-24, 331-32 (1992); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INTL. L. & BUS. 681, 683-719 (1996-97).

utive, often without much public disclosure. And, as Professor Friedman has noted, “[t]here is not much in the political process of electing a President that suggests any particular sensitivity to state concerns.”³⁰⁷ Moreover, the Senate in the case of treaties, and the entire Congress in the case of congressional-executive agreements, is often confronted with what is essentially an up-or-down vote. Unlike much domestic legislation, Congress has essentially no role in drafting treaties and it has relatively little ability to modify their terms. This has been particularly true in the context of so-called “fast-track” legislation.³⁰⁸ Moreover, the costs of a down vote may involve not only a failure to commit to the agreement in question, but also an inability to participate in the international organization associated with the agreement. In these situations, the bargaining power of the Senate or Congress is likely to be fairly low, and it may feel substantial pressure to approve the commitments already made by the President.³⁰⁹ In addition, treaties, especially multilateral treaties, may be more likely than domestic legislation to contain vague and aspirational language, making their effect on state prerogatives harder to anticipate during the ratification process.³¹⁰ Finally, the construction and implementation of many treaties are delegated to international bodies that may lack domestic, let alone state, accountability.³¹¹

Notwithstanding these objections to the political process argument, it must be acknowledged that the Senate often has acted to protect states’ rights in the treaty context, especially with respect to

307. Friedman, *supra* note 2, at 1474.

308. Fast-track legislation allows the President to conclude trade agreements subject to only limited debate and an up-or-down vote in Congress. *See generally* Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INTL. L. 143 (1992); C. O’Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned Into a Battle*, 28 GEO. WASH. J. INTL. L. & ECON. 2 (1994). There has been substantial debate in Congress recently over whether to renew the President’s fast-track authority. *See, e.g.*, Sharon Schmickle, *Stakes High in Debate on Latin American Trade*, MINNEAPOLIS STAR TRIB., Jan. 3, 1998, at A1.

309. *See* Ackerman & Golove, *supra* note 37, at 904-05 (“Today’s Senate often confronts completed agreements that it can reject or revise only on pain of international embarrassment.”).

310. *See* Jackson, *supra* note 306, at 339.

311. *See* Friedman, *supra* note 2, at 1475-79. A good example is the World Trade Organization. This Organization includes a Dispute Settlement Body that adjudicates trade disputes among nations and passes judgment on national laws relating to trade. In two controversial decisions, for example, it has declared invalid certain U.S. environmental regulations. *See* Report of the Panel in United States — Import Prohibition of Certain Shrimp and Shrimp Products, May 15, 1998, 37 I.L.M. 832 (1998); Report of the Appellate Body in United States — Standards for Reformulated and Conventional Gasoline, May 20, 1996, 35 I.L.M. 603 (1996).

human rights treaties.³¹² Human rights agreements have, to date, largely been concluded by means of treaties rather than executive agreements. The Senate has been slow to consent to these treaties, in part because of federalism concerns. And when it has consented, the Senate has sought to protect state interests by declaring the treaties to be non-self-executing and by attaching federalism clauses.³¹³ As Professor Peter Spiro has noted, there has been "a consistent refusal [of the U.S. treaty makers] to displace state law with international human rights treaty obligations."³¹⁴

Of course, that the Senate has acted in a certain way is no guarantee that it will continue to do so as its membership and relationship with the President change.³¹⁵ Moreover, as discussed above, human rights treaties are not the only international agreements that raise federalism concerns, and it is far from clear that the Senate's practices with regard to human rights treaties will be carried over into other contexts. Indeed, if the GATT and NAFTA agreements are any indication, it cannot be assumed that the President will even use the Article II treaty process for these other agreements.³¹⁶ It should also be noted that proponents of the nationalist view have vigorously challenged the Senate's limitations on human rights treaties, so they may be in no position to rely on these limitations to support their political process argument.³¹⁷

More importantly, the limitations imposed by the Senate to date on human rights treaties do not prevent a majority of Congress from relying on the treaties, in conjunction with the Necessary and Proper Clause, as a source of lawmaking power. Indeed, this is ex-

312. See, e.g., Whitton & Fowler, *supra* note 158, at 36-38.

313. See *supra* text accompanying notes 220-21.

314. Spiro, *supra* note 31, at 577.

315. Professor Spiro has suggested that the Senate's practice might itself now represent a constitutional norm, in the spirit of a Bruce Ackerman-style constitutional amendment. See *id.* at 576-78 & nn.32 & 37; cf. BRUCE ACKERMAN, *WE THE PEOPLE* 6-16 (1991) (explaining the amendment theory). Although I find this suggestion unpersuasive, I do agree with Professor Spiro that the Senate's practice is relevant to the question of whether to retain *Holland*. See Spiro, *supra* note 31, at 578. For powerful critiques of Professor Ackerman's amendment theory, see RICHARD A. POSNER, *OVERCOMING LAW*, ch. 7 (1995), and Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759 (1992). See also Richard A. Posner, *This Magic Moment*, THE NEW REPUBLIC, Apr. 6, 1998, at 32.

