THE TREATY POWER: ITS HISTORY, SCOPE, AND LIMITS

Oona A. Hathaway, Spencer Amdur, Celia Choy, Samir Deger-Sen, John Paredes, Sally Pei & Haley Nix Proctor†

This Article examines the scope of the treaty power under the U.S. Constitution. A recent challenge in the courts has revived a debate over the reach and limits of the federal government's treaty power that dates to the Founding. This Article begins by placing today's debate into historical perspective—examining the understanding of the treaty power from the time of the Founding, through the Supreme Court's landmark decision in 1920 in Missouri v. Holland, *and up to the present. It then provides a systematic account of the actual and potential court-enforced limits on the treaty power—including affirmative constitutional limits, limits on implementing legislation, and limits on the scope of the Article II treaty power itself. In the process, the Article develops a detailed pretext test that courts could use to assess whether the federal government has exceeded its Article II authority. Yet even this elaborated pretext test is unlikely to be used to invalidate many treaties. Hence the most important protection against abuse of the treaty power comes not from the courts but from structural, political, and diplomatic checks on the exercise of the power itself—checks that this Article describes and assesses. These checks provide for "top-down" and "bottom-up" federalism accommodation. The result is a flexible system in which the states and the federal government work together to preserve the boundary between their respective areas of sovereignty. The Article concludes that this flexible system of accommodation is likely to be more effective than any court-enforced restraint at protecting against abuse of the federal treaty power.*

† Oona A. Hathaway is the Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School; Celia Choy is an Associate at Covington & Burling, and Haley Nix Proctor is a law clerk to Judge Thomas B. Griffith, Court of Appeals for the District of Columbia. The remaining authors are J.D. candidates at Yale Law School. We are grateful for the assistance of Sam Adelsberg, Philip Levitz, Freya Pitts, and Sirine Shebaya.

Introduction

Carol Anne Bond was initially excited for her close friend Myrlinda Haynes when she learned that Myrlinda was pregnant. She was decidedly less happy, however, when she learned that her own husband was the father. A trained microbiologist, Bond planned a unique form of revenge. She stole 10-chloro-10H-phenoxarsine from the chemical manufacturer Rohm and Haas, where she was employed, and ordered a vial of potassium dichromate over the internet. She then proceeded to spread the highly toxic and dangerous chemicals on her former friend's doorknob, car door handles, and mailbox at

least twenty-four times over the course of several months in an attempt to poison her.[1]

Caught by postal inspectors' surveillance cameras in the act of placing the poisons on Haynes's mailbox, Bond was charged with two counts of possessing and using a chemical weapon in violation of 18 U.S.C. § 229(a)(1). The criminal statute under which Bond was charged had been enacted by the federal government for the purpose of implementing the treaty obligations of the United States under the 1993 Chemical Weapons Convention.[2] Bond responded to the charges against her in part by challenging the application of the federal criminal statute to her conduct as unconstitutional on the grounds that it violated principles of federalism embodied in the U.S. Constitution.[3] The treaty, she argued, could not constitutionally give the federal government the power to criminalize and prosecute her purely domestic acts.

The Third Circuit Court of Appeals rejected Bond's claim, holding that the statute at issue implemented a valid treaty; as a result, the court had no choice but to affirm Bond's conviction.[4] In so holding, the court expressly deferred to the Supreme Court's landmark opinion in *Missouri v. Holland*, which held that a statute that implements a treaty is a constitutional exercise of the treaty power. In so holding, the Court had effectively expanded Congress's authority, allowing it to enact statutes to implement a treaty that it could not enact "unaided" by the treaty power.[5] All three judges in *Bond* concurred in the decision, but not all were content to simply uphold the statute on the basis of what they agreed was binding Supreme Court precedent. Writing separately, Judge Ambro called on the Supreme Court to "clarify (indeed curtail) the contours of federal power to enact laws that intrude on matters so local that no drafter of the [Constitutional] Convention contemplated their inclusion in it."[6]

---

1 *See* United States v. Bond, 581 F.3d 128, 131–34 (3d Cir. 2009), *rev'd on other grounds*, 131 S. Ct. 2355 (2011).

2 *See id.* at 133.

3 *See id.* at 134.

4 *See* United States v. Bond, 681 F.3d 149, 150–51 (3d Cir. 2012). The case was before the Third Circuit for the second time on remand from the Supreme Court, which had reversed the Third Circuit's earlier determination that Bond did not have standing to challenge the constitutionality of the legislation. Bond v. United States, 131 S. Ct. 2355, 2367 (2011).

5 Missouri v. Holland, 252 U.S. 416, 432–33 (1920); *see Bond*, 681 F.3d at 151 (noting that "'there can be no dispute about the validity of [a] statute' that implements a treaty" (quoting *Missouri*, 252 U.S. at 432)).

6 *Bond*, 681 F.3d at 170 (Ambro, J., concurring). Bond filed a petition for certiorari in the U.S. Supreme Court in August 2012. *See* Petition for Writ of Certiorari, Bond v. United States, No. 12-158 (Aug. 1, 2012). Some of the authors of this Article assisted in the preparation of an amicus brief in support of respondent in response to the petition. Brief of Yale Law School Center for Global Legal Challenges as Amicus Curiae in Support of

Whether or not the Supreme Court responds to Judge Ambro's plea, the case against Bond has served to reopen a vigorous debate over the reach and limits of the treaty power under the U.S. Constitution. This Article offers a framework for that debate. We begin by placing the issues into historical perspective. To that end, Part I examines the history of the treaty power. It begins with the Founding Era, showing that the authors of the Treaty Clause of the Constitution envisioned a broad treaty power. Indeed, a key concern about the treaty power was that it would give the federal government the power to cede territory of a state to a foreign nation without the consent of that state. To address this concern, the Framers did not include any express substantive limits on the treaty power but instead put in place structural safeguards—particularly the two-thirds vote threshold in the Senate. In 1920, the Supreme Court's decision in *Missouri v. Holland* reaffirmed this broad grant of authority, expressly holding that the Treaty Clause gave the federal government power above and beyond that granted to it under Article I. This ruling provoked significant backlash—including efforts to amend the Constitution. But the expansion of the Commerce Clause power during and after the New Deal rendered questions over the scope of the treaty power less critical, for most of what the federal government might do under the treaty power it could already do under the enumerated powers of Article I. The renewed contraction of the Commerce Clause power in *United States v. Lopez*[7] and *United States v. Morrison*[8] in the 1990s led to a renewed debate over the scope of the treaty power—a debate that has entered the courts in the *Bond* case.

Part II provides a systematic account of the actual and potential court-enforced limits on the treaty power. The analysis proceeds in three steps. First, there are "affirmative limits"—limits that derive from affirmative constitutional commands—that apply not only to treaties and implementing legislation but to all federal government action. Second, there are specific limits on implementing legislation stemming from the Necessary and Proper Clause. Third, there are limits on the scope of the Article II treaty power—limits, in other words, on what constitutes a constitutionally valid treaty. Specifically, we examine three potential limitations on the Article II power: subject matter, Article I, and pretext. While we conclude that subject-matter and Article I limitations are either unworkable or without merit, we find that there is potential in the pretext limitation. Indeed, the ma-

---

Respondent, Bond v. United States, No. 12-158 (Oct. 2012) (Oona A. Hathaway, counsel of record). As of this writing, the Court has not yet decided whether to grant or deny the petition.

7 514 U.S. 549 (1995).

8 529 U.S. 598 (2000).

jority of scholars who have written on this topic have endorsed a hypothetical pretext test, but thus far none has articulated the parameters of this test or provided guidance as to how courts might apply it. We aim to fill that gap. Drawing on the history of constitutional "purpose tests" and their surrogates, Part II concludes by outlining a detailed pretext test that courts could use to assess whether the federal government has exceeded its authority under the Treaty Clause.

We conclude our discussion of the legal limits on the treaty power by observing that all the legal limits we examine—affirmative constitutional limits, limits on implementing legislation, and limits on the scope of the Article II treaty power itself—are, in the end, unlikely to be used by courts to overturn many, if any, treaties or implementing legislation. Even our elaborated pretext test is unlikely to be used to invalidate many treaties. Instead, we conclude that the most important protection against abuse of the treaty power lies in the structural, political, and diplomatic checks on the exercise of the power itself. These checks are so effective that they have rendered court-enforced legal checks largely unnecessary.

Part III describes these structural, political, and diplomatic checks. The Framers crafted the Treaty Clause's advice and consent requirement for the express purpose of giving the states a voice in the treaty making process. Moreover, the federal government's treaty making is subject to the usual political checks—particularly the contest between political parties and the imperatives of reelection. To this is added a diplomatic check: Article II treaties, unlike domestic legislation, cannot be concluded without the consent of another sovereign nation. This requirement is an independent constraint on the federal government's exercise of the treaty power.

Together, these checks accommodate federalism values without court involvement. The accommodation takes two forms: top-down federalism—the federal government abstains from intruding on state sovereignty by not making treaties that raise federalism concerns—and bottom-up federalism—states assert an active role in the federal international lawmaking process and thus are not mere passive recipients but active players in its creation. The result is a flexible system in which the states and the federal government work together to preserve the boundary between their respective areas of sovereignty. This Article concludes that this flexible system of accommodation is more effective than any court-enforced restraint at protecting against abuse of the federal treaty power.

I
The History of the Treaty Power

The debate about the reach of and limits on the treaty power can be traced to the Founding of the country. This Part explores the evolving understanding of the treaty power from the Founding up to the present. In doing so, it exposes the antecedents of the modern arguments about the reach and limits of the treaty power. It also shows how the concerns of today are both similar to and different from those of the past.

The examination of the history of international lawmaking in the United States serves another related purpose as well. Those on opposing sides of the debate over modern-day international law argue that their normative claims are reflected in (and hence supported by) past practice. This appeal to the past likely stems at least in part from the natural reflex of lawyers to look to the weight of history—or precedent—to guide future practice. But there are reasons for this historical reflex beyond a simple preference for continuity. Past practices can serve as a guide (albeit an imperfect one) as to what practices the Constitution permits or prohibits. One need not hold an originalist view of constitutional interpretation to believe that past uses and interpretation of the Constitution provide some guide as to what the text allows.

Examining the history of international lawmaking practices in the United States and how they have developed over time—focusing in particular on moments of upheaval—reveals that current practices and understandings have been shaped by historical events and circumstances. The Treaty Clause was a compromise that the Framers carefully crafted to hold together the coalition of states in a single government. The Treaty Clause once again became the center of controversy in the period immediately before and after the 1920 Supreme Court decision in *Missouri v. Holland* and again in the 1950s, when an effort to amend the Constitution to restrict the treaty power of the federal government nearly succeeded.[9] That effort to amend the Constitution—today known as the "Bricker Amendment" debate—grew from an emerging backlash against the human rights revolution, particularly against the fear that human rights treaties would be used to challenge racial segregation (a fear made more foreboding to

---

9 *See* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236, 1302–06 (2008) (discussing the Bricker Amendment controversy and its legacy for treaty making in the United States); *see also* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1276 (2000) (discussing President Eisenhower's eventually successful efforts to block passage of a constitutional amendment).

some, as we shall see, by the specter of *Missouri v. Holland* and its recognition of the Treaty Clause as an independent site of federal power vis-à-vis the states). That debate died out not long after, partly because of a massive expansion in the commerce power of the federal government. In recent years, however, the emergence of a new debate over federalism—prompted in part by Supreme Court decisions questioning the reach of the federal government's power under the Commerce Clause—has led once again to discussions about the reach and limits of the treaty power. This is the messy and sometimes dark history that has shaped the treaty power; and it is to this history that we now turn.

A. The Founding Era

The Framers envisioned a broad substantive treaty power. All of the country's power to conclude treaties would vest in the new federal government; the states would retain no independent treaty-making power. The Compacts Clause made clear, if it was not already, that the states ceded all power to make international law to the federal government.[10] The states retained a role, however, through their representatives in the Senate—a body in which each state was equally represented. The Treaty Clause, after all, provided that the President could enter treaties "by and with the Advice and Consent of the Senate . . . provided two thirds of the Senators present concur."[11]

The Framers chose not to enumerate the subjects of the treaty power for fear of restricting their national government in its foreign relations, where unity and flexibility were paramount. Many substantive boundaries, like preservation of basic constitutional structure, were fairly uncontroversial. Where there was disagreement, as over the power to trade territory and regional interests with foreign sovereigns, difficulties in defining the power's substantive scope led to reliance on procedural safeguards. It was ultimately these structural limits that assuaged fears of unbounded treaty making. The Framers did not delve deeply into the question of implementing legislation. They instead assumed that most treaties would not require it. As a result, the relationship they intended between the Treaty Clause and the Necessary and Proper Clause has been the subject of subsequent debate.

---

10 *See* U.S. CONST. art. I, § 10, cl. 3 ("No state shall, without the Consent of Congress, . . . enter into any Agreement or Compact . . . with a foreign Power."); *see also* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 249 (1833) ("A state is forbidden to enter into any treaty, alliance or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power which is conferred entirely on the general government . . . .").

11 U.S. CONST. art. II, § 2, cl. 2.

1. *Treaty-Making Power*

The Framers consistently resisted calls to provide substantive limits on the treaty power.[12] The delegates to the Philadelphia Convention and other state conventions repeatedly and openly acknowledged the impossibility of effectively articulating the proper subjects of such an inherent sovereign power. As Peyton Randolph put it, "[t]he various contingencies which may form the object of treaties, are, in the nature of things, incapable of definition."[13] The Framers emphasized instead the political and structural limits on the treaty power—concluding that they would be sufficient to check its potential excesses.

The Philadelphia Constitutional Convention's discussions "are notable for their paucity of material directly addressing the scope of the treaty power."[14] The Framers devoted little discussion to the issue in part because they simply assumed that the power to conclude treaties would be the same, as was customary for all nations at the time. As David Golove puts it, "the power . . . would extend as far as was customary under international practice."[15] And such power was extensive. Treaties ended wars,[16] regulated navigation,[17] pledged troops,[18] and encouraged trade.[19] Common were bilateral treaties of friendship, commerce, and navigation, which obligated states to engage in

---

12 *See* Golove, *supra* note 9, at 1132–33, 1138, 1145 (arguing that procedural safeguards were more of a priority than substantively limiting the scope of the treaty power). *See generally* Hathaway, *supra* note 9, at 1276–85 (discussing the Founding-Era debate over the Treaty Clause).

13 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 363 (Jonathan Elliot ed., 2d ed. 1859) [hereinafter 3 DEBATES].

14 Golove, *supra* note 9, at 1134.

15 *Id.*

16 *See, e.g.*, Treaty of Peace and Friendship Between His Britannick Majesty, the Most Christian King, and the King of Spain, Gr. Brit.-Spain, art. I, Feb. 10, 1763, *available at* http://avalon.law.yale.edu/18th_century/paris763.asp.

17 *See, e.g.*, Treaty of Amity Commerce and Navigation, Between His Britannick Majesty; and the United States of America, by their President, with the Advice and Consent of their Senate, U.S.-U.K., Nov. 19, 1794, 8 Stat. 116, *reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 245–67 (Hunter Miller ed. 1931) [hereinafter 2 TREATIES], *available at* http://avalon.law.yale.edu/18th_century/jay.asp (Jay Treaty).

18 *See, e.g.*, Treaty of Alliance Between the United States and France, U.S.-Fr., Feb. 6, 1778, 8 Stat. 6, *reprinted in* 2 TREATIES, *supra* note 17, at 35–47, *available at* http://avalon.law.yale.edu/18th_century/fr1788-2.asp.

19 *See, e.g.*, The Barbary Treaties, Treaty with Morocco, U.S.-Morocco, June 28, 1786, 8 Stat. 100, *reprinted in* 2 TREATIES, *supra* note 17, at 185–227 *available at* http://avalon.law.yale.edu/18th_century/bar1786t.asp; Treaty of Amity and Commerce Between His Majesty the King of Prussia and the United States of America, U.S.-Prussia, Sept. 10, 1785, 8 Stat. 84, *reprinted in* 2 TREATIES, *supra* note 17, at 162–84, *available at* http://avalon.law.yale.edu/18th_century/prus1785.asp; Treaty of Amity and Commerce Between His Majesty the King of Sweden and the United States of America, U.S.-Swed., Apr. 3, 1783, 8 Stat. 60, *reprinted in* 2 TREATIES, *supra* note 17, at 123–49, *available at* http://memory.loc.gov/cgi-bin/query/r?ammem/bdsdcc:@field%28DOCID+@lit%28bdsdcc08701%29%29; Treaty of Amity and

peaceful exchange, to trade, and to give equal treatment to each other's citizens.[20]

What little discussion there was of the issue at the Philadelphia Convention[21] made clear that nearly every delegate envisioned a broad treaty power.[22] George Mason, arguing in favor of giving the power to originate legislation to the House of Representatives alone, made it clear that "[h]e was extremely earnest to take this power [to originate legislation] from the Senate, who he said could already sell the whole Country by means of Treaties."[23] Future Supreme Court Justice James Wilson argued (unsuccessfully) in favor of an amendment requiring that treaties not be binding unless "ratified by a law."[24] Arguing in support of the amendment, he explained: "Under the clause, without the amendment, the Senate alone can make a Treaty, requiring all the Rice of S. Carolina to be sent to some one particular port."[25]

The Virginia Ratifying Convention provided more extensive public discussion of the treaty power, and it, too, reflected an understanding of an expansive treaty power. Critics of the Constitution described the treaty power as entirely unbounded. George Mason, arguing for more stringent limits on the treaty power, said that under the Clause as written, "[t]he President and Senate can make any treaty whatsoever. We wish not to refuse, but to guard, this power . . . ."[26] Patrick Henry claimed that the President and Senate could "make any treaty . . . from the paramount power given them."[27] He concluded that the power was, for this reason, "dangerous and destructive."[28]

Defenders of the Constitution explained that defining the treaty power was impossible without hobbling the new federal government

---

Commerce Between the United States and France, *reprinted in* 2 TREATIES, *supra* note 17, at 3–34, *available at* http://avalon.law.yale.edu/18th_century/fr1788-1.asp.