316. See *supra* text accompanying note 95.

317. See, e.g., Damrosch, *supra* note 14, at 518; Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INTL. L. 341 (1995); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1828 n.24 (1998). See generally Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 521-22 (1998) (discussing the limitations imposed by the Senate on human rights treaties and various criticisms of them).

actly what Congress did in *Holland*. Thus, as noted above, a number of commentators have suggested recently that Congress rely on *already-ratified* treaties as the basis for overcoming limitations on its domestic lawmaking power.³¹⁸ This is the process, for example, recommended by Professor Neuman for reenactment of the RFRA statute.³¹⁹ In this context, there is no super-majority protection in the Senate, so we are left with whatever political process checks exist in the majority of Congress — checks viewed by the current Supreme Court and many commentators as insufficient by themselves to protect the states.

C. *One-Voice Argument*

A third argument against imposing federalism limitations on the treaty power is that it would hamper the ability of the United States to speak with one voice in international negotiations. According to this *one-voice argument*, if the treaty power were limited by states' rights, the Executive's ability to negotiate and conclude vital international agreements would be severely compromised. As Professor Neuman has argued, "[r]equiring the unanimous agreement of . . . all the states for ratification of any treaty that includes a provision addressing 'local' concerns would greatly hamper American participation in international treaty regimes."³²⁰

This one-voice argument has strong intuitive appeal. Foreign affairs, after all, concern the entire nation. Moreover, effective international bargaining may well require that we have a national representative with the power to make binding commitments. Consistent with this understanding, the Founders of the Constitution envisioned, in the words of James Madison, that "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations."³²¹ In addition, the Supreme Court has emphasized in a number of cases the need for exclusive federal control over foreign relations.³²²

318. See *supra* text accompanying notes 54-59, 64-69, 73-95, 99-106.

319. See *supra* text accompanying notes 54-59.

320. Neuman, *supra* note 15, at 48. For a general discussion and partial critique of the one-voice argument, see Ralph G. Steinhardt, *Human Rights Litigation and the "One Voice" Orthodoxy in Foreign Affairs*, in *WORLD JUSTICE?: U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS* 23 (Mark Gibney ed., 1991).

321. *THE FEDERALIST*, *supra* note 114, No. 42 (James Madison), at 264.

322. See, e.g., *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976) ("[T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments . . ."); *Zschernig v. Miller*, 389 U.S. 429, 436 (1968) (describing "foreign affairs and international relations" as "matters which the Constitution entrusts solely to the Federal Government"); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("In respect of all interna-

It is likely, however, that the one-voice metaphor has never been very accurate. At the federal level, it is common for all three branches of the government to be involved in foreign affairs matters, preventing any single federal voice. As Professor Goldsmith has observed, "[f]oreign relations law is replete with struggles between the statute-makers, the treaty-makers, the President, and sometimes the courts, for control of the federal foreign relations voice."³²³ In addition, states are involved in a host of regulatory activities that sometimes affect foreign affairs, such as criminal prosecution of aliens, taxation of multinational corporations, and adjudication of cases involving foreign parties or transactions.³²⁴

In any event, the intuitive appeal of the one-voice argument varies dramatically depending on the type of treaty-making involved. It is strongest with respect to traditional treaty-making. Most of us would agree, for example, that the Executive should not be hampered by federalism concerns when negotiating a peace treaty. But, as we have seen, the nature of treaty-making has changed. It now purports to regulate many subjects formerly considered domestic in nature, especially in the human rights area. With respect to *that* sort of treaty-making, the one-voice argument loses much of its intuitive appeal. It is not at all obvious, for example, that it is necessary or desirable that the country speak through the Executive with respect to the regulation of religious freedom.

Whatever federalism limitations are imposed on the treaty power, and I discuss some of the options below, they are likely to be relevant almost entirely with respect to the new types of treaty-making, where the one-voice argument has less appeal. This might not always have been the case. When states' rights were viewed more expansively, and federal power viewed more narrowly, it is possible that federalism limitations, if indiscriminately applied, *would* have interfered with the nation's ability to speak with one voice in international relations. Interestingly, during that same period of time, there was nevertheless support for limitations on the treaty power.³²⁵ Today, with federalism at best a weak restraint on federal power, any threat to flexibility posed by subjecting the treaty power to federalism limitations is substantially lower.

tional negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.").

323. Goldsmith, *supra* note 2, at 1688.

324. *See id.* at 1634-39.

325. *See supra* section II.B.

Moreover, as a political matter, treaty-making today is already subject to federalism limitations on an ad hoc basis. Thus, for example, the Senate routinely attaches federalism clauses to human rights treaties.³²⁶ These clauses have not hampered this country's ability to conclude these treaties. Indeed, it may not have been politically possible to conclude these treaties *without* such clauses.³²⁷ Rejecting the nationalist view would simply give the force of law to this practice without substantially interfering with the nation's ability to conclude treaties.

The one-voice argument also has less doctrinal support than first meets the eye. As noted above, the Court has pulled back from the broad reasoning of decisions like *Curtiss-Wright*.³²⁸ Moreover, the Court's one-voice statements have always been broader than the Court's actual decisions, which have not in fact allowed the federal government unfettered power in foreign affairs.³²⁹ Perhaps most significantly, the Court recently sounded a formal retreat from a strong one-voice position. In *Barclays Bank PLC v. Franchise Tax Board*,³³⁰ the Court considered a challenge, under the dormant foreign commerce clause, to the constitutionality of California's "worldwide combined reporting" method for taxing multinational corporations. In prior decisions, the Court had held that state tax laws would be subject to dormant preemption if they interfered with the federal government's ability to "'speak with one voice when regulating commercial relations with foreign governments.'" ³³¹ Relying on that proposition, the petitioners in *Barclays Bank* pointed out that the California law had provoked enormous diplomatic controversy with the United States' closest trading partners and had been opposed in numerous executive pronouncements.³³² The Court nevertheless rejected their challenge to the law, in large part because Congress had shown a willingness to tolerate state taxation methods like the one at issue.³³³ Importantly, the Court emphasized that the usual method in our constitutional

326. See *supra* note 220 and accompanying text.

327. See Stewart, *supra* note 221, at 1189.

328. See *supra* text accompanying notes 279-84.

329. See Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1192-93 (1990) (making this point and citing relevant decisions).

330. 512 U.S. 298 (1994).

331. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

332. See *Barclays Bank*, 512 U.S. at 324-30.

333. See 512 U.S. at 324-28.

system for overcoming state disuniformity is for Congress to enact a statute within the scope of its Article I powers, and the Court indicated that it was unwilling to deviate from that approach just because foreign affairs were involved.³³⁴ As other commentators have noted, the Court in *Barclays Bank* largely repudiated the strong "one voice" doctrine suggested in some of its earlier foreign commerce clause decisions.³³⁵

A variation of this one-voice argument would be to claim that the scope of the treaty power is a nonjusticiable political question. Under the political question doctrine, courts will not review issues where there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it."³³⁶ While there are indeed broad statements by the Supreme Court suggesting that foreign affairs is a subject largely outside of the scope of judicial review,³³⁷ the key problem here, once again, is that the Court's statements are premised on the existence of a bright line between foreign and domestic affairs. Once this line becomes blurred, as it has in the treaty-making area, the justifications for judicial abstention diminish. Even if the courts lack competence and constitutional authority with respect to truly *inter-national* relations, this may not be the case with respect to international agree-

334. See 512 U.S. at 329-31.

335. See Goldsmith, *supra* note 2, at 1705 ("As for the one-voice test in dormant foreign Commerce Clause cases: *Barclays Bank* effectively eliminated it."); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INTL. L. 121, 164 (1994) ("The decision was a highly significant retreat in a line of foreign Commerce Clause rulings articulating a 'one voice' approach parallel to other forms of foreign affairs preemption."); Charles Tiefer, *Free Trade Agreements and the New Federalism*, 7 MINN. J. GLOBAL TRADE 45, 53 (1998) ("Ultimately, in the *Barclays Bank* case, the Supreme Court all but ended the era of the *Japan Line* 'one voice' doctrine.").

336. *Baker v. Carr*, 369 U.S. 186, 217 (1962); see also *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker*).

337. See, e.g., *Regan v. Wald*, 468 U.S. 222, 242 (1984) ("Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952))); *C. & S. Airlines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("Such decisions [concerning foreign policy] are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative — 'the political' — Departments of the Government . . ."). This notion that the political question doctrine should be applied broadly to cases involving foreign affairs has been criticized by numerous commentators, including proponents of the nationalist view of the treaty power. See generally FRANCK, *supra* note 2; Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Michael E. Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135 (1970).

ments that regulate the internal relationship between governments and their citizens.

In any event, the Court has made clear that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."³³⁸ Rather, the political question doctrine shields from judicial review only "those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."³³⁹ States' rights, according to the current Supreme Court, are very much within the scope of proper judicial review.³⁴⁰ The Court also has specifically observed that the *construction* of treaties and executive agreements is a proper subject for judicial review, even if such construction might have consequences for foreign relations.³⁴¹ While a plurality of the Court did conclude in *Goldwater v. Carter*³⁴² that a challenge by members of Congress to the President's unilateral termination of a treaty presented a political question, it did so because the challenge involved the respective powers of coordinate federal branches of government.³⁴³ The scope of the treaty power, by contrast, involves the powers of the federal government as a whole vis-à-vis the constituent state governments. As the Court has noted, "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'"³⁴⁴

For all of these reasons, neither the one-voice argument nor the related political question doctrine justifies giving the treaty power immunity from federalism restrictions. This is particularly true with respect to the new forms of treaty-making that address issues that in the past largely have been regulated by states. As for those treaties, the one-voice argument simply begs the question: the argu-

338. *Baker*, 369 U.S. at 211.

339. *Japan Whaling Assn. v. American Cetacean Socy.*, 478 U.S. 221, 230 (1986).

340. *See supra* text accompanying notes 47-52.

341. *See Baker*, 369 U.S. at 212; *see also Japan Whaling*, 478 U.S. at 230 ("As *Baker* plainly held . . . the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts.").

342. 444 U.S. 996 (1979) (plurality opinion).

343. *See Goldwater*, 444 U.S. at 1002. For an argument that judicial review is proper even under these circumstances, *see FRANCK, supra* note 2, at 36-38.

344. *Baker*, 369 U.S. at 210. It is also worth noting that the First Judiciary Act included a provision specifically allowing challenges to the validity of treaties, suggesting that this issue was not originally viewed as nonjusticiable. *See* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (current version at 28 U.S.C. § 1652 (1994)) (conferring federal court jurisdiction over suits "where is drawn in question the validity of a treaty").

ment is premised on the need to protect federal prerogatives in foreign affairs, yet whether the new forms of treaty-making are in fact federal prerogatives is exactly what is at issue.