20 *See, e.g.*, Treaty of Amity and Commerce Between His Majesty the King of Prussia, and the United States of America, *supra* note 19, *reprinted in* 2 TREATIES, *supra* note 17, at 162–84; Treaty of Amity and Commerce Between His Majesty the King of Sweden and the United States of America, *supra* note 19, *reprinted in* 2 TREATIES, *supra* note 17, at 123–49.

21 The actual writing of the Treaty Clause's two-third rule took place behind closed doors in the Committee of Eleven during the Ratifying Convention. Its final form was written by the Committee on Style. *See* R. Earl McClendon, *Origin of the Two-Thirds Rule in Senate Action upon Treaties*, 36 AM. HIST. REV. 768, 769–70 (1931).

22 *See* Golove, *supra* note 9, at 1138 (describing a "repeated stress upon the breadth of the treaty power").

23 According to contemporary international practice, a state could be dismembered by treaty. Mason pointed to the British cession of Caribbean islands by treaty as "an example" of what he feared. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 297–98 (Max Farrand ed., 1911) [hereinafter RECORDS].

24 *Id.* at 392.

25 *Id.* at 393.

26 3 DEBATES, *supra* note 13, at 509.

27 *Id.* at 500, 513.

28 *Id.* at 504.

and preventing it from pursuing the country's best interests as they might evolve. Randolph, speaking immediately after Henry, stated, "[w]ill not the President and Senate be restrained? Being creatures of that Constitution, can they destroy it?"[29] He continued, "[i]t is said there is no limitation of treaties. I defy the wisdom of that gentleman to show how they ought to be limited."[30] Madison, too, argued against defining the treaty power. "I do not think it possible to enumerate all the cases in which such external regulations would be necessary. Would it be right to define all the cases in which Congress could exercise this authority? The definition might, and probably would, be defective."[31] He continued, "[t]hey might be restrained, by such a definition, from exercising the authority where it would be essential to the interest and safety of the community. It is most safe, therefore, to leave it to be exercised as contingencies may arise."[32] Madison conceded that "[t]he exercise of the power must be consistent with the object of the delegation," which was "the regulation of intercourse with foreign nations," and he agreed that the power did not include the power "to alienate any great, essential right."[33] But he, too, was unprepared to articulate specific limits on the power.

Supporters did not see the treaty power as unchecked, however. Though there were no specific substantive limits, there were basic structural and political limits. For instance, Madison explained that, unlike the British king, the President was "liable to impeachment."[34] And even if he were able to "seduce a part of the Senate to a participation in his crimes, those who were not seduced would pronounce sentence against him."[35] Moreover, Madison explained, "there is this supplementary security, that he may be convicted and punished afterwards, when other members come into the Senate, one third being excluded every second year."[36]

In Virginia, as elsewhere, a focus of concern over the scope of the treaty power was the power of the federal government to cede territory of a state to a foreign power without the consent of that state.[37] This was no imaginary concern. Spain had earlier proposed a treaty that would have traded navigation rights on the Mississippi river for twenty-five years in exchange for trading privileges, and that treaty

---

29 *Id.*

30 *Id.*

31 *Id.* at 514–15.

32 *Id.* at 515.

33 *Id.* at 514.

34 *Id.* at 516.

35 *Id.*

36 *Id.*

37 *See* Golove, *supra* note 9, at 1141 (identifying "Virginia's passionate attachment to the Mississippi" as the source of much of its concern over the treaty power).

had been only narrowly defeated.[38] George Mason called for "an express and explicit declaration . . . that the power which can make other treaties cannot . . . dismember the empire."[39]

Rather than an express declaration of substantive limits on the treaty power,[40] however, the Framers instead chose to rely on structural and procedural checks to protect states' interests.[41] The states were giving up all power over foreign relations to the central government through the Compacts Clause.[42] They retained a voice in treaty making, however, through the requirement that two thirds of the Senators give their advice and consent to a treaty. The Senate, after all, was to be composed of direct representatives of the states, by contrast with the House, which more directly represented the people. Indeed, at the Philadelphia Convention, Madison argued for a presidential role in treaty making—which did not exist under the Articles of Confederation—precisely because he feared Senators would be *so* loyal to states' sovereign prerogatives.[43] He "observed that the Senate repre-

---

38 *See id.*; Hathaway, *supra* note 9, at 1281–86; Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 GEO. WASH. L. REV. 271, 272 (1934) (arguing that the Treaty Clause "was inserted in the Constitution, *not* on any general theory, but chiefly . . . to allay the fears of the Southern States lest, under the new Constitution, there might be a surrender of American rights to the free navigation of the Mississippi River" (footnote omitted)). In addition to the Southern states' concern over the Mississippi, Northern states feared losing access to Newfoundland fisheries. Thus, "[e]ach section feared that its own particular interest in these two cases might be sacrificed by the treaty method if a mere majority of the senators should be allowed to approve treaties." McClendon, *supra* note 21, at 769. George Mason credited the Northern states' need to protect their fisheries with convincing the Northern states to accept the two-thirds rule. 3 DEBATES, *supra* note 13, at 604.

39 3 DEBATES, *supra* note 13, at 509.

40 Federalists assured the document's detractors that territorial cession was outside the scope of the treaty power. *See, e.g.*, *id.* at 514 (remarks of James Madison) ("I do not conceive that power is given to the President and Senate to dismember the empire . . . ."); Golove, *supra* note 9, at 1143 ("The Federalists denied that the treaty power extended to the cession of territory."). Professor Golove explains that the Federalists actually assumed the scope of the treaty power would be commensurate with contemporary international practice, which they claimed "invalidated treaties dismembering a nation." *Id.* Later commentators construed the obligation to protect states from invasion as a bar on dismemberment through treaty. *See* HENRY ST. GEORGE TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER UNDER THE CONSTITUTION OF THE UNITED STATES 6–7 (photo. reprint 2000) (1915) (quoting 1 BLACKSTONE'S COMMENTARIES, EDITOR'S APPENDIX 338 (Lawbook Exchange, Ltd. 1996) (St. George Tucker ed., 1803)).

41 *See* Hathaway, *supra* note 9, at 1274–85; *see also* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 809 (1995) (arguing that an original proposal to give *all* treaty-making power to the Senate seems "to have been motivated by a commitment to federalism").

42 *See* U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War . . . .").

43 *See* Ackerman & Golove, *supra* note 41, at 809.

sented the States alone, and that" therefore, "it was proper that the President should be an agent in Treaties."[44]

The Treaty Clause was thus designed to protect state prerogatives in multiple ways. The requirement of Senate approval meant that states could directly weigh in on international agreements. Senatorial advice and consent also protected small states' interests from being traded away by large states because the Senate was to be the body where all states had equal representation. The two-thirds requirement further protected states in the minority from those in the majority by requiring a supermajority to approve any treaty. Indeed, the Federalists pointed to the two-thirds requirement as an important protection against an unchecked use of the treaty power.[45] A similar structural safeguard had allowed southern states to block the earlier treaty with Spain, even though they were in the minority.[46] Some suggested even more stringent procedural checks for treaties with graver implications, but these were ultimately rejected as excessive.[47]

2. *Treaty-Implementing Power*

The Framers devoted almost no discussion to the relationship between the treaty power and Congress's Article I, Section 8 powers. They never directly confronted the question of whether, pursuant to a treaty, Congress could legislate beyond its enumerated sphere for one simple reason: they assumed that most treaties would be self-executing. There was certainly awareness that some treaty provisions would require legislative action even after ratification, especially when the treaty made it explicit.[48] But most agree that the Framers considered treaties to be self-executing.[49] Evidence that Founding-Era treaties

---

44 RECORDS, *supra* note 23, at 392.

45 *See, e.g.*, *id.* at 347–48, 357–59, 362–65, 500.

46 *See* Hathaway, *supra* note 9, at 1283–84. The Articles of Confederation required that nine of thirteen states approve all treaties. The Constitution's two-thirds requirement was a direct substitute for this supermajority requirement. Newly phrased as a ratio, it would not require revision when new states were added. *Id.* at 1284.

47 *See* Ackerman & Golove, *supra* note 41, at 810.

48 Richard Henry Lee proposed that, to preserve Congress' control over foreign commerce, "it [should] be left to the legislature to confirm commercial treaties." TUCKER, *supra* note 40, at 33 (quoting THE LETTERS OF RICHARD HENRY LEE (James Curtis Ballagh ed., 1787) (internal quotation marks omitted)). This proposal never caught on, as evidenced by the Supreme Court enforcing a self-executing private right of action pursuant to a commercial treaty in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). Of course, it would not take long for the early Supreme Court to announce that some treaties, or at least provisions of treaties, require legislative action before they can be incorporated into domestic law. *See* Foster v. Nielson, 27 U.S. (2 Pet.) 253, 314–15 (1829).

49 *See* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2095–99 (1999) (responding to criticism of the "orthodoxy" of self-execution); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 698–700 (1995) (arguing that the Supremacy Clause anticipated direct court enforcement). *But see* John C. Yoo, *Global-*

were largely meant to self-execute includes the placement of treaties in the Supremacy Clause,[50] an overt endorsement of self-execution at the North Carolina ratifying convention,[51] and statements like Jefferson's in his *Manual of Parliamentary Practice* that "[t]reaties are legislative acts. A treaty is a law of the land."[52] Early practice in the courts further supports this view.[53]

That said, a few statements implied that a treaty could do what normal legislation could not. Madison, in *The Federalist No. 42*, discussed the Constitution's improvements over the Articles of Confederation in the foreign policy sphere.[54] One deficiency he noted in the Articles was that they denied the central government authority to receive consuls, *except*

> *where treaties of commerce stipulate* for the mutual appointment of consuls, whose functions are connected with commerce, the admission of foreign consuls may fall within the power of making commercial treaties . . . . But the admission of consuls into the United States, *where no previous treaty has stipulated it*, seems to have been nowhere provided for.[55]

Although about the Articles of Confederation and not the Constitution, this statement reveals a background assumption that treaties could make law that Congress could not ordinarily make. Some leading thinkers, including Patrick Henry and George Mason, even believed that treaties could violate rights guaranteed by the Constitution.[56] This point was roundly criticized, but not on the

---

ism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 COLUM. L. REV. 1955, 2085 (1999) ("[T]he Framers believed that treaties could not exercise domestic legislative effects without congressional implementation."). The Supreme Court, in *Medellín v. Texas*, 552 U.S. 491 (2008), reversed this presumption. *See* 552 U.S. at 505–06; Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 70–71 (2012).

50 *See* Vázquez, *supra* note 49, at 698–99 (describing how pre-constitutional concerns about states not enforcing national treaties led the Framers to "alter[ ] the British rule" and "direct[ ] the courts to give [treaties] effect" without awaiting action by legislatures). If treaties required implementation to count as domestic law, the inclusion of "Laws of the United States" in the Clause would have sufficed for making implemented treaties supreme. U.S. CONST. art. VI, cl. 2.

51 William Davie said that "[i]t was necessary that treaties should operate as laws upon individuals. They ought to be binding upon us the moment they are made." 3 DEBATES, *supra* note 13, at 158.

52 THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE COMPOSED ORIGINALLY FOR THE USE OF THE SENATE OF THE UNITED STATES (1812), *reprinted in* JEFFERSON'S PARLIAMENTARY WRITINGS 353, 420 (Wilbur S. Howell ed., 1988).

53 *See* Hathaway et al., *supra* note 49, at 57–62.

54 *See* THE FEDERALIST NO. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961).

55 *Id.* at 264–65 (emphasis added).

56 *See* 3 DEBATES, *supra* note 13, at 507–08, 512–14 (remarks of George Mason and Patrick Henry, respectively).

grounds that the treaty power could not exceed the authority granted in Article I.[57]

If the treaty power was understood to extend beyond the legislative power granted in Article I, could Congress ever use that power to pass implementing legislation? On this point, it is far from clear what the Framers intended. The Constitution makes no mention of treaty implementation,[58] likely because the Framers' treaties were self-executing. The Necessary and Proper Clause provides for the execution of "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[59] This would seem to give Congress the power to take the necessary and proper actions—including passing legislation—to meet the obligations of a duly concluded Article II treaty. But there are dissenters from this view. Professor Nicholas Rosenkranz, for example, argues that the power Congress can execute is that of *making* treaties, not implementing them.[60] In his view, then, the Necessary and Proper Clause does not give the federal government the power to ensure that the treaties it enters are effectively observed—despite the well-documented concerns among the Framers that unenforced treaty obligations imperiled the nation.

The uncertainty regarding the Necessary and Proper Clause's relationship to the Treaty Clause is compounded by a disagreement over the drafting history of Section 8. Professor Henkin has claimed that "[t]he 'necessary and proper' clause originally contained expressly the power 'to enforce treaties' but it was stricken as superfluous."[61] This statement's implication of broad treaty-implementing power quickly became conventional wisdom on founding intent and was cited in scholarly work and by the Supreme Court.[62] Professor Rosenkranz

---

57 *See id.* at 507, 516 (remarks of George Nicholas and James Madison, respectively); *see also* Golove, *supra* note 9, at 1147–48 (describing the efforts of Edmund Randolph, James Madison, and George Nicholas to refute Patrick Henry's arguments).

58 *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 618–22 (1842) ("[T]he power is nowhere in positive terms conferred upon Congress to make laws to carry the stipulations of treaties into effect.").

59 U.S. CONST. art. I, § 8, cl. 18.

60 *See* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1892 (2005) ("Those two clauses in conjunction confer on Congress only the power 'To make all Laws which shall be necessary and proper for carrying into Execution . . . [the] Power . . . to *make* Treaties.'" (emphasis added) (footnote omitted)).

61 LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 481 n.111 (2d ed. 1996).

62 *E.g.*, United States v. Lara, 541 U.S. 193, 201 (2004) (recognizing that the treaty power "authorize[d] Congress to deal with matters with which otherwise Congress could not deal" (internal quotation marks omitted)); *see also* United States v. Lue, 134 F.3d 79, 82–84 (2d Cir. 1998) (upholding the Act for the Prevention and Punishment of the Crime of Hostage-Taking as a necessary and proper implementation of the Convention Against the Taking of Hostages); Ana Maria Merico-Stephens, *Of Federalism, Human Rights, and the* Holland *Caveat: Congressional Power to Implement Treaties*, 25 MICH. J. INT'L L. 265, 305

has challenged Henkin's account, claiming that the phrase "enforce treaties" was actually stricken from the Militia Clause, not the Necessary and Proper Clause.[63] If correct, the historical record is even less clear.

B. *Missouri v. Holland*

In early years of the twentieth century, an academic literature emerged around questions of the treaty power's scope and limitation.[64] That debate culminated in 1920 in the now-famous Supreme Court decision in *Missouri v. Holland*. Like *Bond*, *Holland* involved a constitutional challenge to a statute enacted to implement a treaty. The Supreme Court held that the statute was a constitutional exercise of the treaty power.[65] That power, moreover, was not limited to what Congress could enact "unaided" by the treaty power—an important holding because the Act at issue was nearly identical to a statute struck down earlier by two federal district courts on the ground that it exceeded the enumerated powers of the federal government.[66] The Supreme Court's decision in *Holland* set off a maelstrom that has ebbed and flowed for over nine decades. This Section traces the antecedents of the decision, the decision itself, and the contemporary reaction to it.

In 1913, Congress passed and President William Howard Taft signed the Weeks-McLean Act[67] with the aim of protecting the passenger pigeon and other migratory birds from over-hunting. For almost ten years, conservation organizations, state game officials, and federal officials at the Department of Agriculture had been pushing for such

---

(2004) (recognizing that "the [Necessary and Proper Clause] is a valid form of expressing the treaty-makers' intent regarding the domestic operation of treaties").

63 *See* Rosenkranz, *supra* note 60, at 1915–16. Professor Rosenkranz also claims that the "to" in Henkin's formulation was added in error. *See id.* at 1915.

64 *See generally* CHARLES H. BURR, THE TREATY-MAKING POWER OF THE UNITED STATES AND THE METHODS OF ITS ENFORCEMENT AS AFFECTING THE POLICE POWERS OF THE STATES (1912) (discussing the constitutional reach of the treaty power); CHARLES HENRY BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES (1902) (same); EDWARD S. CORWIN, NATIONAL SUPREMACY: TREATY POWER VS. STATE POWER (1913) (same); ROBERT T. DEVLIN, THE TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES (1908) (same); TUCKER, *supra* note 40, at 19 (same); Edward S. Corwin, *The Treaty-Making Power: A Rejoinder*, 199 N. AM. REV. 893, 898 (1914) ("[T]he United States has exactly the same range of power in making treaties that it would have if the States did not exist." (emphasis omitted)); Ralston Hayden, *The States' Rights Doctrine and the Treaty-Making Power*, 22 AM. HIST. REV. 566 (1917) (surveying the political branches between 1830 and 1860 and concluding that the branches did not believe they could exceed federal authority with the treaty power); Henry St. George Tucker, *The Treaty-Making Power Under the Constitution of the United States*, 199 N. AM. REV. 560, 562 (1914) ("Can the Constitution be supreme when it embraces in its folds an adder whose fangs may sting it to death?").

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

66 *Id.* at 432.

67 Pub. L. No. 62-430, ch. 145, 37 Stat. 828, 847–48 (1913).

legislation.[68] Also known as the Migratory Bird Act of 1913, the statute made it a crime to "shoot or by any device kill or seize and capture migratory birds . . . during . . . closed seasons."[69]

The statute was on shaky ground from the beginning,[70] and the Department of Agriculture "tried to avoid enforcement for provoking an adverse result."[71] The Supreme Court had earlier held that states, not the federal government, were the proper owners of migratory species. According to the Court in *Geer v. Connecticut*, for instance, "[t]he right to preserve game flows from the undoubted existence in the State of a police power . . . ."[72] Citing these precedents, the courts declared the Migratory Bird Act invalid. In *United States v. Shauver*, for example, an Arkansas court held that "animals ferae naturae . . . are owned by the states . . . in their sovereign capacity as the representatives . . . of all their people,"[73] and that it was "practically free from real doubt"[74] that the statute infringed on the Tenth Amendment's reservation. Courts in Kansas and Maine concurred.[75]

Blocked by the courts, supporters of the Act came up with a new strategy. Senator Elihu Root introduced a resolution recommending the conclusion of a treaty.[76] He argued that "it may be that under the treaty-making power a situation can be created in which the Government of the United States will have constitutional authority to deal with this subject."[77] The Wilson Administration agreed, and the State

---

68 *See* Charles A. Lofgren, Missouri v. Holland *in Historical Perspective*, 1975 SUP. CT. REV. 77, 78.