V. PROTECTING AMERICAN FEDERALISM

As discussed above, the nationalist view of the treaty power is unsupported by history, and its principal legal and policy justifications are questionable. Consequently, to the extent that American federalism continues to be worth protecting, there does not appear to be any good justification for exempting the treaty power from this protection. Indeed, at least some of the reasons for protecting federalism, such as the desirability of having a check against the centralization of power, would seem to be especially relevant to the treaty power, which entails the centralization of power even further away from the average U.S. citizen than does domestic legislation.³⁴⁵

The question remains, however, *how* federalism should be protected. As we have seen, the political process does not appear by itself to offer sufficient protection. Because there are two components of the nationalist view of the treaty power, there are, at least in theory, two additional avenues for protecting federalism. The treaty power could be subjected to some sort of a subject matter test, or it could be subjected to structural federalism limitations. In this Part, I consider both possibilities.

As I explain, the answer to this question may be different today than it would have been in the past. Historically, it often was assumed that the treaty power was appropriate only for certain externally oriented subjects. As the distinction between foreign and domestic affairs wanes, however, it becomes increasingly difficult to maintain any meaningful subject matter limitation. As a result, I argue that it makes more sense today to focus on structural federalism limitations on the treaty power, and, for a variety of reasons, I argue that the treaty power should be subject to the same federalism limitations that apply to Congress's legislative powers. In other words, my argument is that the federal government should not be able to use the treaty power (or executive agreement power) to create domestic law that could not be created by Congress. To the extent that this conclusion would require overruling *Holland*, I

345. See Friedman, *supra* note 2, at 1477-81; Detlev Vagts, *International Agreements, the Senate and the Constitution*, 36 COLUM. J. TRANSNATL. L. 143, 154 (1997).

argue that the justifications for stare decisis are weak in this context.

A. *Reviving a Subject Matter Limitation*

One option for protecting federalism in this context would be to revive a subject matter limitation on the treaty power. After all, such a limitation has substantial historical support and was rejected by commentators only recently. Moreover, this limitation has never been squarely rejected by the Supreme Court and thus presumably could be revived without revisiting settled Supreme Court precedent. Indeed, *Holland* itself arguably assumed that there was such a limitation on the treaty power.³⁴⁶

There are two possibilities here. The first would be to limit the treaty power to matters usually the subject of treaties at the time the Constitution was adopted. This was one of the limitations suggested by Jefferson.³⁴⁷ This suggested limitation has never received much acceptance, however.³⁴⁸ Moreover, as a policy matter, this limitation would seem to be highly undesirable. Not only would it exclude U.S. participation in human rights treaties, it also would presumably exclude U.S. participation in treaties relating to the environment, terrorism, and private international law, to name a few subjects. Moreover, it is doubtful that this limitation could be justified even under a strict originalist interpretation of the Constitution. There is no evidence that the Founders intended the treaty power to be frozen to 1780s issues, and the inflexibility such a limitation would impose on the national government makes it highly unlikely that the Founders would have had such an intent. And, of course, other constitutional powers — such as the commerce power — have not been limited in this fashion.³⁴⁹

The other possibility would be to limit the treaty power to matters that are truly “international” in nature. This is the approach suggested, for example, by Charles Evans Hughes and the *Restatement (Second)*.³⁵⁰ Although this approach may deserve further exploration, it suffers from a substantial problem: Today, almost any

346. See *supra* text accompanying note 190-194.

347. See *supra* text accompanying notes 142-48.

348. See *supra* text accompanying note 147.

349. Cf. Louis Henkin, *The Constitution, Treaties, and International Human Rights*, 116 U. PA. L. REV. 1012, 1021 (1968) (“[S]uch a limitation cannot be taken seriously There is as little, or less, reason for limiting the treaty power to those matters about which nations negotiated in the eighteenth century as there is for limiting the commerce power or the war powers to the needs of that era.”).

350. See *supra* text accompanying notes 227-30, 242-45.

issue can plausibly be labeled "international." Given the globalization of trade, technology, and travel, among other things, nations are indisputably connected to each other in a variety of ways. As a result, "domestic" actions by nations are often matters of concern to the international community. As Professor Tribe has observed, "[w]ith global interdependence reaching across an ever broadening spectrum of issues," any requirement that the treaty power be restricted to matters of international concern "seems unlikely to prove a serious limitation."³⁵¹

This may be true even in the area of human rights. Human rights is, of course, a matter today of international negotiation and agreement. Unlike some proponents of the nationalist view,³⁵² I do not find that fact alone dispositive of the question whether this subject falls within the scope of the federal government's treaty power. If it were dispositive, it would mean that the federal government's power in this regard would be determined entirely by the international community rather than by domestic-law standards, something at odds with this country's "dualist" approach to international law.³⁵³ Nevertheless, it is difficult to dispute that, in this day and age, how one nation treats its citizens has international effects.³⁵⁴ These effects may be direct and physical — for example, an influx of refugees, or instability in the region. Or they may be more abstract and emotional — for example, a sense of moral outrage, or an empathetic loss. Anyone who has observed recent events in Tiananmen Square, Somalia, or Rwanda will find it difficult to deny the existence of such effects.

351. *TRIBE*, *supra* note 43, at 228; *see also, e.g.*, *Friedman*, *supra* note 2, at 1442 ("As the world gets smaller, it will become more difficult to separate the domestic and foreign spheres."); *Goldsmith*, *supra* note 2, at 1669-80 (discussing the waning of the distinction between domestic and foreign affairs).