69 United States v. Shauver, 214 F. 154, 155 (E.D. Ark. 1914).

70 Even the bill's sponsors knew that judicial invalidation was likely. Senator George McLean "was so unsure at first whether the legislation could stand on its own that he introduced a constitutional amendment to validate it." Lofgren, *supra* note 68, at 79.

71 Edward T. Swaine, *Putting* Missouri v. Holland *on the Map*, 73 MO. L. REV. 1007, 1009 (2008) (footnote omitted).

72 161 U.S. 519, 534 (1896) (citations omitted); *see also* Manchester v. Massachusetts, 139 U.S. 240, 258 (1891) ("[I]ncluded in . . . territorial jurisdiction is the right of control over . . . [migratory] fish . . . ."); McCready v. Virginia, 94 U.S. 391, 394 (1876) ("[T]he states own the tide-waters themselves, and the fish in them, . . . and the ownership is that of the people in their united sovereignty." (citation omitted)).

73 *Shauver*, 214 F. at 157. The government appealed the decision—an appeal it withdrew after a new statute was enacted. United States v. Shauver, 248 U.S. 594, 595 (1919) (mem.).

74 *Shauver*, 214 F. at 156.

75 *See* United States v. McCullagh, 221 F. 288, 294 (D. Kan. 1915); State v. Sawyer, 94 A. 886, 888–89 (Me. 1915). One court apparently upheld the statute in an unpublished and unreported decision. Lofgren, *supra* note 68, at 83 n.33 (citing United States v. Shaw (D.S.D., 18 April 1914)).

76 *See* 49 CONG. REC. 1494 (1913); Lofgren, *supra* note 68, at 81.

77 51 CONG. REC. 8349 (1914) (statement of Senator Robinson); Lofgren, *supra* note 68, at 81 n.22 (citing William L. Finley, *Uncle Sam, Guardian of the Game*, 107 OUTLOOK 481, 487 (1914)) ("Proponents of [migratory bird] protection did not see a treaty merely as a means to remedy possible constitutional defects in the 1913 legislation. They also believed that international effort was needed for its real protective benefits.").

Department concluded a treaty with Great Britain (acting on behalf of Canada) in 1916.[78] Two years later, Congress passed the Migratory Bird Treaty Act implementing the treaty. The new Act was nearly identical to the statute enacted five years earlier that had been found invalid by the courts as an impermissible exercise of federal authority at the expense of the states.[79]

Root's strategy worked. The new statute, shored up by the treaty power, was repeatedly upheld against constitutional challenges.[80] The first appeal to reach the Supreme Court involved two Missourians who had been indicted for violating the new hunting restrictions. Missouri sued to enjoin the federal game warden from enforcing the statute against them. Missouri District Court Judge Van Valkenburgh upheld the Act.[81] Judge Van Valkenburgh relied on *Geofroy v. Riggs*,[82] in which the Supreme Court had held that the treaty power extended to "any matter which is properly the subject of negotiation with a foreign country," limited only by "those restraints which are found in [the Constitution] against the action of the government . . . and those arising from the nature of the government itself . . . ."[83] Citing the case, Judge Van Valkenburgh concluded that the treaty power extended to "all questions that can possibly arise between us and other nations and which can only be adjusted by their mutual consent, whether the subject-matter be comprised among the delegated or the reserved powers."[84] Indeed, a central government must be able to negotiate with other countries and reach agreements on common concerns.[85] Protection of migratory birds, he pointed out, is "properly the subject of negotiation with a foreign country."[86]

On appeal, the Supreme Court affirmed Judge Van Valkenburgh. The Court, in an opinion authored by Justice Holmes, explained that the power to make treaties is distinct from the power to legislate under Article I. The Tenth Amendment did not reserve the power to the states quite simply because "the power to make treaties is delegated expressly" to the federal government in the Constitution, and treaties concluded thereunder are expressly declared to be the "su-

78 *See* Convention for the Protection of Migratory Birds, U.S.-U.K., art. VIII, Aug. 16, 1916, 39 Stat. 1702.

79 *See* Migratory Bird Treaty Act, Pub. L. No. 65-186, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–712 (2006)).

80 *See* United States v. Rockefeller, 260 F. 346, 348 (D. Mont. 1919); United States v. Selkirk, 258 F. 775, 776–77 (S.D. Tex. 1919).

81 *See* United States v. Samples, 258 F. 479, 484–85 (W.D. Mo. 1919).

82 133 U.S. 258 (1889).

83 *Id.* at 267 (citations omitted).

84 *Samples*, 258 F. at 482 (quoting Secretary of State John C. Calhoun).

85 *See id.*

86 *Id.* at 483 (quoting *Riggs*, 133 U.S. at 267).

preme law of the land."[87] Indeed, as the Court pointed out, there had been many cases in which a treaty trumped state law, even in contexts traditionally governed by the states, such as property and marriage.[88] As long as the treaty is valid, it concluded, the legislation made to implement it is valid as well: "If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government."[89] Like Peyton Randolph and James Madison a century and a half before,[90] the Court defined flexible subject-matter limits born "of the sharpest exigency for the national well being."[91] In the process, the Court reaffirmed a broad scope for the treaty power—one that reached even beyond the limits of Article I.[92]

The treaty power endorsed by the Court was not without limits. The Court emphasized that "a national interest of very nearly the first magnitude is involved" and this national interest "can be protected only by national action in concert with that of another power."[93] Notably, the Court never explicitly addressed whether the treaty was merely pretextual—and, if so, whether that would affect the constitutional analysis—even though the Missouri and Kansas briefs asserted that the federal government had used the treaty power to purposely evade constitutional limitations.[94]

Contemporary reaction to the Court's decision was mixed. Defenders of states' rights criticized the opinion as allowing unlimited expansion of federal authority.[95] The immediate legal effect, however, was limited. As one commentator later put it, the primary effect of the decision was to offer "a constitutional base for such further con-

---

87 Missouri v. Holland, 252 U.S. 416, 432 (1920).

88 *See id.* at 434–35 (citing Hopkirk v. Bell, 7 U.S. (3 Cranch) 454 (1806)); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)). In a similar vein, Calhoun had said: "In our relation to the rest of the world the case is reversed. Here the States disappear." 29 ANNALS OF CONG. 531–32 (1816). *See generally* LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 67 (2002) ("One of the effects the Civil War had on American culture was to replace the sentiment of section with the sentiment of nation, and Holmes's self-conscious transformation from provincial to cosmopolite was of a piece with this larger development."). Historians contend that Holmes would have been very familiar with Calhoun's thoughts on the matter.

89 *Missouri*, 252 U.S. at 432.

90 *See* 3 DEBATES, *supra* note 13, at 363, 504, 514–15.

91 *Missouri*, 252 U.S. at 433.

92 *See id.* at 435.

93 *Id.*

94 *See* Lofgren, *supra* note 68, at 93 n.92.

95 *See* L.L. Thompson, *State Sovereignty and the Treaty-Making Power*, 11 CALIF. L. REV. 242, 253 (1923) ("[U]nder the decision of the court in the migratory bird case, the sovereignty of the state is completely subordinate to the treaty-making power and the legislative power of Congress in the exercise of the enforcement of a treaty . . . ."). General Thompson further warned: "In this day of internationalism the possibilities inherent in such a system are not lightly to be disregarded." *Id.*

servation efforts as federal wildlife preserves, reforestation projects, and associated state land donations."[96] This muted effect on the law was reflected in the tepid early scholarly reaction, which came in the form of case commentaries and student notes.[97]

During the next couple of decades, courts and commentators continued to endorse the broad but not unlimited treaty power endorsed in *Holland*. In a famous speech to the American Society for International Law, for example, Charles Evan Hughes posited that "[t]he power is to deal with foreign nations with regard to matters of international concern."[98] He explained that

> there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power.[99]

In a subsequent case, the Court reaffirmed that "[t]he treaty-making power . . . extend[s] to all proper subjects of negotiation between our government and other nations,"[100] even where a treaty displaced local law.[101]

---

96 Lofgren, *supra* note 68, at 114–15; *see also* Swan Lake Hunting Club v. United States, 381 F.2d 238, 242 (5th Cir. 1967) (acknowledging that in passing the Migratory Bird Act, Congress "authorized the purchase or rental of areas for use as [wildlife] sanctuaries"); *In re* United States, 28 F. Supp. 758, 763–64 (W.D.N.Y. 1939) (recognizing the state's authority for reforestation projects); United States v. 546.03 Acres, 22 F. Supp. 775, 777 (W.D. Pa. 1938) (authorizing the United States to acquire certain lands); United States v. 2,271.29 Acres, 31 F.2d 617, 621 (W.D. Wis. 1928) (recognizing the state's power to consent to the acquisition of land for the purpose of conserving migratory birdlife).

97 *See, e.g.*, Thomas Reed Powell, *Constitutional Law in 1919–1920*, 19 MICH. L. REV. 1, 11–13 (1920); *Comment on Recent Cases*, 8 CALIF. L. REV. 169, 177–80 (1920); Note, *The Treaty-Making Power Under the United States Constitution—The Federal Migratory Birds Act*, 33 HARV. L. REV. 281 (1919); Comment, *Treaty-Making Power as Support for Federal Legislation*, 29 YALE L.J. 445 (1920).

98 Charles Evan Hughes, Remarks on the Limitation of the Treaty-Making Power of the United States in Matters Coming Within the Jurisdiction of the States (Apr. 26, 1929), *in* 23 AM. SOC'Y INT'L L. PROC. 194, 194–96 (1929).

99 *Id.* Louis Henkin adopted a similar view. Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 907 n.9 (1959) (stating that "it has been assumed . . . that such a requirement in fact governs the treaty power" and "adopt[ing] that assumption as unquestioned").

100 Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (citations omitted) ("The treaty was made to strengthen friendly relations between the two nations. As to the things covered by it, the provision quoted establishes the rule of equality between Japanese subjects while in this country and native citizens. Treaties for the protection of citizens of one country residing in the territory of another are numerous, and make for good understanding between nations." (footnote omitted)); *see also* Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) ("The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations . . . ." (citations omitted)); United States v. Lue, 134 F.3d 79, 83 (2d Cir. 1998) ("[T]he Convention addresses . . . the treatment of foreign nationals while they are on local soil, a matter of central concern among nations. More specifically,

C. Commerce Clause Expansion

The treaty power became less important as an independent source of legislative authority as the New Deal Era arrived. The New Deal brought an expanded conception of the federal government's Article I Commerce Clause power. With more expansive authority to legislate under the Commerce Clause, the federal government found it unnecessary to rely upon the treaty power for independent authority. A repeat of the events that led up to the *Missouri v. Holland* decision thus became increasingly unlikely. With Congress increasingly able to achieve all it wished through its Article I powers, there was no need to use the Treaty Clause to work around limits on Congress's enumerated powers.

1. *The New Deal*

In *Holland*, the Supreme Court made clear that the commerce power did not encompass regulation of migratory bird hunting. The Commerce Clause was generally understood to be narrower than it is today, and the Tenth Amendment was therefore more robust. That would begin to change in the wake of President Roosevelt's conflicts with the Court over landmark New Deal legislation.

In 1929, as the Great Depression began, congressional tools for responding to the crisis were limited. In prior decades, the Supreme Court had struck down such federal economic legislation as child labor prohibitions,[102] minimum wage mandates,[103] and labor rights regulation.[104] A constitutional battle ensued, pitting the President and Congress against the Court.[105] Events came to a head in 1937 when Justice Owen Roberts, who had previously voted to strike down Roosevelt's early legislative efforts as constitutional overreaching, switched sides.[106] In *NLRB v. Jones & Loughlin Steel Corp.*,[107] Roberts voted with a 5-4 majority to uphold the fair bargaining provisions of

---

the Convention addresses a matter of grave concern to the international community: hostage taking as a vehicle for terrorism.").

101 *See Asakura*, 265 U.S. at 343 (invalidating a local ordinance, which regulated pawnbroker licensing, as contrary to a treaty with Japan); *see also* Golove, *supra* note 9, at 1270 ("It would be hard to imagine a subject more local in character . . . .").

102 *See* Bailey v. Drexel Furniture Co., 259 U.S. 20, 43–44 (1922); Hammer v. Dagenhart, 247 U.S. 251, 276–77 (1918).

103 *See* Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 561–62 (1923), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1936).

104 *See* Adair v. United States, 208 U.S. 161, 180 (1908).

105 *See, e.g.*, Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan*, 12 INT'L REV. L. & ECON. 45, 56 (1992).

106 *See generally* MARIAN MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937, at 426–28 (2002) (recounting the court-packing crisis of 1937 and Justice Robert's "switch in time that saved nine").

107 301 U.S. 1 (1937).

the 1935 National Labor Relations Act. The Court reasoned that, "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[108]

The next year, the Court upheld a federal prohibition on the interstate shipment of "filled milk."[109] In its decision, the Court announced a highly deferential standard for reviewing enactments under the Commerce Clause: a "rational basis for legislation"[110] would suffice and "the existence of facts supporting the legislative judgment [was] to be presumed . . . ."[111] By 1942, when the Court decided that Congress could tax wheat grown by an individual farmer for purely personal use, it was clear that prior limitations on the commerce power were completely removed.[112] Federal legislation could now be sustained by any argument for a connection to interstate commerce, even if the activity being regulated occurred purely within one state. By analogy, Congress could now also take greater steps to "regulate Commerce with foreign Nations."[113] Combined with loosened economic due process restrictions on federal legislation, this expansion opened the door to a wide range of new nationwide progressive programs.[114]

This expansion of Congress's Article I legislative powers temporarily quieted the debate over the treaty power. Indeed, "the Court's post-1937 acquiescence in federal programs . . . deprived *Missouri v.*

---

108 *Id.* at 37 (citation omitted).

109 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938).

110 *Id.*

111 *Id.* at 152.

112 *See* Wickard v. Filburn, 317 U.S. 111, 133 (1942); *see also* United States v. Darby, 312 U.S. 100, 118 (1941) (upholding the Fair Labor Standards Act and noting that the commerce power was "not confined to the regulation of commerce among the states").

113 U.S. CONST. art. I, § 8, cl. 3; *see* Henkin, *supra* note 99, at 915 ("[S]ince the revolution initiated by *Jones & Laughlin*, . . . Congress can reach all interstate or foreign 'intercourse'; it can reach matters precedent to or subsequent to interstate or foreign commerce; it can reach what relates to or affects as well as what is commerce; it can reach strictly local commerce and activities when necessary to make effective a regulation of interstate or foreign commerce. The power of Congress over foreign commerce would then, of itself, support legislation equivalent to a large part of the law 'enacted' by treaty." (footnotes omitted)).

114 *See* Lofgren, *supra* note 68, at 117; *see, e.g.*, Williamson v. Lee Optical of Okla., 348 U.S. 483, 491 (1955) ("We cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds."); Nebbia v. New York, 291 U.S. 502, 525 (1934) (holding that New York could regulate the price of milk); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937); Adkins v. Children's Hosp. of D.C., 261 U.S. 525 (1923) (holding that federal minimum wage legislation for women infringed on freedom of contract), *overruled by W. Coast Hotel Co.*, 300 U.S. at 400.

Holland of much of its earlier significance."[115] During the New Deal and in the decades after, uses of the commerce power stretched far and wide.[116] No federal statute would be conclusively struck down for falling outside the commerce power until 1995.[117]

2. *The Bricker Amendment*

In the aftermath of World War II, a multilateral architecture of human rights treaties emerged, championed by none other than First Lady Eleanor Roosevelt.[118] The United States ratified the U.N. Charter in 1945 and the Universal Declaration of Human Rights[119] in 1948. The United States also signed the Convention on the Prevention and Punishment of the Crime of Genocide in 1948, though it did not ratify the agreement until 1988.[120] Some of these treaties called for domestic legislation to give them effect. A question thus emerged whether the Commerce Clause, now more generously read by the Supreme Court, provided sufficient authority for implementing legislation or whether an independent treaty power would be a necessary source of authority for such legislation.[121]

---

115 Lofgren, *supra* note 68, at 117; *see also* HENKIN, *supra* note 61, at 72 ("Holmes wrote more than 70 years ago, before the explosion of Congressional powers. Today, there is surely no warrant for confident assertion that there is any matter relating to foreign affairs that is not subject to legislation by Congress."); Zechariah Chafee, Jr., *Federal and State Powers Under the UN Covenant on Human Rights*, 1951 WIS. L. REV. 389, 400–24 [hereinafter Chafee, *Federal and State Powers*] (discussing Congress's influence over human rights through the Commerce Clause); Henkin, *supra* 99, at 915; Arthur E. Sutherland, Jr., *Restricting the Treaty Power*, 65 HARV. L. REV. 1305, 1334 (1952) ("Even if the Supremacy Clause in our Constitution were altered . . . to exclude federal legislation in the *Missouri v. Holland* situation, the present scope of the commerce power is so inclusive . . . that a great many treaties could be made subject to subsequent federal legislation, without the necessity of recourse to state statutes." (footnote omitted)).

116 *See* HENKIN, *supra* note 61, at 65 ("No longer subject to serious constitutional challenge, Congress has embarked on unprecedented, far-reaching regulation of trade and finance, transportation and communication, labor and management, crime and punishment, manners and morals . . . .").

117 In *National League of Cities v. Usery*, 426 U.S. 833, 855–56 (1976), the Court struck down a federal minimum wage law but reversed itself less than a decade later in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 557 (1985).

118 *See generally* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001) (examining Eleanor Roosevelt's role in crafting the Universal Declaration of Human Rights).

119 *See* Universal Declaration of Human Rights, G.A. Res. 217A (III)A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

120 *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

121 *See* Chafee, *Federal and State Powers*, *supra* note 115, at 429 ("[T]he whole of the latest draft of the International Covenant on Human Rights can be enforced by Congress, either through the affirmative powers it possesses this very minute, or through those which it will gain, after ratification, from the treaty clauses and the 'necessary and proper' clause."); Lofgren, *supra* note 68, at 117.

Some were concerned that human rights treaties might allow Congress to legislate beyond its enumerated powers.[122] The early 1950s saw a flurry of scholarship lamenting the scope of the treaty power expressed in *Holland*.[123] States' rights proponents began looking for a way to "eliminate what they saw as the Court-sanctioned route of amending the Constitution through treaty making."[124]

In 1952, Senator John Bricker of Ohio introduced the first of several constitutional amendments that would have limited the substantive scope of the treaty power. Over the next several years, Bricker and others proposed many different versions of the amendment. The strong version would have limited the scope of the treaty power to the enumerated powers in Article I, Section 8. Bricker's first version 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."[125] The effect of such language would have also been to make all treaty provisions non-self-executing. President Eisenhower, along with a sizeable contingent of legislators and scholars,[126] promised to "fight to the bitter end against the 'which clause', [sic] if need be by going into every State in the Union."[127] A weakened version of the amendment—which prohibited treaties that were inconsis-

---

122 In objecting to ratification of the U.N. Charter, some argued that "[t]he road to federal absolutism is being made very, very easy." Carl B. Rix, *Human Rights and International Law: Effect of the Covenant Under Our Constitution*, 35 A.B.A. J. 551, 618 (1949).

123 *See, e.g.*, George A. Finch, *The Need to Restrain the Treaty-Making Power of the United States Within Constitutional Limits*, 48 AM. J. INT'L L. 57, 61–62 (1954); Vermont Hatch, *The Treaty-Making Power: "An Extraordinary Power Liable to Abuse,"* 39 A.B.A. J. 808, 809 (1953); Frank E. Holman, *Treaty Law-Making: A Blank Check for Writing a New Constitution*, 36 A.B.A. J. 707, 709 (1950).

124 Lofgren, *supra* note 68, at 118 (footnote omitted).

125 JOHN MARSHALL BUTLER, CONSTITUTIONAL AMENDMENT RELATIVE TO TREATIES AND EXECUTIVE AGREEMENTS, S. REP. NO. 83-412, at 1 (1953).

126 *See, e.g.*, Zechariah Chafee, Jr., *Stop Being Terrified of Treaties: Stop Being Scared of the Constitution*, 38 A.B.A. J. 731, 732 (1952); Chafee, *Federal and State Powers*, *supra* note 115, at 432 ("In a queer terror lest the Senate, which has been the graveyard of treaties, will suddenly nurture treaties like a crowded incubation ward in a lying-in hospital, the great difference between domestic affairs and foreign affairs has been forgotten. In domestic affairs, after the boundary of federal power is reached, there is no vacuum in the law because the states can legislate amply to meet all needs. But in foreign affairs there would be a vacuum if the federal treaty power were narrowly limited. The states cannot take over. They are forbidden to conduct negotiations with other nations. Consequently, unless the national government can act, nobody can act.").

127 Memorandum by Arthur L. Minnich, Assistant White House Staff Secretary (Jan. 11, 1954), *in* 1 FOREIGN RELATIONS OF THE UNITED STATES, 1952–1954, at 1832 (William Z. Slany et al. eds., 1983); *see* DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP 139–43, 153 (1988); Golove, *supra* note 9, at 1276.

tent with the Constitution—came within one vote of passing the Senate.[128]

In the wake of the Amendment's failure, it soon became clear that the worst fears of the *Holland*-era federalists were not being realized. The treaty power had not been used to circumvent Article I limits since the Migratory Birds Treaty Act of 1918. Four decades had passed, and the federal government was not using constitutional technicalities to seize power from the states. Writing in the early 1950s, Professor Zachariah Chafee pointed to the existence of political, diplomatic, and moral checks. Politically, the Senate is unlikely to "ratify . . . an absurdity."[129] Diplomatically, "[i]t takes a good deal of time and trouble to frame a treaty, and nations are not likely to concern themselves with matters which have no international concern."[130] Morally, government actors tend to not violate their society's established ethics too seriously.[131] In sum, a host of non-legal mechanisms may have been at work to prevent the post-*Holland* treaty power from being abused by the political branches. The Framers' procedural safeguards were being supplemented by other structural checks.

D. Commerce Clause Contraction and the Renewed Challenge

In the last twenty years, the Supreme Court has, for the first time since the New Deal, held that legislation exceeded the scope of the federal government's authority under the Commerce Clause. In the 1995 case, *United States v. Lopez*,[132] the Court held that the federal government could not regulate gun possession near schools.[133] Five years later, in *United States v. Morrison*,[134] the Court invalidated the section

---

128 *See* Golove, *supra* note 9, at 1276 & n.688. This version of the amendment did include the "which" clause as applied to executive agreements but not to Article II treaties. *Id.*

129 Chafee, *Federal and State Powers*, *supra* note 115, at 469.

130 *Id.* at 468.

131 Professor Dicey called this phenomenon "internal checks." *See* ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 77–79 (8th ed. 1915). As Chafee puts it, in England,

> Parliament, being unrestrained by any constitution, has power to repeal the Habeas Corpus Act any day. It can, but it won't. King George and the Labor Cabinet can dismantle the British Navy, without needing any statute. They can, but they won't. President Truman has complete constitutional 'Power to grant . . . Pardons for Offences against the United States . . .' Hence he might turn every prisoner in Alcatraz loose tomorrow, and nobody on earth could prevent him. He can, but he won't.

Chafee, *Federal and State Powers*, *supra* note 115, at 443 (citation omitted).

132 514 U.S. 549 (1995).

133 *See* Gun-Free School Zones Act of 1990, Pub. L. 101-647, 104 Stat. 4789, *invalidated by* United States v. Lopez, 514 U.S. 549 (1995).

134 529 U.S. 598 (2000).

of the Violence Against Women Act[135] that created a federal civil cause of action for victims of gender violence. While the Court did not make clear the precise limits on the commerce power, it now held that the Commerce Clause did not permit regulation whose "effects upon interstate commerce [are] so indirect and remote that"[136] they would "'obliterate the distinction between what is national and what is local.'"[137]

The same period also saw the emergence of other states' rights doctrines. The Court developed the anticommandeering doctrine in the 1992 case *New York v. United States*[138] and the 1997 case *Printz v. United States*.[139] The federal government could not, the Supreme Court held, compel state legislation or enlist local executive branch officials. And in *City of Boerne v. Flores*, the Court struck down the Religious Freedom Restoration Act, holding that it exceeded congressional power under Section 5 of the Fourteenth Amendment.[140]

These decisions raised the possibility that the treaty power could once again be an important source of independent power for the federal government, allowing it to act in areas that might otherwise be off limits. The cases inspired a revival of scholarly attention to the treaty power.[141] Curtis Bradley, for example, proposed reviving and clarifying the subject-matter limitations that courts and commentators had always acknowledged but never fully elucidated.[142] He also suggested restricting the treaty power, and hence implementing legislation, to

---

135 Violence Against Women Act of 1994, Pub. L. 103–322, tit. IV, § 40302, 108 Stat. 1796, *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

136 *Lopez*, 514 U.S. at 557.

137 *Id.* at 567 (quoting A.L.A. Schechter Poultry Co. v. United States, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring) (citation omitted)). Chief Justice John Roberts's opinion in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2585 (2012), in a section of the opinion not joined by the rest of the Court, concludes that the Commerce Clause allows the federal government to regulate, but not compel, commercial activity by individuals and therefore cannot be used to justify the individual health insurance mandate. The dissenting opinion also argues that the individual mandate could not be upheld under the Commerce Clause. *Id.* at 2644–51 (Scalia, J., dissenting).

138 505 U.S. 144 (1992).

139 521 U.S. 898 (1997).

140 *See* 521 U.S. 507 (1997).

141 *See generally* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003) (assessing the relationship between the new federalism doctrines and the treaty power); Thomas Healy, Note, *Is* Missouri v. Holland *Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726 (1998) (discussing whether the new federalism jurisprudence might be used to limit the treaty power).

142 *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 451 (1998) [hereinafter Bradley, *Treaty Power Part I*]; *see also* Curtis Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98, 105–111 (2000) [hereinafter Bradley, *Treaty Power Part II*] (defending substantive subject-matter limitations on the treaty power); Robert Knowles, Comment, *Starbucks and the New Federalism: The Court's Answer to Globalization*, 95 NW. U. L. REV. 735, 740, 749 (2001) (concluding that the treaty power encroaches on "traditional state prerogatives").

the enumerated powers in Article I—a conclusion he acknowledged would likely require overruling *Missouri v. Holland*.[143] Meanwhile, Nicholas Rosenkranz looked back to the drafting history of the Treaty Clause in search of limits on the treaty power.[144] Others responded with their own historical accounts, invoking *Holland* as a codification of the correct understanding of the treaty power.[145]

The case with which this Article began—*United States v. Bond*—emerged from this ferment. As earlier noted, Carol Anne Bond responded to the criminal charges against her in part by challenging the federal criminal statute as unconstitutional on the grounds that the federal government had exceeded its powers as enumerated in U.S. Constitution.[146] The Third Circuit Court of Appeals held that Bond lacked standing to challenge the federal statute on these grounds, but the Supreme Court reversed and remanded back to the Circuit Court for reconsideration.[147] The Court explained that "[t]he ultimate issue of the statute's validity turns in part on whether the law can be deemed 'necessary and proper for carrying into Execution' the President's Article II, § 2 Treaty Power," inviting the Court of Appeals to address the issue on remand.[148]

The case has quickly become a cause célèbre for those on both sides of the longstanding debate over *Missouri v. Holland*. Commentators asked: "Will the Supreme Court revisit *Missouri v. Holland*?"[149] "Will Mrs. Bond Topple *Missouri v. Holland*?"[150] The Third Circuit's decision to affirm the statute largely on the grounds that it saw itself as bound by the Supreme Court's earlier decision could set the stage for the Supreme Court to enter the fray. Indeed, former Solicitor General Paul Clement's decision to represent Ms. Bond has added fuel to the fire of speculation that the case could become a vehicle for challenging the Supreme Court's decision in *Holland* head on. Clement's supplemental brief before the Third Circuit in *Bond* suggests as much. The brief argues for a narrow interpretation of the applicable statute,

---

143 *See* Bradley, *Treaty Power Part I*, *supra* note 142, at 395, 456.

144 *See* Rosenkranz, *supra* note 60, at 1912–18.

145 *See, e.g.*, Golove, *supra* note 9, at 1257–69, 1314; David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DEPAUL L. REV. 579, 586–87 (2002); David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1975–84 (2003); Swaine, *supra* note 71, at 1013–18; Carlos Manuel Vázquez, Breard, Printz, *and the Treaty Power*, 70 U. COLO. L. REV. 1317, 1338–43 (1999).

146 *See* United States v. Bond, 581 F.3d 128, 134 (3d Cir. 2009), *rev'd on other grounds*, Bond v. United States, 131 S. Ct. 2355 (2011).

147 *See Bond*, 131 S. Ct. at 2367.

148 *Id.* at 2367 (quoting U.S. CONST. art. I, § 8, cl. 18).

149 Peter Spiro, *Will the Supreme Court Revisit* Missouri v. Holland*? More Likely as of Yesterday*, OPINIO JURIS (June 17, 2011, 3:43 PM), http://opiniojuris.org/2011/06/17/will-the-supreme-court-revisit-missouri-v-holland-more-likely-as-of-yesterday/.

150 John C. Eastman, *Will Mrs. Bond Topple* Missouri v. Holland*?*, 2011 CATO SUP. CT. REV. 185, 185.

but then states, "if the Court concludes that the government has correctly interpreted the statute, this Court should strike it down as applied in excess of the federal government's power and in derogation of our constitutional system."[151] Though not expressly calling for a reversal of *Holland*, the argument undoubtedly suggests that conclusion. His petition for certiorari similarly calls for the court to revisit *Holland*, describing "confusion over the meaning and wisdom" of what he calls "dictum" in *Holland*.[152]

The *Bond* case has thus brought questions regarding the treaty power's substantive scope back into the courts. In light of the reemergence of these issues, the next Part of this Article considers court-enforced limits on the proper scope of the treaty power.

II
Court-Enforced Limits on the Treaty Power

There are constitutional limits on both the scope of the Article II power and the implementing legislation passed pursuant to a treaty enacted under Article II. Our analysis of these limits proceeds in three steps. First, we examine the affirmative constitutional limits on the use of the treaty power. These "affirmative limits"—limits that derive from affirmative constitutional commands—apply not only to treaties and implementing legislation but to all federal government action. The Constitution guarantees certain individual rights and protections as well as certain sovereign and dignitary interests of the states. These affirmative guarantees may not be transgressed by the federal government in the exercise of its treaty power or, indeed, any other power.

Second, we look at the specific limits placed on implementing legislation passed pursuant to a valid treaty. Specifically, we examine the operation of the Necessary and Proper Clause on implementing legislation. Implementing legislation made pursuant to a valid treaty is itself valid, provided it survives the rational relation test of the Necessary and Proper Clause.

We next turn to exploring the scope of Article II itself to see what makes a constitutionally valid treaty. There is considerable uncertainty regarding the limits on the Article II power, both in case law and in the academic literature. We discuss three potential substantive limitations on the treaty power: subject matter, Article I, and pretext. While subject-matter limitations are unworkable, and limiting the scope of the Article II power to the confines of Article I is without

---

151 Defendant-Appellant's Supplemental Reply Brief at 22, United States v. Bond, No. 08-2677 (3d Cir. argued Nov. 16, 2011).

152 Petition for Certiorari, *supra* note 6, at 22.

merit, there is potential in the heretofore under-analyzed pretext limitation. Scholars of all stripes agree that the federal government cannot enact a treaty *solely* as a way to pass otherwise impermissible domestic legislation, but none has yet proposed a workable judicial test to prevent such an action or even discuss how one might be constructed. We begin this discussion by examining the challenges involved in implementing such a test and, drawing on the history of constitutional "purpose tests" and their surrogates, propose a potential way forward. We then examine the reach of such a test to determine whether it addresses the abiding concerns of those worried about the federal government's expansive authority under the treaty power.

We conclude our discussion of the legal limits on the treaty power by observing that all the legal limits we examine—affirmative constitutional limits, limits on implementing legislation, and limits on the scope of the Article II treaty itself—are, in the end, unlikely to be used by courts to overturn many, if any, treaties or implementing legislation. As we explain in the following Part, the most important protection against abuse of the treaty power is found in structural and political checks on the exercise of the power.

A. Affirmative Limits on Federal Government Action

Constitutional text and doctrine pose a set of affirmative constitutional commands that necessarily limit the exercise of power by the federal government. Such affirmative guarantees are set forth explicitly in the Bill of Rights' recognition and guarantee of individual rights and in the Constitution's provisions prescribing the structure of the national government. Among the structural guarantees is the preservation of a continuing role for the states and maintenance of certain areas of state authority and control. This, in turn, has been reinvigorated in recent years with the new Commerce Clause cases, the expansion of state sovereign immunity, and the rise of the anticommandeering doctrine. This section explores the ways that these affirmative limits, which apply to all exercises of federal authority, affect the federal government's power to make and implement treaties.

1. *Rights and Structure*

The Constitution does not place any express limits on the treaty power, but even advocates of an extensive treaty power agree that treaties and laws enacted to implement them must not violate certain fundamental constitutional rights and structures.[153] Courts often construe treaties broadly or recognize expansive powers to conclude

153 *See, e.g.*, HENKIN, *supra* note 61, at 277.

treaties, but they also uniformly recognize that the Constitution places affirmative prohibitions on government action that must apply equally to treaties.[154] The *Holland* Court was no exception: it first took care to state that the Migratory Bird Convention "does not contravene any prohibitory words to be found in the Constitution" before proceeding to its Tenth Amendment analysis.[155]

It has long been established that, although the treaty power is broad, it does not extend "so far as to authorize what the Constitution forbids."[156] The exact boundaries of "what the Constitution forbids," however, are less established. Justice Field in *Geofroy v. Riggs*—on which the *Holland* Court had heavily relied[157]—held that the treaty power extended to "any matter which is properly the subject of negotiation with a foreign country," limited only by "those restraints which are found in [the Constitution] against the action of government . . . and those arising from the nature of the government itself."[158] The *Geofroy* Court made clear that, at the very least, the federal government could not by treaty cause a "change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."[159]

Amidst the Bricker Amendment controversy, the Supreme Court went out of its way to clarify that the Bill of Rights applies a set of affirmative restrictions on the treaty power. As Justice Black stated in the majority opinion of the 1957 decision, *Reid v. Covert*:

> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanc-

---

154 *See, e.g.*, Edwards v. Carter, 580 F.2d 1055, 1058 (D.C. Cir. 1978) ("The section of the Restatement . . . states that the treaty power, like all powers granted to the United States, is limited by other restraints found in the Constitution on the exercise of governmental power. Of course the correctness of this proposition as a matter of constitutional law is clear. (citations omitted)); United States v. Yian, 905 F. Supp. 160, 163 (S.D.N.Y. 1995) ("It is . . . well established that neither treaties nor laws passed pursuant to them are 'free from the restraints of the Constitution,' . . . such as the Bill of Rights." (citations omitted)), *aff'd*, United States v. Lue, 134 F.3d 79 (2d Cir. 1997); *see also* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 302(2) (1987) ("No provision of an agreement may contravene any of the prohibitions or limitations of the Constitution applicable to the exercise of authority by the United States.").

155 Missouri v. Holland, 252 U.S. 416, 433 (1920).

156 Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (quoting Geofroy v. Riggs, 133 U.S. 258, 267 (1890)).

157 *See Missouri*, 252 U.S. at 432–33.

158 *Geofroy*, 133 U.S. at 267.