352. *See, e.g.*, *Neuman*, *supra* note 15, at 46.

353. Under the dualist approach, international and domestic law are treated as distinct, the individual nation determines for itself when and to what extent international law is incorporated into its legal system, and the status of international law in the domestic system is determined by domestic law. *See* LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 153-54 (3d ed. 1993). For a recent confirmation by the Supreme Court of this country's dualist approach, *see Breard v. Greene*, 118 S. Ct. 1352 (1998), where the Court made clear that the incorporation and enforcement of international law is subject to domestic law standards, such as habeas corpus limitations, the last-in-time rule concerning conflicts between treaties and federal statutes, and the Eleventh Amendment. *See generally* Curtis A. Bradley, *The Breard Case, Our Dualist Constitution, and the Internationalist Conception*, 51 *STAN. L. REV.* (forthcoming 1999).

354. For a strong argument that human rights treaties involve matters of "international concern," *see* *Henkin*, *supra* note 349; *see also* Myres S. McDougal & Gertrude C.K. Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 59 *YALE L.J.* 60 (1949) (arguing that human rights is a proper subject for international regulation).

But perhaps a focus on *effects* is not the right test. Another test would be a focus on *need*. The question here might be whether the issue requires international cooperation in order to be addressed. This is, after all, how the Court described the migratory bird treaty at issue in *Holland*. Under this test, human rights treaties might be suspect, since their implementation involves action by individual governments within their territories rather than cooperative action.³⁵⁵ But this line is fuzzy at best. It is arguable that there is in fact a demonstrable need for cooperative international action to address even "domestic" issues such as human rights. Without reciprocal agreements, along with international monitoring and other enforcement mechanisms, many nations might well continue to engage in human rights abuses. Perhaps treaties are required to obtain results even here. To be sure, the proliferation of human rights treaties has not eliminated human rights abuses in the countries that have ratified them, but it is certainly possible that it has helped improve conditions.

In any event, even if there were a workable distinction in theory between international and domestic matters, it seems unlikely that U.S. courts would feel competent to contradict the political branches on this issue. It is far from clear, for example, what standard the courts could use to draw such a line. Unlike some grants of federal power, the wording of the treaty power does not itself suggest any particular subject restriction. In construing the scope of the Commerce Clause, for example, one might look to the movement of goods or the exchange of money.³⁵⁶ But other than the form of the agreement itself, what is an attribute of a permissible treaty? International law does not appear to offer any help. A treaty is defined in international law simply as an agreement concluded between nation-states.³⁵⁷ The only subject matter limitation under international law is that treaties cannot violate certain fundamental *jus cogens* norms, none of which is likely to have much rele-

355. Cf. Jack L. Goldsmith, *International Human Rights Law and the United States Double Standard*, 1 GREEN BAG 2D 355, 359 (1998) ("If two nations are not inclined for purely domestic reasons to provide a certain level of individual rights protection to their citizens, they gain nothing from a mutual promise to provide greater protection to their citizens.").

356. See, e.g., *United States v. Lopez*, 514 U.S. 549, 567 (1995) ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.").

357. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(1), S. TREATY Doc. No. 92-1 (1969), 8 I.L.M. 679 [hereinafter *Vienna Convention*].

vance to U.S. treaties.³⁵⁸ Moreover, at least since the New Deal, the Supreme Court has imposed few subject matter restraints even on the federal powers that seem amenable to such a limitation.³⁵⁹

The difficulty of judicial line-drawing here is compounded by the changing nature of the subject. What is considered "international" will undoubtedly vary over time, as world conditions and relationships between nations change. As Professor Henkin has explained: "What is of international concern, what affects American foreign relations and is relevant to American foreign policy, what matters the United States wishes to negotiate about, differ from generation to generation, perhaps from year to year, with the ever-changing character of relations between nations."³⁶⁰ In other areas of foreign affairs law, it is evident that the courts tend to defer to the political branches and, indeed, attempt to shift decisionmaking on such issues to those branches.³⁶¹ They are particularly likely to do so with respect to the scope of this country's international relations.

A recent decision that illustrates this point is the Second Circuit's decision in *United States v. Lue*.³⁶² The defendant in that case, a foreign national, was convicted under the Hostage Taking Act, a statute enacted as part of this country's implementation of

358. *Jus cogens* norms, also called "peremptory" norms, are rules of customary international law "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Vienna Convention*, *supra* note 357, art. 53; *see also* *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715-17 (9th Cir. 1992) (discussing attributes of peremptory norms); *Committee of United States Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988) (same); RESTATEMENT (THIRD), *supra* note 13, § 102 cmt. k, reporters' note 6 (same). As these materials explain, *jus cogens* norms concern only a few egregious international law violations, such as genocide, war crimes, and torture.

359. *See Kramer*, *supra* note 46, at 1488.

360. Henkin, *supra* note 349, at 1025.

361. *See, e.g., Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 331 (1994) (refusing to preempt state tax on multinational corporations, despite protests from foreign governments, because "we leave it to Congress — whose voice, in this area, is the Nation's — to evaluate whether the national interest is best served by tax uniformity, or state autonomy"); *United States v. Alvarez-Machain*, 504 U.S. 655, 669 (1992) (refusing to invalidate abduction of foreign suspect from Mexico at behest of United States officials, noting that "the decision of whether respondent should be returned to Mexico, as a matter outside of the [extradition] Treaty, is a matter for the Executive Branch"); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 259 (1991) (refusing to apply Title VII extraterritorially and noting that "Congress, should it wish to do so, may similarly amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot"); *see also Bradley*, *supra* note 317, at 525-29 (making this point in connection with the canon of construction that federal statutes are to be construed not to violate international law); *Bradley*, *supra* note 92, at 550-61 (making this point in connection with courts' use of the presumption against extraterritoriality).

362. 134 F.3d 79 (2d Cir. 1998).

the International Convention Against the Taking of Hostages.³⁶³ The basis for the conviction was the defendant's attempted abduction of a person in New York for the purpose of compelling the victim's relatives to pay ransom. Consistent with the terms of the Convention, the Hostage Taking Act applies even to domestic kidnappings if done "in order to compel a third person or a governmental organization to do or abstain from doing any act," except that the Act does not apply where "each alleged offender and each person seized or detained are nationals of the United States, and each alleged offender is found in the United States, unless the governmental organization sought to be compelled is the Government of the United States."³⁶⁴ Since the defendant in this case was a foreign national, this exception did not apply.

In response to the defendant's argument that the Act's regulation of domestic crimes was beyond the scope of the treaty power, the court stated that "[t]he defendant relies far too heavily on a dichotomy between matters of purely domestic concern and those of international concern, a dichotomy appropriately criticized by commentators in the field."³⁶⁵ While acknowledging that there "must be certain outer limits" to the scope of the treaty power, the court explained that the Act's regulation of hostage taking could easily be classified as a matter of international concern:

Whatever the potential outer limit on the treaty power of the Executive, the Hostage Taking Convention does not transgress it. At the most general level, the Convention addresses — at least in part — the treatment of foreign nationals while they are on local soil, a matter of central concern among nations. More specifically, the Convention addresses a matter of grave concern to the international community: hostage taking as a vehicle for terrorism.³⁶⁶

Given that the subject matter could plausibly be characterized as one of international concern, the court believed that it was inappropriate for the judiciary to second-guess the treaty-makers and thereby "impinge upon the Executive's prerogative in matters pertaining to foreign affairs."³⁶⁷

As this decision illustrates, the line between what is domestic and what is international is difficult to define, the scope of what can plausibly be labeled international has grown substantially in recent

363. International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081.

364. 18 U.S.C. § 1203 (1994).

365. *Lue*, 134 F.3d at 83 (citing the *Restatement (Third)*, *supra* note 13).

366. *Lue*, 134 F.3d at 83.

367. *Lue*, 134 F.3d at 83.

years, and courts as a result are unlikely to restrict the treaty power much, if at all, based on this distinction. If federalism is to be protected in the treaty context, another approach must be found.

B. *Parity with Federal Legislation*

Another option for protecting federalism, and the option I favor, would be to subject the treaty power to the same federalism restrictions that apply to Congress's legislative powers. Under this approach, the treaty power would not confer any additional regulatory powers on the federal government, just the power to bind the United States on the international plane. Thus, for example, it could not be used to resurrect legislation determined by the Supreme Court to be beyond Congress's legislative powers, such as the legislation at issue in the recent *New York, Lopez, Boerne*, and *Printz* decisions.³⁶⁸

As mentioned above, this approach was endorsed by George Nicholas during the Virginia Ratifying Convention,³⁶⁹ Thomas Jefferson in his *Manual on Parliamentary Practice*,³⁷⁰ and the Supreme Court in its 1836 decision, *New Orleans v. United States*.³⁷¹ It also is essentially the law in Canada, where the treaty power has been construed not to give the national government legislative power over matters reserved to the provinces.³⁷²

In addition to this historical and comparative-law support, there are several conceptual and doctrinal reasons why it may make sense today to subject treaties to the same federalism limitations as federal statutes. First, unlike traditional treaties that were generally bilateral and addressed the relations between nations, both the form and substance of modern treaty law resembles domestic legislation. As discussed above, treaty law today regulates the relations between nations and their citizens, it covers many of the same subjects as domestic law, and it is even made in a kind of legislative way, through mechanisms such as multilateral drafting conferences.³⁷³

368. See *supra* notes 47-59.

369. See *supra* note 130 and accompanying text.

370. See *supra* notes 142-48 and accompanying text.

371. See *supra* notes 164-66 and accompanying text.

372. See *Canada v. Ontario*, 1937 App. Cas. 326, 354 (P.C. 1937) (appeal taken from Can.); Friesen, *supra* note 188, at 1416. For a discussion of the scope of the treaty power in a variety of federal systems, see IVAN BERNIER, *INTERNATIONAL LEGAL ASPECTS OF FEDERALISM* 152-71 (1973).

373. See *supra* text accompanying notes 26-27; see also RESTATEMENT (THIRD), *supra* note 13, § 102 cmt. f ("Multilateral agreements open to all states . . . are increasingly used for

Second, as the *Restatement (Second) of Foreign Relations Law* recognized,³⁷⁴ the immunity of the treaty power from states'-rights limitations is premised on the existence of a meaningful distinction between the foreign and the domestic. Yet proponents of the nationalist view themselves, probably correctly, deny that we can continue to make this distinction. Once that is denied, however, there is a much stronger case, based upon the limited and enumerated powers doctrine, for subjecting the treaty power to the same limitations that apply to other federal law.