159 *Id.*

> tioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.[160]

Hence, the federal government is forbidden from violating any of the affirmative individual rights enshrined in the Constitution as well as any affirmative limitations on federal authority. For example, the federal government could not use the treaty power to suspend the Writ of Habeas Corpus privilege or grant a title of nobility,[161] or indeed to carry out any of the actions specifically prohibited by Article I, Section 9.[162]

Affirmative constitutional limits on the treaty power also include duties imposed on the federal government. For example, the United States likely could not sign a treaty that relieved it of its obligations to states under the Guarantee Clause.[163] Moreover, the federal government cannot use the treaty power to alter the constitutional allocation of power—for instance, by agreeing to vest the judicial power of the United States in an international judicial body. To enter such a treaty would, as Justice Black argued, amount to a constitutional amendment in contravention of Article V.[164]

This is not to say that the interest in upholding international commitments is not a factor in constitutional balancing tests. In *Boos v. Barry*, the Supreme Court suggested that a national interest in complying with international law might, in certain circumstances, be "sufficiently 'compelling' to support a content-based restriction on speech."[165] The Court found the restriction at issue—a D.C. statute regulating signs and banners near embassies—was insufficiently narrowly tailored and therefore did not reach the question of whether the requirement under international law to protect the dignity of foreign officials demanded an adjustment of First Amendment analysis. Nevertheless, it left open the possibility that international legal obligations, including treaty obligations, may affect courts' analysis of what the Constitution requires.

---

160 Reid v. Covert, 354 U.S. 1, 17 (1957) (footnote omitted).

161 *See* RESTATEMENT (THIRD), *supra* note 154, § 302 cmt. b.

162 *See* U.S. CONST. art. I, § 9.

163 *See* Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1298–99 (1999); Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 64.

164 *See Reid*, 354 U.S. at 17.

165 Boos v. Barry, 485 U.S. 312, 324 (1988); *see* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 68–70 (2006) (analyzing cases that indicate the possibility of international obligations playing a role in constitutional analysis).

2. *Eleventh Amendment Immunity*

Eleventh Amendment sovereign immunity also supplies a possible affirmative limit on the federal government's exercise of the treaty power. The extent of this limit is, however, both controversial and extremely narrow. Even assuming it does apply to the treaty power, it affects only the relief available to private individuals bringing suit against states for alleged treaty violations.

The text of the Eleventh Amendment bars any suit in federal court "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."[166] The plain language of the Eleventh Amendment appears narrow in scope, precluding suits in federal court against a state by citizens of another state (or citizens or subjects of a foreign state). Yet, since the 1890 Supreme Court decision *Hans v. Louisiana*, the Amendment has been understood as "constitutionalizing" the principle of inherent state sovereign immunity and thus also barring suits against states by their own citizens.[167] Congress may abrogate state sovereign immunity through Section 5 of the Fourteenth Amendment[168] but not through its Article I powers.[169] This raises the possibility that state sovereign immunity might also apply in cases arising under a treaty.

The historical evidence that the Eleventh Amendment immunity was meant to apply to treaties is mixed. Congress reportedly considered including an exception for "cases arising under treaties made under the authority of the United States"[170] but ultimately decided against it—suggesting a decision not to exclude treaties from the Amendment's purview. John Gibbons argues, however, that the history of the ratification debates shows a common awareness among those who participated that states would be amenable to suit by individuals in federal court to ensure the enforcement of the 1783 Peace Treaty.[171]

---

166 U.S. CONST. amend. XI.

167 *See* Hans v. Louisiana, 134 U.S. 1, 15 (1890).

168 *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996) (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 452–455 (1976)).

169 *See id.* at 63–66 (overruling precedent permitting Congress to abrogate state sovereign immunity pursuant to the Interstate Commerce Clause and noting the Court was unlikely to justify "limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution." (quoting Pennsylvania v. Union Gas Co., 491 U.S. 1, 42 (1989) (Scalia, J., dissenting))).

170 Alden v. Maine, 527 U.S. 706, 721 (1999) (internal quotation marks omitted) (citations omitted).

171 *See* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1899–1914 (1983); *see also* Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 94–95, 114–15 (1989) (examining the history of state sovereignty and the Eleventh Amendment); *cf.* Edelman v.

Some suggest that the traditional dignitarian justifications for state sovereign immunity should apply regardless of the basis for suit. Edward Swaine, for example, points out that the Court has tended to presume that state sovereignty applies even where treaties are concerned,[172] although it has never directly addressed the issue. Swaine notes that because Article II predates the Eleventh Amendment, Congress should not be able to abolish state sovereign immunity using the antecedent Treaty Clause.[173] Carlos Vázquez outlines an argument for a treaty-based abrogation power derived from *treaty doctrine*, ultimately concluding that "[t]here is little support in *state sovereign immunity doctrine* for an exemption for exercises of the Treaty Power."[174]

Ultimately, the answer to the constitutional question of whether the Eleventh Amendment operates as an affirmative limit on the treaty power may have little practical import. Mechanisms for federal enforcement of federal law and treaty obligations, and even for individual recovery, remain available under current Eleventh Amendment doctrine.[175] Current doctrine does not foreclose, for example, injunctive relief against state officials in their personal capacities.[176] There is also some support for enforcing treaty violations under 42 U.S.C.

Jordan, 415 U.S. 651, 660 n.9 (1974) (noting that a theory of broad state sovereign immunity from suit by individuals was "the prevailing view at the time of the ratification of the Constitution").

172 *See* Swaine, *supra* note 141, at 435 n.131 (citing Fed. Republic of Ger. v. United States, 526 U.S. 111, 112 (1999) (per curiam) ("[A] foreign government's ability here to assert a claim against a State is without evident support in the Vienna Convention and in probable contravention of Eleventh Amendment principles." (internal quotation marks omitted))); *supra* note 141 and accompanying text; *see also* Breard v. Greene, 523 U.S. 371, 377 (1998) (per curiam) (citing the Eleventh Amendment as "a separate reason why Paraguay's suit might not succeed").

173 *See* Swaine, *supra note* 141, at 433–37; *see also Seminole Tribe of Fla.*, 517 U.S. at 66 (stating that antecedent provisions of the Constitution do not limit the Eleventh Amendment).

174 Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT'L L. 713, 726 (2002) (emphasis added). *But see* Susan Bandes, *Treaties, Sovereign Immunity, and "The Plan of the Convention,"* 42 VA. J. INT'L L. 743, 743–44, 749 (2002) (questioning the fundamental assumption that current state sovereign immunity doctrine is correct). Certain competing interpretations of the Eleventh Amendment—especially the textualist argument that the Amendment eliminated only federal diversity jurisdiction over private suits against states, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473–84 (1987)—would not bar private suits against states based on treaties, since those would fall within constitutionally protected federal question jurisdiction. *Cf.* Bradley, *Treaty Power Part II*, *supra* note 142, at 400 (noting that the Court's recent state sovereign immunity jurisprudence has narrowed, rather than broadened, the federal government's ability to abrogate state immunity).

175 *See* Vázquez, *supra* note 174, at 737–39. Indeed, Vázquez argues that the only remedies foreclosed by state sovereign immunity are suits brought by private parties, foreign states, or Indian tribes seeking damages against the states themselves. *Id.* at 738.

176 *See Ex parte* Young, 209 U.S. 123, 155–56 (1908).

§ 1983.[177] Thus, to the extent that the Eleventh Amendment only affects the relief available to private individuals bringing suit against states for alleged treaty violations, the limits it poses on the treaty power, if any, would be narrow.

3. *Anticommandeering*

Anticommandeering doctrine may provide another affirmative limit on the federal treaty power—though, again, a controversial one that would apply only in a narrow set of circumstances. Anticommandeering does not limit the permissible subjects of congressional regulation but rather restricts the method of regulation.[178] It prohibits the federal government from "commandeering" state governments—though when and how is a matter of significant debate.

The anticommandeering doctrine announced in *New York v. United States* and expanded in *Printz v. United States* places affirmative limits on the federal government's powers to enact domestic legislation. Yet whether those principles apply beyond the Commerce Clause context, much less to the treaty power specifically, remains deeply unsettled.[179] In *New York*, the Supreme Court held that the federal government could not require state and local legislatures to pass legislation governing interstate commerce.[180] Five years later in *Printz*, the Court held that the federal government could not compel state executive officers to participate in a federal regulatory scheme.[181] The *Printz* Court read *New York* broadly, stating, "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[182] In the 2000 case *Reno v. Condon*, the Court

177 *See* Hathaway et al., *supra* note 49, at 78–80 (discussing the use of Section 1983 actions for treaty violations); Jeremy Lawrence, *Treaty Violations, Section 1983, and International Law Theory*, 16 SW. J. INT'L L. 1, 13–14 (2010).

178 This distinction is the most clear in *New York*: the subject of the legislation at issue in that case—interstate commerce—was undeniably within the purview of Congress; only its method was impermissible. *See* Reno v. Condon, 528 U.S. 141, 149 (2000) ("In *New York* . . ., we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment.").

179 *See* Swaine, *supra* note 141, at 424.

180 *See* New York v. United States, 505 U.S. 144 (1992).

181 *See* Printz v. United States, 521 U.S. 898 (1997). The Court clarified in *Reno*, 528 U.S. at 150–51, that anticommandeering bars federal control over state regulation of private individuals but not federal regulation of the states themselves.

182 *Printz*, 521 U.S. at 935. The majority rejected a narrower interpretation of *New York* that would have made the applicability of anticommandeering contingent on whether the federal orders commanded state officials—legislative or executive—to exercise discretion or policymaking authority. *Id.* at 927 (stating that "[t]he Government's distinction between 'making' law and merely 'enforcing' it, between 'policymaking' and mere 'implementation,' is an interesting one" but ultimately rejecting it as unworkable). The

clarified that federal enactments are permissible when they "regulate[ ] state activities" but not when they "seek[ ] to control or influence the manner in which States regulate private parties."[183] That the regulation requires "time and effort" on the part of the state is not dispositive: "Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect."[184]

Applied to the treaty context, anticommandeering might appear to prevent the federal government from using treaties to force state legislatures to pass regulations or to compel state executive officials to perform particular acts. Read broadly, this prohibition could even jeopardize such treaties as the Vienna Convention on Consular Relations (VCCR), which requires signatory states to inform detained foreign nationals of the right to confer with the consul of their country.[185] If the United States were prevented from requiring state officers to conduct law enforcement activities in a certain way or from compelling states legislatures to adopt legislation in compliance with the Convention, the result could be adverse to the interests of both federalism and foreign affairs. To fulfill its treaty obligations, the federal government would have to enforce the Convention's requirements by having federal agents inform foreign nationals of their rights even when they are taken into state or local state custody—a solution that would not only be impractical but would also "create[ ] incentives

---

principles underlying *New York* and *Printz* have since permeated the Court's opinions in the closely related state sovereign immunity context. In *Alden v. Maine*, 527 U.S. 706 (1999), the Court drew on the reasoning of its anticommandeering cases to hold that Congress could not enact legislation subjecting states to private suit in state court. *Id.* at 749 ("A power to press a State's own courts into federal service to coerce the other branches of the State . . . is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals." (citation omitted)).

183 *Reno*, 528 U.S. at 150 (quoting South Carolina v. Baker, 485 U.S. 505, 514–15 (1988)).

184 *Id.* at 150–51.

185 *See* Vienna Convention on Consular Relations art. 36.1(b), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR]. The Convention was the subject of *Breard v. Greene*, 523 U.S. 371 (1998), in which Breard, a foreign national who had been sentenced to death in Virginia for attempted rape and capital murder, challenged his sentence on the ground that Virginia had violated the Convention by failing to inform him of his right to consult with the consul of his country. The Supreme Court, denying certiorari, held that Breard had procedurally defaulted on his claim by failing to raise it in state court; it did not reach questions of federalism or anticommandeering. Nevertheless, because the Convention appears to commandeer state officers—in this case, to force them to comply with certain procedures upon the arrest of a foreign national—the case raises interesting questions about whether anticommandeering applies to treaties.

for the National Government to aggrandize itself"[186] in a manner contrary to the very core of federalism principles.

Yet there are many reasons to think the anticommandeering doctrine does not apply with full force in the treaty context. Carlos Vázquez, for example, argues that a broad version of anticommandeering (such as a rule barring the federal government from imposing obligations on states but not on private individuals or from affecting states "in their role as governments") could not plausibly apply to treaties.[187] Such a rule would result in the invalidation of the typical treaty, which binds states-parties, not individuals, and would be inconsistent with longstanding Supreme Court doctrine repeatedly upholding such treaties.[188]

In addition, the rationale of the anticommandeering doctrine does not have the same force in the treaty context. The Compacts Clause expressly prohibits the states from entering treaties without the consent of the federal government. As a consequence, the states have no treaty-making power to protect from federal encroachment.[189] At the same time, if the federal government cannot compel some state cooperation and compliance, its capacity to enter treaties would be severely hampered. Indeed, the Framers delegated *all* the treaty making power to the federal government precisely in response to the problems created by the decentralized system under the Articles of Confederation.[190] Restricting the federal government's ability to bind the nation on the international plane by placing limitations on state-level implementation conflicts would undermine the aim of providing for an effective federal treaty power.[191]

---

186 *Printz*, 521 U.S. at 959 (Stevens, J., dissenting).

187 *See* Vázquez, *supra* note 145, at 1347–48, 1351–53; *see also* Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 52 (1997) (noting "the inapplicability of *New York v. United States* to exercises of the treaty power, and the weakness of the evidence for the anti-commandeering principle in general" (footnote omitted)); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1260 (1995) (noting that the limit on Congress's lawmaking power to the enactment of laws "applying generally and directly to the nation's people, as opposed to the enactment of directives commandeering the states as such" is "not applicable, of course, to the treaty power").

188 *See* Vázquez, *supra* note 145, at 1348 ("Interpreting the anticommandeering principle of *New York* and *Printz* to invalidate such obligations would thus require the rejection of numerous treaty precedents.").

189 *See Printz*, 521 U.S. at 922–23.

190 *See* Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630, 1653 (1999); *see also* THE FEDERALIST NO. 3, at 243 (John Jay) (Clinton Rossiter ed., 1961) ("Under the national government, treaties and articles of treaties . . . will always be expounded in one sense and executed in the same manner—whereas adjudications on the same points and questions in thirteen States, or in three or four confederacies, will not always accord or be consistent . . . .").

191 To be sure, as early as 1796, the Supreme Court interpreted the Supremacy Clause as clearly requiring state courts to enforce national treaty obligations. *See* Ware v. Hylton, 3

The separation-of-powers rationale for executive anticommandeering also has less force in the treaty context. The *Printz* Court argued that transferring the power to execute federal laws to state officials would impinge upon presidential authority.[192] However, the danger of dilution of executive power seems remote in the treaty context, given that a treaty cannot become effective without the President's initiative and ratification. By contrast, a statute may be passed over a presidential veto.

Even accepting arguendo that the anticommandeering doctrine applies to treaties, the restrictions could in many cases be avoided. Indeed, the *New York* Court suggested methods by which Congress could encourage, rather than compel, state regulation.[193] In addition, the federal government could act directly to implement the treaty through creation of a federal bureaucracy for that purpose.[194] For these reasons, the anticommandeering doctrine does not seem likely to be a significant, effective constraint on the treaty power.

B. Limits on Implementing Legislation

While any affirmative limits apply to the treaty power as a whole, the Necessary and Proper Clause may provide secondary restraints that operate solely on implementing legislation. The crux of the *Holland* holding lies in Holmes's assertion that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government."[195] Curtis Bradley and Jack Goldsmith note that this proposition is "[t]he least controversial holding of *Holland*;"[196] most subsequent court opinions have indeed treated it as settled.[197] But

---

U.S. (3 Dall.) 199, 237 (1796). Yet this does not distinguish treaties from federal statutes, which state courts must also enforce, by virtue of the strict textual mandate of the Supremacy Clause. *See* Testa v. Katt, 330 U.S. 386 (1947). The *Printz* holding does not disturb the basic principle that state courts cannot refuse to apply federal law. *See Printz*, 521 U.S. at 928–29 (distinguishing *Testa*, 330 U.S. 386, and Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982)). *See generally* Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71 (1998) (discussing the applicability of *New York* and *Printz* to state courts).

192 *See Printz*, 521 U.S. at 922–23.

193 *See* New York v. United States, 505 U.S. 144, 166–68 (1992).

194 Citing Justice Breyer's dissenting opinion in *Printz*, Carlos Vázquez notes that there is an irony that "the federal government's inability to commandeer may paradoxically result in the creation of an unwieldy federal bureaucracy more threatening to the states." Vázquez, *supra* note 145, at 1359.

195 Missouri v. Holland, 252 U.S. 416, 432 (1920).

196 CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 419 (2d ed. 2006).

197 *See, e.g.*, United States v. Ferreira, 275 F.3d 1020, 1027 (11th Cir. 2001); United States v. Lue, 134 F.3d 79, 84 (2d Cir. 1988); United States v. Emmanuel, No. 06-20758-CR, 2007 WL 2002452, at *6 (S.D. Fla. July 5, 2007) (applying *Missouri* to uphold the Torture

the soundness of that principle has recently come into question, once again, in the case with which this Article began—*United States v. Bond*.

In *Bond*, the appellant was convicted under the Chemical Weapons Act for use of a chemical weapon.[198] Bond argues that the statute, enacted to implement the Chemical Weapons Convention, is unconstitutional because it exceeds Congress's enumerated powers and intrudes on powers reserved to the states.[199] She has specifically contested the government's reliance on the Necessary and Proper Clause as the sole basis for the federal statute.[200] She further argues that "[t]he Treaty Power is truly boundless under the government's approach, as any federal statute passed to enact an international treaty would necessarily pass constitutional muster."[201] Hence, the government could use the treaty power as a "'back door' to resurrect federal legislation invalidated by the Supreme Court as exceeding Congress' authority" as well as to create federal jurisdiction over all crimes even in the absence of a federal nexus.[202]

In its first ruling, the Third Circuit did not reach the constitutional questions, finding that the appellant lacked standing to bring a Tenth Amendment challenge to the Chemical Weapons Act.[203] The Supreme Court reversed that decision,[204] however, creating the possibility that the scope of the government's power to implement treaties through the Necessary and Proper Clause may in fact be ripe for reconsideration. On remand, the Third Circuit expressed significant discomfort with *Holland*. Although acknowledging that it was "bound to take at face value" Justice Holmes's statement about the Necessary and Proper Clause[205] and equally constrained by the "simplistic reading" the Supreme Court gave that passage in *Reid v. Covert*,[206] the

---

Act as necessary and proper to implement the Convention Against Torture). *But see* Oneida Indian Nation of N.Y. v. New York, 860 F.2d 1145, 1163 (2d Cir. 1988) ("[T]he relation of [the treaty] power to state prerogatives is less certain. It is highly doubtful that under the Articles of Confederation the reconciliation of national power and state prerogatives was subject to adjustment in favor of national power simply by the use of national treaties." (citation omitted)).