Third, there is strong doctrinal support for the equal treatment of federal statutes and treaties. Since at least the late 1800s, the Supreme Court has consistently held that treaties and federal statutes have an equal status in the U.S. system, such that, in the case of a conflict, the last in time is the controlling domestic law.³⁷⁵ This well-settled equality of treaties and federal statutes supports treating them as equal as well for federalism purposes.³⁷⁶ As the Supreme Court has observed, its decisions "generally have regarded treaties as on much the same plane as acts of Congress, and as usually subject to the general limitations in the Constitution."³⁷⁷ Indeed, not treating them the same with respect to federalism limitations presents a doctrinal puzzle: If treaties can be made that go beyond what Congress could do pursuant to its legislative powers, then what happens to Congress's ability to supersede the treaty with subsequent legislation? As William Mikell explained many years ago:

If, however, a treaty were made which affected the reserved rights of the states, it is, to say the least, doubtful if such a treaty could be abrogated at all without the consent of the President, for Congress having no power to pass a law, affecting the reserved rights of the states, could enact no law either in affirmance or derogation of the treaty.³⁷⁸

general legislation . . ."); John W. Head, *Supranational Law: How the Move Toward Multilateral Solutions is Changing the Character of "International" Law*, 42 KAN. L. REV. 605, 606 (1994) (describing the "proliferation of multilateral sets of rules"); Van Alstine, *supra* note 83, at 700 ("From a substantial perspective . . . the [private law] conventions have the look and feel of standard federal statutes.").

374. See *supra* note 245 and accompanying text.

375. See, e.g., *The Chinese Exclusion Case*, 130 U.S. 581, 600-02 (1889); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Head Money Cases*, 112 U.S. 580, 599 (1884); see generally Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987).

376. For an early argument to this effect, see James Harrington Boyd, *The Treaty-Making Power of the United States and Alien Land Laws in States*, 6 CAL. L. REV. 279 (1918). See also 5 MOORE, *supra* note 177, at 166.

377. *United States v. Minnesota*, 270 U.S. 181, 208 (1926).

378. Mikell, *supra* note 157, at 536-37.

Further doctrinal support for imposing on the treaty power the same federalism limitations as those imposed on Congress's Article I powers can be found in cases involving the Eleventh Amendment. This Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."³⁷⁹ This language refers only to suits by citizens and subjects, but it has been held to apply to suits by foreign nations themselves against U.S. states.³⁸⁰ Moreover, although the language refers to jurisdiction, the Amendment has been read as embodying more general principles of state sovereignty.³⁸¹ Importantly, the Supreme Court has held that the federal government cannot overcome the Eleventh Amendment (as so defined) by means of Congress's commerce power.³⁸² The question remains, however, whether the federal government can overcome Eleventh Amendment immunity by means of its treaty power. The distinction made in *Holland* and *Reid* between federalism limitations on Article I powers and those on the treaty power at least raises the possibility that the treaty power should be treated differently from the commerce power with respect to the Eleventh Amendment.³⁸³ Recently, however, the Supreme Court made clear that treaty claims, even when brought by foreign governments, are indeed subject to the Eleventh Amendment.³⁸⁴

Notwithstanding this doctrinal support, a principal disadvantage of this proposal is that it might require overruling at least some portion of the *Holland* decision. The Court in *Holland* was unclear about many things, but one thing it did make clear is that the treaty

379. U.S. CONST. amend. XI.

380. See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934); see also *Blatchford v. Native Village*, 501 U.S. 775, 780-82 (1991) (relying on *Monaco* to support the existence of Eleventh Amendment immunity in suits brought against states by Indian tribes).

381. See *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2033 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996).

382. See *Seminole Tribe*, 517 U.S. at 72-73.

383. For commentators making this argument, see, for example, Lori Fisler Damrosch, *The Justiciability of Paraguay's Claim of Treaty Violation*, 92 AM. J. INTL. L. 697 (1998); and Jordan J. Paust, *Breard and Treaty-Based Rights Under the Consular Convention*, 92 AM. J. INTL. L. 691 (1998).

384. See *Breard v. Greene*, 118 S. Ct. 1352, 1356 (1998). Before this decision, a number of lower courts had reached the same conclusion. See, e.g., *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998); *United Mexican States v. Woods*, 126 F.3d 1220, 1222 (9th Cir. 1997). The *Restatement (Third)* similarly expresses the view that the treaty power is subject to the Eleventh Amendment. See *RESTATEMENT (THIRD)*, *supra* note 13, § 302 reporters' note 3.

power is not subject to the same federalism restrictions as Congress's lawmaking powers.³⁸⁵ My proposal's deviation from *Holland*, however, is not as great as it first might appear. The specific holding of the *Holland* decision — that the migratory bird treaty was a proper exercise of the treaty power — presumably would be preserved, given the much narrower scope of the Tenth Amendment today. Moreover, as discussed above, although *Holland* has been construed as giving the treaty power complete immunity from federalism limitations, the decision itself can be read much more narrowly.³⁸⁶ Recent confirmation of this can be found in the brief filed by the Clinton administration in the recent *Breard* case stating that there are in fact federalism limits on the national government's power to enforce treaties.³⁸⁷

In any event, the Supreme Court has said that *stare decisis* carries less weight with respect to constitutional decisions, since Congress cannot overturn them.³⁸⁸ This is especially so when fundamental assumptions in the first decision no longer hold true.³⁸⁹ That is exactly the case with respect to *Holland*.