198 *See* United States v. Bond, 581 F.3d 128, 131–33 (3d Cir. 2009), *rev'd on other grounds*, 131 S. Ct. 2355 (2011).

199 *See* Defendant-Appellant's Brief on Appeal at 12, United States v. Bond, 581 F.3d 128 (3d. Cir. 2009) (No. 08-2677).

200 *See id.* at 16–18.

201 Defendant-Appellant's Brief at 24, *Bond*, 581 F.3d 128 (No. 08-2677); *see also* Defendant-Appellant's Supplemental Reply Brief at 20, United States v. Bond, 681 F.3d 149 (3d Cir. 2012) (No. 08-2677) ("[U]nder our Constitution, determining what punishment is the appropriate response to purely local crimes is entrusted to the exclusive authority of state officials.").

202 Defendant-Appellant's Brief on Appeal at 24, *Bond*, 581 F.3d 128 (No. 08-2677).

203 *See Bond*, 581 F.3d at 137–38.

204 *See* Bond v. United States, 131 S. Ct. 2355, 2367 (2011).

205 *Bond*, 681 F.3d at 162.

206 *See id.*

Third Circuit considered Bond's arguments about potentially limitless congressional power to be "not without merit."[207] It cited the argument by Nicholas Rozenkranz that *Holland* rests on a misreading of the Treaty Clause in conjunction with the Necessary and Proper Clause[208] but concluded that "*Holland* remains binding precedent . . . and forecloses this line of reasoning."[209] Judge Ambro, in a concurring opinion, went so far as to "urge" the Supreme Court to clarify the *Holland* statement, describing its consequences as creating an "acquirable police power."[210]

Historically, the Necessary and Proper Clause has been read to grant broad authority to the federal government to enact legislation in pursuance of a legitimate constitutional purpose. In *McCulloch v. Maryland*, Chief Justice Marshall read "necessary" as "appropriate . . . and conducive to the end."[211] Presuming a legitimate goal that lies within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[212] That reading has since guided courts' application of the Necessary and Proper Clause.[213]

Invoking Marshall's language from *McCulloch*, the Supreme Court recently employed an expansive reading of the Necessary and Proper Clause. In *United States v. Comstock*, the Court upheld a federal statute allowing the civil commitment of a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise have been released.[214] In addition to finding congressional authority in an area "more than one step removed from a specifically enumerated power,"[215] the Court stated that deciding whether Congress has the authority to enact a particular statute under the Necessary and Proper

---

207 *Id.* at 158 ("Juxtaposed against increasingly broad conceptions of the Treaty Power's scope, reading *Holland* to confer on Congress an unfettered ability to effectuate what would now be considered by some to be valid exercises of the Treaty Power runs a significant risk of disrupting the delicate balance between state and federal authority.").

208 *See* Rosenkranz, *supra* note 60, at 1882–85.

209 *Bond*, 681 F.3d at 157 n.9. The Third Circuit was responding to the argument of Petitioner that the court should engage in a "fundamental reassessment" of the *Missouri* holding. Brief for Petitioner at 38–40, *Bond*, 131 S. Ct. 2355 (No. 09-1227) (citing Rosenkranz, *supra* note 60, at 1868).

210 *Bond*, 681 F.3d at 169–70 (Ambro, J., concurring).

211 McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 415 (1819).

212 *Id.* at 421.

213 *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 59–60 (2005); Katzenbach v. Morgan, 384 U.S. 641, 650 (1966); United States v. Sabri, 326 F.3d 937, 948 (8th Cir. 2003), *aff'd and remanded*, Sabri v. United States, 541 U.S. 600 (2004); Mills v. Maine, 118 F.3d 37, 44 (1st Cir. 1997); *see also* Buckley v. Valeo, 424 U.S. 1, 90 (1976) (discussing the "enlargement of power" by the Necessary and Proper Clause).

214 *See* United States v. Comstock, 130 S. Ct. 1949 (2010).

215 *Id.* at 1963.

Clause involves determining whether the statute was "*rationally related* to the implementation of a constitutionally enumerated power."[216]

Nevertheless, several members of the Court have expressed reservations about such a broad reading of what the Necessary and Proper Clause authorizes. Justice Kennedy, for example, took care to note the distinction between the deferential rational basis review in the due process context and rational basis in the Commerce Clause context.[217] The latter, upon which the Court's *Comstock* opinion relies, requires a "tangible link" to commerce, not simply a conceivable rational relation.[218] Further, Justice Kennedy would place federalism restraints on the operation of the Necessary and Proper Clause itself; assertions of federal power under the Clause that intrude upon "essential attributes of state sovereignty" would suggest "the power is not one properly within the reach of federal power."[219] Similarly, in *Gonzales v. Raich*, Justice Scalia parsed Chief Justice Marshall's pronouncement to place additional restraints on the use of the Necessary and Proper Clause. Means employed under the Clause must be "appropriate" and "plainly adapted," but, in addition, they must not be otherwise "prohibited" and must be "consistent with the letter and spirit of the constitution."[220] On Scalia's reading, as evinced in *Gonzales* and *Printz*, the Necessary and Proper Clause does not authorize a law that violates a constitutional principle of state sovereignty.[221]

Some have argued that even if a given measure might be "necessary" to carry out a valid legislative objective, federal regulation might not be the "proper" means of doing so, particularly if Congress has not determined that state or local regulation would not be sufficient to achieve that objective.[222] This view was embraced by Justice John Roberts in *National Federation of Independent Business v. Sebelius*.[223] There, Roberts concludes that "[e]ven if the individual mandate is 'necessary' to the Act's insurance reforms, such an expansion of federal power is not a 'proper' means for making those reforms effec-

---

216 *Id.* at 1956–57 (emphasis added) (citing cases).

217 *See id.* at 1966–67 (Kennedy, J., concurring).

218 *See id.* at 1967.

219 *Id.* at 1967–68.

220 Gonzales v. Raich, 545 U.S. 1, 39 (2005) (Scalia, J., concurring) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 421 (1819)).

221 *See id.*; Printz v. United States, 521 U.S. 898, 923–24 (1997); New York v. United States, 505 U.S. 144, 166 (1992).

222 *See* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 800 (1996); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297 (1993); *see also* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 217 (2003) (arguing that, to be "proper," a law must be within the jurisdiction of Congress, according to principles of separation of powers, federalism, and "background rights retained by the people").

223 *See* 132 S. Ct. 2566, 2591–93 (2012).

tive."[224] This portion of the opinion, however, was not joined by any other Justice. The argument is not only directly at odds with arguments made pursuant to the anicommandeering doctrine—in the treaty context, it would also seem to fly in the face of the very purpose of both the Treaty Clause and Compacts Clause, which unequivocally federalize the treaty power.

Carlos Vázquez proposes a limit on implementing legislation that gives some bite to the Necessary and Proper Clause without fundamentally undermining the treaty power. Vázquez suggests that Congress's power to enact "necessary and proper" implementing legislation pursuant to a non-self-executing treaty addressing matters beyond its Article I powers extends only to determinate treaty obligations, not to aspirational treaty provisions.[225] Aspirational treaty provisions typically grant treaty parties broad discretion to implement the treaty and thus arguably pose the greatest danger of intrusion on rights reserved to the state. At the same time, they do not create specific obligations binding on the United States with which the federal government must therefore be able to compel compliance.[226] Thus, Vázquez argues, excluding aspirational treaty provisions as a sole basis for congressional legislative authority preserves the Framers' intent in declaring the supremacy of treaties[227] and ensures the United States' compliance with its international obligations.[228] As Vázquez recognizes, there may be challenges in discerning which provisions of treaties are aspirational and which are obligatory.[229]

Thus far, however, the federal courts—including the Third Circuit—have followed the broad reading of the Necessary and Proper Clause set forth in *Comstock* in upholding implementing legislation.[230] The Eleventh Circuit Court of Appeals drew heavily from the *Comstock* opinion and similar circuit court precedent to uphold the Hostage Taking Act as necessary and proper to implement the Convention

---

224 *Id.* at 2592.

225 *See* Carlos Manuel Vázquez, Missouri v. Holland*'s Second Holding*, 73 MO. L. REV. 939, 965–66 (2008) [hereinafter Vázquez, *Second Holding*].

226 *See id.* at 965.

227 *See* U.S. CONST. art. VI, cl. 2.

228 *See* Vázquez, *Second Holding*, *supra* note 225, at 965.

229 *See id.* at 966.

230 *See, e.g.*, United States v. Bond, 681 F.3d 149, 162 n.14 (3d Cir. 2012) (upholding under the Necessary and Proper Clause the Chemical Weapons Convention Implementation Act); United States v. Kebodeaux, 647 F.3d 137, 138 (5th Cir. 2011) (upholding under the Necessary and Proper Clause a statute requiring sex offenders to update registration after intra-state relocation), *rev'd*, 687 F.3d 232 (5th Cir. 2012) (en banc); United States v. Yelloweagle, 643 F.3d 1275, 1276–77 (10th Cir. 2011) (same); Mead v. Holder, 766 F. Supp. 2d 16, 18–19 (D.D.C. 2011) (upholding the individual insurance mandate of the Patient Protection and Affordable Care Act under the Necessary and Proper Clause), *aff'd*, Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2012).

Against Torture.[231] Indeed, the court stated that the scope of Congress's powers under the Necessary and Proper Clause are especially broad in the area of foreign relations.[232] Thus, it appears overall that current Necessary and Proper Clause jurisprudence does not significantly limit Congress's power to pass legislation implementing a valid treaty.

C. Scope of the Treaty Power

Are there any limits on the treaties the federal government may conclude or that the courts will enforce? In other words, are there treaties that are beyond the constitutional grant of authority to the President to "make Treaties, provided two thirds of the Senators present concur."[233] We address this question here. We proceed by first outlining how the political question doctrine applies to questions regarding the appropriate scope of the treaty power. Although the doctrine does not act to prohibit the courts from assessing the constitutional validity of the exercise of the treaty power as a general matter, the doctrine may be invoked in cases in which there are no "judicially discernible and manageable standards."[234] Second, we examine in detail three candidate limitations on the treaty power—subject-matter limits, limits derived from Article I, and limits on concluding pretextual treaties. We find that only the last of these—the limitation on pretextual treaties—provides any judicially enforceable limit on the treaty power. We then sketch a much more detailed pretext test than has previously been articulated in the literature. We conclude, however, that few treaties will fail even this test. Instead, the real protections against abuse of the treaty power derive from the structural, political, and diplomatic checks on the exercise of the power described in the following Part.

1. *Is the Scope of the Treaty Power a Political Question?*

The political question doctrine can be traced back to *Marbury v. Madison*, in which Chief Justice Marshall stated that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[235] Under the doctrine, courts abstain from deciding issues either because they conclude that a certain subject matter has been entrusted entirely to another branch or because they believe that the judicial process is not

---

231 *See* United States v. Belfast, 611 F.3d 783, 804–05 (11th Cir. 2010).
232 *Id.* at 805.
233 U.S. CONST. art. II, § 2, cl. 2.
234 *See* Davis v. Bandemer, 478 U.S. 109, 123 (1986), *overruled by*, Vieth v. Jubelirer, 541 U.S. 267, 281 (2004).
235 5 U.S. (1 Cranch) 137, 170 (1803).

adequate for deciding the issue.[236] The focus, in general, is on separation of powers.[237] The political question doctrine guides our assessment of the judicial tools available for ascertaining whether or not a given treaty, by virtue of its content, exceeds the authority of the federal government under the Treaty Clause.[238]

The modern doctrine is based on the 1962 decision *Baker v. Carr*, in which the Supreme Court decided that federal courts can intervene in and decide legislative apportionment cases.[239] *Baker* established a six-prong test to guide courts as to whether a case is a political question:

> Prominent on the surface of any case held to involve a political question is found [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[240]

The first prong of the *Baker* test requires "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[241] In practice, the Court has seldom found this to be the case.[242] For the most part, federal courts routinely review the con-

---

236 *See* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 86 (7th ed. 2011).

237 *See id.*

238 Questions about the scope of the treaty power differ from those concerning the process of treaty making, such as whether or not the President may unilaterally abrogate treaties. The political question analysis may differ on the latter set of questions, which are largely beyond the scope of this Article. *See infra* text accompanying notes 247–50.

239 *See* 369 U.S. 186, 187–88 (1962).

240 *Id.* at 217.

241 *Id.*

242 The Court has only found such a commitment of an issue to another branch of government when something in the text can be read as specifically excluding the courts. Before the *Baker* test, the Court found such a commitment in the Guarantee Clause. *See* Luther v. Borden, 48 U.S. (7 How.) 1, 32, 42 (1849) (refusing to decide which of two opposing camps was the legitimate government of Rhode Island). Subsequent cases under the Guarantee Clause have followed *Luther*'s reasoning. *See, e.g.*, Mountain Timber Co. v. Washington, 243 U.S. 219, 234 (1917); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 129, 143 (1912); Taylor v. Beckham, 178 U.S. 548, 578 (1900); *see also* WRIGHT & KANE, *supra* note 236, at 87 ("[T]he Court consistently has refused to resort to the Guaranty Clause as a constitutional source for invalidating state action."). Other areas held to be political questions under the first prong of *Baker* include the impeachment process, Nixon v. United States, 506 U.S. 224, 226 (1993), and the training of the national guard, Gilligan v. Morgan, 413 U.S. 1, 6–7 (1973) (holding that the Article I, Section 8 "Authority of train-

stitutionality of exercises of Article I[243] and II[244] powers. The fact that these powers are entrusted to other branches does not mean that oversight of their lawful exercise is outside the responsibility of the judiciary. The text of the Treaty Clause states only 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 . . . ."[245] This is worded as are any other Article I and II powers, which the Court has consistently held subject to judicial review. There is no allocation, express or implied, of a power to judge the validity of treaties to either of the political branches. It is highly doubtful, therefore, that the scope of the treaty power is, as a general matter, a political question under the first prong of the *Baker* test.

The second and third *Baker* prongs require federal courts to abstain from questions that cannot be decided by applying judicial criteria.[246] Perhaps the most important foreign relations case to fall under these prongs is *Goldwater v. Carter*, in which the Supreme Court summarily vacated a court of appeals judgment holding that President Carter could unilaterally terminate a mutual defense treaty with Taiwan.[247] Justice Rehnquist, writing for the plurality, stated that "while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty."[248] Citing *United States v. Curtiss-Wright Export Corp.*,[249] the plurality believed that "the justifications for concluding that the question here is political in nature are even more compelling . . . because it involves foreign relations . . . ."[250] The applicability of these prongs of *Baker* to the treaty power depends on the workability of judicial tests created to define the boundaries of

---

ing the Militia according to the discipline prescribed by Congress" demonstrates a textual commitment of the issue to a coordinate branch (citing U.S. CONST. art. I, § 8)).

243 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 551 (1995) (holding that the Gun-Free School Zones Act of 1990 exceeded Congress's authority under the Commerce Clause).

244 *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582, 589 (1952) (holding that President Truman lacked authority to seize the country's steel mills in response to a national strike, even given the exigencies of the Korean War).

245 U.S. CONST. art. II, § 2, cl. 2.

246 In *Coleman v. Miller*, 307 U.S. 433, 450 (1939), for example, the Court declined to decide how long a proposed constitutional amendment stays open for adoption and whether a prior rejection bars a state from subsequently ratifying an amendment. The Court found no constitutional or statutory basis for making a decision, and concluded that any resolution of these questions would implicate policy concerns that are not properly within the scope of the judiciary. *See id.* at 450, 453–54.

247 *See* 444 U.S. 996, 996–98 (1979).

248 *Id.* at 1003.

249 299 U.S. 304, 315 (1936).

250 *Goldwater*, 444 U.S. at 1003–04. *But see id.* at 1007 (Brennan, J., dissenting) ("The issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.").

Article II. If a workable test to limit the scope of the treaty power could be fashioned, then it is unlikely the issue would be a political question. On the other hand, if any test would ultimately rely on arbitrary distinctions or involve the judiciary in complex foreign policy determinations, then the second and third *Baker* factors would preclude judicial review. The next two subsections examine the workability of various judicial tests to limit the scope of the treaty power.

The fourth, fifth, and sixth prongs of the *Baker* test all address the prudential consideration that there are times when it is imperative for the government to speak with one voice. Historically, these prudential factors seem to have been relatively inconsequential. We are not aware of any Supreme Court case that has declared an issue a nonjusticiable political question based on prudential grounds alone. Nonetheless, if there were an area in which the Court would hold an issue nonjusticiable on prudential grounds, foreign relations is a strong candidate. In *Haig v. Agee*, Chief Justice Burger, writing for the Court, opined that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."[251] Rather, they are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[252] Note that requiring that treaties adhere to affirmative limitations set by the Constitution is much less invasive to the political branches than imposing extratextual subject-matter or procedural limitations on the treaty power. As such, it is possible that the latter would invoke the prudential prongs of the political question doctrine while the former would not. Yet the Supreme Court's recent decision in *Medellín v. Texas*,[253] against briefing by the United States,[254] suggests that the current Court is unlikely to be moved by prudential concerns in the treaty context regarding the "lack of the respect due coordinate branches of government"[255] or the "embarrassment from multifarious pronouncements by various departments on one question."[256]

If a court were to declare the scope of the treaty power to be a political question, it would likely do so under the second and third prongs of the *Baker* test on the grounds that there are insufficient "judicially discernible and manageable standards."[257] It is therefore with

---

251 453 U.S. 280, 292 (1981).

252 *Id.* (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952)).

253 552 U.S. 491, 505 (2008).

254 *See* Brief for the United States as Amicus Curiae Supporting Petitioner, Medellín v. Texas, 552 U.S. 491 (2008) (No. 06-984).

255 Baker v. Carr, 369 U.S. 186, 217 (1962).

256 *Id.*

257 *See* Davis v. Bandemer, 478 U.S. 109, 123 (1986), *overruled by*, Vieth v. Jubelirer, 541 U.S. 267, 281 (2004).

an eye toward identifying such standards that we now turn to three possible substantive limits on the treaty power.

2. *Proposed Boundaries on the Treaty Power*

The scope of the treaty power has long been a subject of debate. Three limitations on the treaty power have received sustained attention from the courts and scholars. First, some have argued that Article II treaties are constrained by subject-matter limitations—that they may only address subjects of "international concern." There is, however, no consensus on where or how to draw the appropriate boundaries, if indeed those boundaries are appropriate for judicial inquiry at all. Second, a minority of commentators have suggested that the scope of the treaty power should be limited to Congress's enumerated powers under Article I, thus subjecting the treaty power to precisely the same federalism restrictions that apply to ordinary domestic legislation. This remains, however, a novel proposition with few adherents and little legal support. The third and most plausible proposed limitation on the treaty power is a prohibition on the power of the federal government to enact a purely pretextual treaty—one that serves as a pretext for the federal government to pass a law that it would otherwise be unable to pass.

Although the third limitation has strong scholarly consensus behind it, thus far no one has provided clear guidance as to what the test entails or how to apply it. We attempt to fill that gap. Drawing on purpose tests in other contexts, we describe a test that courts could apply to determine whether a treaty is solely pretextual. Although this test, if adopted by courts, would prevent purely pretextual treaties from being enforced, we ultimately conclude that few treaties will in fact fail this test. The real limits on the treaty power thus come not from any court-enforced limitations but from structural, political, and diplomatic checks inherent in the treaty power itself—checks to which we turn in the following Part.

a. *Subject-Matter Limits*

It has often been asserted that an Article II treaty may only address subjects of "international concern."[258] James Madison raised this idea during the ratification debates.[259] It was also mentioned in Justice Field's opinion in *Geofroy v. Riggs*, which noted that treaties

---

258 This specific phrase initially appeared in an address to the American Society of International Law by Charles Evans Hughes. *See* Hughes, *supra* note 98, at 194. In 1965, it was incorporated into the Restatement (Second) of Foreign Relations Law of the United States as one of only two proposed limitations on the treaty power (the other being that a treaty could not violate affirmative constitutional rights). *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 117(a) (1965).

259 *See supra* text accompanying note 33.

must address issues "which [are] properly the subject of negotiation with a foreign country."[260] *Holland* itself contains dicta suggesting that Blackstone accepted this limitation.[261] The D.C. Circuit in *Power Authority of New York v. Federal Power Commission* strongly implied that Article II treaties are limited by subject matter.[262]

The nomenclature of "subject-matter limitation" obscures the fact that there are actually three different types of limitation to which the label can be attached. The apparent consensus around this limitation is therefore more lexical than analytical: different commentators appear to have different limits in mind when they discuss the topic. These limits can stretch from those that are so permissive that they are limits only in name to those that are so constrictive that they would involve U.S. withdrawal from the majority of modern day treaties. The basic claim that the treaty power is restricted by "subject matter," therefore, allows for such variance in practical limitations that, without more, it provides little or no guidance. It is therefore important to distinguish between the various limitations nominally in this category.

The first subject-matter limitation candidate involves restricting the Article II treaty power to those subjects about which a valid treaty can be formed under international law. Such a formulation only requires that the treaty have a suitable co-signatory and have international legal effect.[263] It could encompass a treaty with provisions that are exclusively domestic.[264] Although some scholars have described

---

260 Geofroy v. Riggs, 133 U.S. 258, 267 (1890). An even earlier statement of a similar view comes in *Holden v. Joy,* 84 U.S. (17 Wall.) 211, 243 (1872) (noting that the treaty-making power extends to "all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty").

261 *Missouri* stressed how state interests could be subordinated in "matters of the sharpest exigency for the national well being." Missouri v. Holland, 252 U.S. 416, 433 (1920). It described the subject of the treaty as a "matter[ ] requiring national action." *Id.* Indeed, the Migratory Bird Treaty involved a "national interest of very nearly the first magnitude." *Id.* at 435. It could "be protected only by national action in concert with that of another power." *Id.* The specific justification for the validity of the treaty therefore was that the national interest required it and that a treaty was the only means of implementing an effective regulatory scheme; in effect, the treaty was valid because it involved a valid international subject matter.

262 *See* Power Auth. of N.Y. v. Fed. Power Comm'n, 247 F.2d 538, 541 (D.C. Cir. 1957), *vacated sub nom.*, Am. Pub. Power Ass'n v. Power Auth. of State of N.Y., 355 U.S. 64 (1957); *see also* United States v. Lue, 134 F.3d 79, 83 (2d Cir. 1998) ("Admittedly, there must be certain outer limits, as yet undefined, beyond which the executive's treaty power is constitutionally invalid." (citations omitted)).

263 *See* HENKIN, *supra* note 61, at 184–85.

264 It is likely that a treaty with Mexico to create gun-free zones near schools in both countries would be a valid treaty under international law since Mexico, as an independent sovereign state, is a valid treaty partner and both parties would undertake that the provisions be binding as a matter of international law.

such a rule as a subject-matter limitation,[265] it does not actually impose any subject-linked restriction on which treaties the United States may enter.[266] As discussed below, international law places almost no limit on the validity of a treaty so long as a state can find a willing treaty partner.[267] This "limitation" therefore places few practical restraints on the treaty power and vests significant authority in the political branches to use the power prudentially. It is, therefore, both uncontroversial and unlikely to have much impact.

A second type of subject-matter limitation specifies the particular subjects that treaties may address. For example, treaties could be limited to matters that typically constituted treaties in 1791[268] or to a set of issue areas that have a long lineage in the state practice of treaty making, such as treaties regarding commerce, territory, and defense.[269] Perhaps novel types of treaties, like environmental or human rights agreements, could move from being outside of the subject matter scope to being within it, depending on evolving international custom.[270] This approach, which involves the pre-specification of particular subject areas, is the most literal vision of a "subject-matter limitation." However, because it involves limits that are fundamentally

---

265 Henkin notes that a treaty must be "a bona fide treaty [which] deals with a foreign nation about matters which pertain to our external relations, that are of mutual international concern." HENKIN, *supra* note 61, at 197 (internal quotation marks omitted). This language is suggestive of a subject-matter limitation to topics of "international concern." However Henkin later clarifies that international law provides the only significant limit on the treaty power:

> If there are reasons in foreign policy why the United States seeks an agreement with a foreign country, it does not matter that the subject is otherwise 'internal' . . . or that—apart from treaty—the matter is normally and appropriately . . . within the local jurisdictions of the States.

Id. (internal quotation marks omitted).

266 The only sense in which international law might be said to provide a subject-matter limitation is the requirement that no treaty can violate a *jus cogens* norm. *See* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

267 *See infra* Part III.A.3.

268 Curtis Bradley suggests that this restriction was the one intended by Thomas Jefferson. *See* Bradley, *Treaty Power Part II*, *supra* note 142, at 451.

269 It appears this was the view advanced by Charles Evans Hughes, referenced in Part I. *See supra* note 99 and accompanying text. Hughes believed that the treaty power is not "intended to be exercised . . . with respect to matters that have no relation to international concerns." In particular, the federal government cannot use the power to "control matters which normally and appropriately were within the local jurisdictions of the States." Hughes, *supra* note 98, at 194–96. While this text alone gives us no sense of what Hughes had in mind, we do know that Hughes believed that the United States was not constitutionally authorized to join a treaty to establish uniform principles of private international law. *See* Charles Evans Hughes, *The Outlook for Pan Americanism—Some Observations on the Sixth International Conference of American States*, 22 AM. SOC'Y INT'L L. PROC. 1, 12 (1928).

270 Though an interesting proposition, there has been little written about such an "evolutionary" approach to the subject-matter limitation. This might be because such a restriction of the treaty power would preclude the United States from a being norm leader in novel areas of international cooperation.

inflexible, it risks severely limiting the capacity of the United States to engage in treaty making and is not adaptable to novel areas of international cooperation. It also relies on an untenable distinction between domestic and international "subject matter." Since almost all treaties touch on both international and domestic affairs, this rule has the significant potential to be under- or overinclusive.[271] It also confers significant discretionary authority upon the institutional actor charged with determining which subjects are valid ones for the purposes of the treaty power. And it flies in the face of the Framers' clear intent to grant the federal government a treaty power that was not limited to particular subjects precisely to allow for evolution over time.[272]

A third possibility scholars have raised is that a treaty's subject must be related to the United States' foreign policy goals. Such a restriction would allow treaties to be enacted only on subjects that could plausibly require international coordination or reciprocity. Valid treaties would need to be related to some objectively discernible foreign policy interest and not merely designed to regulate domestic behavior. This third formulation was largely endorsed in the Second Restatement of the Law of U.S. Foreign Relations.[273] The Second Restatement specifies that treaties can only be concluded on subjects of "international concern," which are described as matters that "relate to the external concerns of the nation as distinguished from matters of a purely internal nature."[274] These are "not confined to matters *exclusively* concerned with foreign relations," but they must further United States foreign policy in some tangible and discernible fashion.[275] Unlike the previous subject-matter limitation, this subject-matter limitation does not pre-specify a narrow range of subjects upon which treaties can be concluded, nor does it risk excluding all treaties that have domestic implications. It must, however, pre-specify a particular set of legitimate foreign policy goals around which valid treaties can be formed. The Second Restatement provides two examples of valid treaties that help define the limits of the government's power:

---

271 *See* United States v. Lue, 134 F.3d 79, 83 (2d Cir. 1998) ("[The] dichotomy between matters of purely domestic concern and those of international concern . . . [is] appropriately criticized by commentators in the field.").

272 *See supra* Part I.A.1.

273 *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 117 (1965). The Second Restatement is clear that "[u]sually, matters of international concern have both international and domestic effects, and the existence of the latter does not remove a matter from international concern." *Id.* § 117 cmt. b. Indeed, the Second Restatement clarifies that a treaty which provides "that no national of either [state] may be denied permission to practice accountancy in the other state by reason of alienage," an ostensibly internal matter, would be within the treaty power. *Id.* § 117 cmt. b, illus. 3.

274 *Id.* § 117 cmt. b.

275 *Id.* (emphasis added).

First, the restatement notes that it would be constitutional if "State A and the United States make a treaty providing that no national of either country may be denied permission to practice accountancy in the other state by reason of alienage."[276] Second, it notes that it would also be constitutional if "State A and the United States, whose territories adjoin, make a treaty providing for specified closing hours of saloons and bars located within fifty miles of the border between them."[277] The foreign policy goals in these examples are extremely direct and tangible, conferring material benefits on particular U.S. citizens or regions.

If these examples were to represent the outer limits of the treaty power, this type of subject-matter limitation would be a significant one. For example, while a reciprocal treaty based on alienage clearly confers specific material benefits on U.S. citizens abroad, most human rights treaties are expressive in character and cannot be said to materially benefit any particular group of U.S. citizens. It is possible that the restatement's illustrations are designed not to be outer limits but merely typical examples. This, however, raises another concern with this limitation—that it may involve intractable problems of line drawing. For example, would it be permissible to regulate the closing time of bars that are 200 miles from the border? Is there a distance between 50 and 200 miles where regulating closing times is no longer an issue of international concern? If so, it seems impossible to know where such a line could be fairly and logically drawn. Finally, the Restatement gives no guidance as to how a court may discern whether the federal government's desire is a legitimate foreign policy goal. If a foreign policy goal is simply what the political branches say it is, then policing this limitation becomes a de facto political question. If, on the other hand, this limitation involves an actual determination made by courts as to which foreign policy goals are legitimate or important enough to be described as proper subjects of the treaty power, then this limitation risks becoming arbitrary or inconsistent. A test that uses foreign policy goals as its subject matter touchstone, therefore, has the potential to both heavily restrict legitimate international treaties and involve the judiciary in irresolvable line drawing problems.

Perhaps it is for these reasons that the Third Restatement rejected the Second Restatement's formulation.[278] The Third Restatement explains that, "[c]ontrary to what was once suggested, the

---

276 *Id.* § 117 cmt. b, illus. 3.

277 *Id.* § 117 cmt. b, illus. 4.

278 The Third Restatement contains expansive language suggesting that the treaty power is unlimited by subject matter and limited only by the scope of international law: "The references in the Constitution presumably incorporate the concept of treaty and of other agreements in international law. International law knows no limitations on the purpose or subject matter of international agreements, other than that they may not conflict

Constitution does not require that an international agreement deal only with 'matters of international concern.'"[279] Although there remains some debate over whether there ought to be any substantive limits on the treaty power,[280] even scholars who support limiting the treaty power admit that "the new *Restatement (Third)* position . . . is now being treated as if it were black-letter law" and that the "rejection of a subject matter limitation on the treaty power now appears to be the accepted view, at least among academic commentators."[281] As a result, it is unlikely that courts today would reject a treaty as insufficiently international in nature.[282] Therefore, subject-matter limits are unlikely to place any real constraints on the exercise of the treaty power.

b. *Article I*

A minority of commentators have suggested that the scope of the treaty power should be limited to Congress's enumerated powers under Article I.[283] This would "subject the treaty power to the same federalism restrictions that apply to [ordinary legislation]."[284] The desire for such a limitation is grounded in the desire to restrict the power the Treaty Clause grants the federal government over the states. If "the form and substance of modern treaty law resembles domestic legislation,"[285] Professor Curtis Bradley has argued, then the restrictions on treaty law should also mirror those on domestic legislation.[286]

---

with a peremptory norm of international law . . . ." RESTATEMENT (THIRD), *supra* note 154, § 302 cmt. c.

279 *Id.* The Restatement adopted the position of its chief reporter, Louis Henkin. *See* Louis Henkin, *"International Concern" and the Treaty Power of the United States*, 63 AM. J. INT'L L. 270, 276–78 (1969).

280 *Compare* Golove, *supra* note 9, at 1287–89 (supporting general subject-matter limitations requiring advancement of foreign policy interests), *with* Bradley, *Treaty Power Part I*, *supra* note 142, at 450–61 (advocating for "reserved powers" limitations on the treaty power instead of subject-matter limitations).

281 Bradley, *Treaty Power Part I*, *supra* note 142, at 432–33 (footnote omitted).

282 Curtis Bradley notes that it "seems inconceivable that courts would second-guess [the political branches], which presumably would require an examination of either the national interests of the United States, the subjective beliefs of the U.S. treatymakers, or both." Bradley, *Treaty Power Part II*, *supra* note 142, at 107. David Golove concurs that courts "cannot be expected to second-guess the political branches on the question of whether a treaty deals with a matter that is sufficiently international in nature." Golove, *supra* note 9, at 1291.

283 *See, e.g.*, Bradley, *Treaty Power Part I*, *supra* note 142, at 393; cf. Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 576 (1997) ("One might go so far as to question whether the treaty power now encompasses a federal capacity to overcome state laws in spheres of traditional state authority . . . .").

284 Bradley, *Treaty Power Part II*, *supra* note 142, at 456.

285 *Id.*

286 *See id.*

The claim is novel and has weak support in constitutional text and history. There is little reason to believe that the Framers would create an entirely separate procedural mechanism for passing treaties—one subject to its own set of structural, political, and diplomatic checks—if there was nothing that could be achieved through the treaty power that was not already possible through ordinary legislation. As Part I shows, a significant motive behind the creation of the Article II Treaty Clause was to ensure that the new United States could speak with unity on the international stage and live up to its treaty commitments irrespective of the views of a few recalcitrant states.[287]

Those who advocate restricting the scope of the treaty power to the limits of Article I do not dispute the novelty of the idea. But they argue that the similarity between modern day statutes and treaties necessitates the restriction.[288] Since modern treaties create domestic law in a way never envisaged in 1791, they argue, modern treaties provide an opportunity for the federal government to abuse the treaty power to further its domestic agenda that the Framers never considered.[289]

As shown in Part I, however, the Framers understood that the uses of the treaty power would change over time, and that is precisely why they declined to place subject-matter limits on the power.[290] There is no evidence that they believed the treaty power would remain cabined to a narrow range of issues, neatly divorced from domestic legislation. Quite the opposite. If there really was no possibility that treaties could encroach on states' rights, then there would be no reason to create an alternative mechanism for their ratification, one that was especially sensitive to the views of the states. Moreover, limiting the treaty power to the confines of Article I would overturn the specific holding of *Holland*. Those who advocate this idea are therefore proposing a rule that does not comport with text and history and that contradicts well-settled precedent.[291] In sum, this proposed limitation is likely to remain confined to the academic literature.

---

287 *See supra* Part I.A.1.

288 *See* Bradley, *Treaty Power Part II*, *supra* note 142, at 456–58.

289 In particular, in light of changes in the landscape of international law post-*Missouri*, not least the proliferation of human rights treaties after World War II, there may be an argument that "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." Planned Parenthood v. Casey, 505 U.S. 833, 855 (1992) (citation omitted).

290 *See supra* Part I.A.

291 A few commentators have suggested ways to re-read *Missouri* so as to allow for Tenth Amendment limits notwithstanding the opinion's apparently explicit rejection of such limits; specifically, one reading views *Missouri* as making the applicability of the Tenth Amendment to treaties more flexible and subject to change over time. *See* Jay Loyd Jackson, *The Tenth Amendment Versus the Treaty-Making Power Under the Constitution of the United States*, 14 VA. L. REV. 331, 351–52 (1928).

c. *Pretext*

A final limitation on the treaty power is a prohibition on the power of the federal government to enact a purely pretextual treaty. A treaty may not, in other words, serve as a pretext for the federal government to pass a law that it would otherwise be unable to pass.