The world in which *Holland* was decided looks very different from our own. The Court in *Holland* assumed that the power of Congress to regulate interstate commerce was relatively narrow. As a result, the Court thought it necessary that the treaty power be more expansive than the commerce power, in order to address "matters of the sharpest exigency for the national well being that an act of Congress could not deal with."³⁹⁰ Today, of course, Congress's commerce power is extremely broad, and it is likely to remain so notwithstanding the Supreme Court's renewed commitment to federalism.

Holland also was decided at a time when customary international law, rather than treaties, was the dominant form of international law.³⁹¹ Since then, however, there has been a proliferation of

385. See *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

386. See *supra* text accompanying notes 203-07. Another area of doctrinal support is in the area of separation of powers. As discussed above, it is generally accepted that the treaty power is subject to the same separation of powers limitations as Congress's legislative powers. See *supra* text accompanying notes 285-86.

387. See *supra* text accompanying note 81.

388. For a recent statement by the Court to this effect, see *Agostini v. Felton*, 117 S. Ct. 1997, 2016 (1997).

389. See, e.g., *State Oil Co. v. Khan*, 118 S. Ct. 275, 284 (1997) (emphasizing, in overturning a prior antitrust decision, the need for "recognizing and adapting to changed circumstances and the lessons of accumulated experience").

390. *Holland*, 252 U.S. at 433.

391. See *supra* text accompanying note 25.

treaties, as well as the rise of numerous multilateral treaty regimes, such that treaties "have become the principal vehicle for making law for the international system."³⁹² This shift from custom to code has meant that international law is now more specific and regulates a substantially wider range of subjects. As Professor Mark Janis has observed, today "[v]irtually every human activity is to some degree the object of some treaty."³⁹³ These changes have thus substantially heightened the significance of the treaty power in this country.

The Court in *Holland* also appeared to assume that treaties would deal only with matters concerning truly *inter-national* relations. Thus, the Court emphasized that the treaty there concerned a problem that "can be protected only by national action in concert with that of another power."³⁹⁴ Since then, however, we have seen the rise of international human rights law, which regulates the relations between nations and their citizens. Among other things, this means that there is today a significantly greater overlap and potential for conflict between treaty law and U.S. domestic law.

Finally, the Court in *Holland* placed great emphasis on the delegation language of Article II,³⁹⁵ something problematic on its own terms but especially so given that most international agreements concluded by the President today take the form of executive agreements rather than Article II treaties. Even if it were true that the treaty clause in Article II was intended to delegate unlimited law-making power to the federal government, subject only to certain process protections, this clause has become much less relevant to American treaty-making.

In sum, there is a strong case — based on history, doctrine, and policy — for subjecting the treaty power to the same federalism limitations that apply to Congress's legislative powers. This approach would involve overruling some of the reasoning in *Holland*, but that reasoning has become questionable in light of changes in both the nature of treaty-making and the scope of federal legislative power. It is particularly questionable if, contrary to the Court's apparent assumption in *Holland*, there is no subject matter limitation on the treaty power. Importantly, this proposal would not interfere substantially with the treaty power. It might preclude some of the broadest intrusions on state power, such as Professor Neuman's re-

392. RESTATEMENT (THIRD), *supra* note 13, pt. I, introductory note, at 18.

393. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 13 (2d ed. 1993).

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

395. 252 U.S. at 432.

cent proposal concerning RFRA, but it would leave the political branches with substantial flexibility to conclude and implement international agreements in the national interest.

CONCLUSION

The treaty power in this country is a power to make supreme federal law. For much of our history, courts, commentators, and government officials have assumed that this power is limited by subject matter, states' rights, or both. In recent years, however, conventional wisdom has denied any such limitations. The result of this view is that the treaty makers have essentially unlimited power vis-à-vis the states. Such unlimited power, however, is inconsistent with a central principle of American federalism — that the national government's powers are limited and enumerated. This inconsistency is particularly significant today, in light of the rapidly expanding nature of this country's treaty commitments.

Faced with this conflict between foreign affairs orthodoxy and federalism, we could, of course, abandon our commitment to protecting federalism. Perhaps the increased globalization and interdependence of nations renders federalism obsolete. On the other hand, these forces might actually increase the desire for local democracy and experimentation and thus make federalism even more attractive.³⁹⁶ In any event, we must make a choice. As we continue with what is in essence an "international New Deal," we must decide whether federalism is worth preserving. If it is, the nationalist view of the treaty power should be reconsidered.

This is not the only foreign affairs issue that may require reconsideration. As I have explained, the nationalist view of the treaty power is but one example of an approach that could be called "foreign affairs exceptionalism." This approach, which is largely a product of academic and judicial thinking during the 1920s through the 1940s, distinguishes sharply between domestic and foreign affairs. As we enter the next century, that distinction, and the foreign affairs exceptionalism that it justifies, will become increasingly difficult to maintain.

396. See Friedman, *supra* note 2, at 1443 ("As we become subject to regulation that develops farther and farther from our grasp, there will be a strong incentive to reinvigorate local and state government, in order to return control over other aspects of our lives to governments quite close to home.").