Although there is no evidence that any treaty has in practice been purely pretextual, there is academic consensus that such a treaty, were it to exist, would be unconstitutional. Louis Henkin states that, for a treaty to be valid, it must be "a bona fide agreement, between states, not a 'mock-marriage.'"[292] David Golove agrees that "the President and Senate may not constitutionally enter into a treaty for the sole purpose of making domestic legislation."[293] Chandler Anderson claims treaties must be made pursuant to "the international interests or relations of the nation" and cannot be made "as a mere subterfuge for exercising . . . power."[294] Duncan Hollis notes that scholars generally "do not . . . endorse 'mock marriage' treaties designed primarily to regulate domestic standards."[295] Indeed, no scholar anywhere appears to openly admit that the treaty power can be lawfully used as a pretext to pass domestic legislation.[296] While this consensus appears universal, it is almost exclusively addressed in footnotes and incidental to the authors' main arguments. It is notable that a universally agreed upon pretext limitation on the treaty power has received almost no direct scholarly attention or careful examination.

Scholars have also been unclear about how this limitation operates in practice. Louis Henkin makes the argument that international law provides a check against pretextual usage of the treaty power. He notes:

> [H]ypothetically, if in order to circumvent the House of Representatives and the states, the President wrote a uniform divorce law, applicable to the United States alone, into 'a treaty', [sic] and the Prime Minister of Canada cooperated in the scheme . . ., it would presumably not be a treaty under international law, and therefore not a treaty under the Constitution.[297]

---

292 HENKIN, *supra* note 61, at 185.

293 Golove, *supra* note 9, at 1090 n.41 (citation omitted).

294 Chandler P. Anderson, *The Extent and Limitations of the Treaty-Making Power Under the Constitution*, 1 AM. J. INT'L L. 636, 665 (1907).

295 Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1337 n.56 (2006) (citation omitted).

296 That includes one of the authors of this Article. *See* Hathaway, *supra* note 9, at 1344 (arguing that treaties must be "genuine" and that "a treaty concluded for the sole purpose of enabling a party to avoid its domestic lawmaking rules would *not* constitute a genuine agreement." (footnote omitted)).

297 HENKIN, *supra* note 61, at 185 (footnote omitted).

However, it is possible that such a treaty *would* constitute a valid agreement under international law,[298] and even if it did not, it would certainly be a lawful treaty if Canada undertook to reciprocally implement the divorce law. Hence, international legality is not dispositive of whether a treaty is or is not pretextual.

Moreover, no scholar is especially clear on how a prohibition on pretextual treaties would be judicially enforced in domestic courts. Many appear to suggest that whether a treaty is pretextual is a political question. Robert Looper notes that "[e]ven in the case of bilateral treaties, it would be difficult to secure judicial review of the question [of whether a treaty was pretextual]."[299] David Golove largely avoids the issue: "Whether a constitutional limitation of the kind I have suggested would be judicially enforceable, and, if so, to what extent and under what circumstances, are wholly separate questions [from the ones addressed here]."[300] Other scholars do not even discuss the judicial enforceability of treaties,[301] while some scholars reject the notion that there should be any judicial role whatsoever in treaty enforcement. As Thomas Healy puts it, "the unique role of the Senate in ratifying treaties provides the states adequate political protection in the treaty-making process, making judicial intervention unnecessary and inappropriate."[302]

Scholars have been all too willing to ignore this critical area, which might hold the key to resolving lingering anxieties about the scope of the federal government's power under the Treaty Clause. Since advocates of states' rights are primarily concerned with the judicial enforceability of treaty restrictions and are most worried about the covert extension of Article I powers, a judicially enforceable "pretext test" would allay many of their fears. Yet, unlike a test that limits the treaty power to the limits of Article I, a "pretext test" would comport with the Constitution's structure and history. There is little doubt that the treaty power was never intended as a way for the federal government to make an end run around the limits of Article I and to implement legislation with a *solely* domestic purpose. A workable pretext test, with judicially manageable standards, would therefore address abiding and warranted concerns about the scope of federal power

---

298 States may, after all, engage in unilateral treaties or declarations which are binding as a matter of international law. *See* Alfred P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1, 3–6 (1977).

299 Robert B. Looper, *Limitations on the Treaty Power in Federal States*, 34 N.Y.U. L. REV. 1045, 1058 (1959).

300 Golove, *supra* note 9, at 1090 n.41.

301 *See generally* Malvina Halberstam, *A Treaty Is a Treaty Is a Treaty*, 33 VA. J. INT'L L. 51 (1992) (discussing the difference between domestic and international application of treaties but avoiding the judicial enforceability of treaties).

302 Healy, *supra* note 141, at 1747.

while preserving the national government's freedom and flexibility on the international stage. It is to this project that we now turn.

3. *A Two-Step Test for Identifying Clearly Pretextual Treaties*

Here, we aim to set out a new pretext test—one that identifies judicially manageable standards. In doing so, we are mindful of the purpose tests that have recently proliferated in Supreme Court jurisprudence—in areas such as the Equal Protection Clause,[303] the Takings Clause,[304] the Establishment[305] and Free Exercise[306] Clauses, substantive due process,[307] and political gerrymandering.[308] Richard Farrell argues that courts tend to employ purpose tests when there is "reasonable disagreement about what the Constitution means or how it ought to be applied. Otherwise divergent views and theories often converge on the conclusion that statutes enacted for certain purposes offend the Constitution."[309] Thus, purpose tests represent a "lowest common denominator" between divergent constitutional viewpoints.[310]

We begin by noting two broad classes of difficulties inherent in designing a pretext test: the first involves the difficulty of discerning the true intent or motivation behind the enactments of a multimember deliberative body (call these "evidentiary considerations"), and the second involves the deference that federal courts owe the political branches due to separation of powers (call these "separation-of-powers considerations"). We then propose a two-step test to unearth unconstitutional purposes. The first step is a threshold inquiry into whether the treaty entails domestic legislation beyond the scope of Congress's enumerated powers. If it does not, then the inquiry ends and the treaty passes constitutional muster. If it does, the inquiry moves to a second step: a rational basis test in which the court asks whether there is some valid international purpose for the treaty. If there is, then the treaty passes the pretext test. If there is not, then the treaty should be ruled unconstitutional. In practice, the number of treaties that would fail the test will be exceedingly small. Nonetheless, the test offers a mechanism to address the possibility—albeit the

---

303 *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239–41 (1976).

304 *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 477–78 (2005).

305 *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

306 *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540–42 (1993).

307 *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992).

308 *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 127, 142–43 (1986), *overruled by*, Vieth v. Jubelirer, 541 U.S. 267, 281 (2004).

309 RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 89 (2001).

310 *Id.* at 95 ("The Justices may be able to agree on purpose tests as a device for implementing the Constitution, even when they cannot agree about what the Constitution means.").

small possibility—that treaties might be used to evade constitutional limits on the federal government's lawmaking authority.

a. *Challenges to Designing a Pretext Test*

Modern purpose tests attempt to determine the actual, as opposed to the declared, motive of the legislature in passing a statute by examining evidence external to the text. In particular, courts consider themselves freer than in the past to examine legislative history and the circumstances surrounding the passing of the statute.[311] In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[312] Justice Powell, writing for the Court, declared that judges could validly investigate the hidden motivations behind legislative acts, as they had done in the past with administrative agencies. The Court remarked that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[313] In hunting for racially discriminatory intent, judges could consider the "sequence of events leading up to the challenged decision" as well as the "legislative or administrative history."[314] The Court has similarly turned to legislative history and surrounding circumstances in examining legislative motivation in women's rights cases,[315] Establishment Clause cases,[316] Free Exercise Clause cases,[317] and many others.[318]

One possible approach to treaties would be to apply a strong pretext test that scrutinizes actual motivation as in *Arlington Heights*. However, such a probing pretext test raises a host of difficulties. To begin with, it is difficult to discern the true intent or motivation behind the enactments of a multimember deliberative body. There are at least three evidentiary difficulties that cast into question the ability of courts to discern actual legislative motivation. First, it seems all but impossible to tease out the hidden and multifarious motivations of individual legislators. Often, legislators voice one motive but are secretly driven by another. Moreover, people often act with more

311 *See* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1850–57 (2008) ("[M]odern courts routinely consult internal legislative history and other sources of information that their predecessors considered off-limits.").

312 429 U.S. 252 (1977).

313 *Id.* at 266.

314 *Id.* at 267–68.

315 *See, e.g.*, Califano v. Webster, 430 U.S. 313, 318–20 (1977) (per curiam); Weinberger v. Wiesenfeld, 420 U.S. 636, 648–51 (1975).

316 *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 587, 591–93 (1987); Wallace v. Jaffree, 472 U.S. 38, 56–60 (1985).

317 *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 541–42 (1993).

318 *See* Nelson, *supra* note 311, at 1855–59 (noting that legislative history plays a prominent role in deciding cases about the dormant Commerce Clause, the Ex Post Facto and Bill of Attainder Clauses, and the constitutional right to travel).

than one motive.[319] Second, it seems at best a fiction to attribute a single intent to the enactments of a multimember body.[320] Even if one can determine the motives of individual legislators, how many would have to vote for a bill with impermissible motives to invalidate it?[321] The more rigor one demands in ascertaining the collective motivation of a legislature, the more the quest risks incoherence. Third, legislative history and the records of the circumstances surrounding legislation tend to be inconclusive and manipulable.[322] Moreover, the fact that courts are willing to scrutinize legislative history to spot unconstitutional motives might itself make legislators less candid in debate.[323]

Addressing these difficulties with regard to legislation rather than treaties, Richard Pildes argues that examination of legislative history to discern purpose does not require judges to discern the individual motives of legislators. Rather, judges can simply rely on accepted methods of purposive statutory interpretation, which include examining legislative history to determine Congress's intent.[324] Leaving to one side general critiques of purposive statutory interpretation, there remains a crucial difference between purposive interpretation and scrutiny for unconstitutional legislative purpose. While purposive interpretation is fundamentally an act of deference to the legislature,

---

319 As Justice Scalia notes in his dissent in *Edwards v. Aguillard*:

> [W]hile it is possible to discern the objective "purpose" of a statute (*i.e.*, the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth . . . discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite.

482 U.S. at 636–37 (Scalia, J., dissenting).

320 *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 323 (1997).

321 *See Edwards*, 482 U.S. at 638 (Scalia, J., dissenting) ("Having achieved . . . an assessment of what individual legislators intended, we must still confront the question (yet to be addressed in any of our cases) how *many* of them must have the invalidating intent. . . . Or is it possible that the intent of the bill's sponsor is alone enough to invalidate it—on a theory, perhaps, that even though everyone else's intent was pure, what they produced was the fruit of a forbidden tree?").

322 *See id.* ("Legislative histories can be contrived and sanitized, favorable media coverage orchestrated, and postenactment recollections conveniently distorted.").

323 *See* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1215 (1970); *accord* Scott W. Breedlove & Victoria S. Salzmann, *The Devil Made Me Do It: The Irrelevance of Legislative Motivation Under the Establishment Clause*, 53 BAYLOR L. REV. 419, 443 (2001).

324 *See* Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 729 n.45 (1994) ("[T]he process is one of constructing a narrative account that provides the most convincing explanation of the reasons that an action has been taken—just as with any judicial act of purposive statutory interpretation.").

purpose scrutiny is an act of skepticism.[325] Purposive interpretation examines legislative history because, come what may, courts *must* construe the statute to mean one thing, and reliance on often treacherous legislative history is better than nothing when the text is completely indeterminate. Purpose scrutiny, on the other hand, looks for unconstitutional purposes when they are not apparent on the face or effects of a statute. This difference might require one to engage in the impossible task of examining the individual motives of legislators because often a statute passed with a legitimate public justification might be tacitly motivated by unconstitutional designs.[326]

Moreover, the stakes for purpose scrutiny of legislative history are much higher than for purposive interpretation. Under purposive interpretation, should the Court misinterpret a statute, Congress can always pass a law clarifying its meaning after the fact. Yet if the Court mistakenly strikes down a statute due to an unconstitutional motive, such a holding cannot be reversed by the political branches and is likely to become entrenched.[327] For these reasons, a higher level of certainty is appropriate in the context of purpose scrutiny than in purposive interpretation.

A second challenge to developing a pretext test is found in separation-of-powers doctrine. Separation-of-powers considerations counsel particular deference to the political branches in questions involving the treaty power. First, in almost all modern cases that use explicit purpose tests to strike down a statute, *federal* courts are invalidating *state* statutes. There are very few modern cases in which the Supreme Court has struck down an act of Congress explicitly due to an unconstitutional motive.[328] Richard Fallon notes that courts are often hesitant to accuse legislatures of acting for an illicit reason for fear of insulting them.[329] Federal courts have been even more careful

---

325 *See, e.g.*, *Edwards*, 482 U.S. at 586–87 ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.")

326 *See* Ely, *supra* note 323, at 1213–14.

327 *See* Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. REV. 1, 38–39 (2007) (noting that Congress's purpose is irrelevant in matters dealing with the Commerce Clause, taxation, and the Necessary and Proper Clause).

328 *See id.* at 12–16. *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), might be one such example. Although the Court nominally employed a rational basis test, it found no such rational basis and found evidence in the legislative history that Congress passed the food stamp regulation in question to discriminate against hippies. The Court concluded that "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id.* at 534. Formally, it is possible that if the Court had found a rational basis, it would have overlooked the evidence to the contrary in the legislative history. This is speculative, though. For further discussion on *Moreno*, see *infra* text accompanying notes 355–59.

329 *See* FALLON, *supra* note 309, at 92; *see also* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1285

about assessing the motivations of coordinate branches of the federal government.

Moreover, as noted in our earlier discussion of political question doctrine, courts traditionally defer to the political branches in issues of foreign affairs,[330] often declining to review "[m]atters intimately related to foreign policy and national security."[331] In *United States v. Curtiss-Wright Exp. Corp.*,[332] Justice Sutherland, writing for the Court, quotes with approval the Senate Foreign Relations Committee in pronouncing negotiations with foreign nations to be under the constitutional authority of the President:

> The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution.[333]

Sutherland also raises prudential concerns that counsel for freeing the President from statutory restrictions in negotiating matters of foreign affairs: the government's need to speak with one voice to avoid international embarrassment and the President's superior access to sensitive information relevant to international negotiations.[334] These two concerns are generally thought to apply to the courts as much as to Congress.

Both the evidentiary and separation-of-powers considerations counsel for a fairly deferential test in searching for pretextual uses of the treaty power. Given the legal and prudential reasons for the judiciary to defer to the political branches in matters of foreign affairs, we posit that courts should be fairly certain that the political branches are acting with an unconstitutional motive when they strike down treaties. Moreover, whenever possible, courts should avoid all appearances of an interbranch political struggle. Due to evidentiary difficulties in determining the actual intent of Congress through legislative history and circumstances surrounding enactment, it may be virtually impossible to reach the requisite level of certainty. Thus, a direct pretext test that closely examines legislative history and other circumstances surrounding the political process might be inadequate to the task of ferreting out pretextual treaties. Moreover, the very act of putting the political

---

(1986) (noting that the Court hesitates to engage in motive review because of the fear of falsely accusing state officials of improper purpose).

330 *See supra* Part II.C.1.

331 Haig v. Agee, 453 U.S. 280, 292 (1981).

332 299 U.S. 304 (1936).

333 *Id.* at 319 (internal quotation marks omitted).

334 *See id.* at 320.

branches' motives on trial could harm the United States' credibility in negotiating with foreign powers.

Richard Fallon notes that certain substance tests are designed to "smoke out" unconstitutional purposes when direct purpose tests might be too difficult to administer or too politically sensitive.[335] Under the Equal Protection Clause, for example, heightened scrutiny for suspect classifications is driven in part by the consideration that statutes that differentiate on certain bases are likely to serve unconstitutional purposes.[336] In particular, the Court's affirmative action jurisprudence, "though formally framed in suspect-content terms, manifests a clear preoccupation with what the Court takes to be constitutionally forbidden purposes."[337] Two themes in affirmative action are clearly purpose-based: first, although the government has a compelling interest in remedying past injustices, it cannot constitutionally engage in race-based redistribution for its own sake;[338] and second, it is important to subject affirmative action programs to strict scrutiny to uncover such redistributive motives.[339]

b. *The Two-Stage Inquiry*

The challenges to designing an appropriate pretext test are significant but not insuperable. Here we consider the form a purpose test might take in the treaty context. An appropriate judicial test of the treaty power would strike down only treaties that are clearly

---

335 FALLON, *supra* note 309, at 92.

336 *See id.*

337 *Id.* (citing David Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 24–26).

338 *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 236 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

339 *See Pena*, 515 U.S. at 226–27; *Croson*, 488 U.S. at 493. Content neutrality in free speech doctrine seems similarly purpose-driven:

> [I]t may sometimes be permissible . . . for the government to enact a relatively broad ban, such as a prohibition against all picketing close to elementary schools, but not to enact a narrower regulation that would actually permit more speech, such as a prohibition against all picketing except labor picketing.

FALLON, *supra* note 309, at 92 (footnote omitted); *see* Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (upholding an ordinance prohibiting picketing near a school); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 94 (1972) (striking down an ordinance prohibiting picketing within 150 feet of a school during class hours unless the school is involved in a labor dispute); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443–45 (1996) (discussing how content-neutral laws, as well as content-based laws, can lessen the ability to speak); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 55–56 (1987) (discussing the difficulty courts face in determining if legislatures have acted to limit speech). The most likely explanation for this is a presumption about unconstitutional purposes. The government bans specific content in order to shield citizens from certain ideas. *See* FALLON, *supra* note 309, at 92; Kagan, *supra*, at 450–51.

pretextual while avoiding any unnecessary appearance of discord among the branches of government. To meet these criteria, we propose a two-step test that examines substance to unearth unconstitutional purposes. The first step is a threshold inquiry into whether the treaty entails domestic legislation beyond the scope of Congress's Article I powers. If not, then the inquiry ends because any law that falls within the limits of Article I is *a fortiori* within any reasonable federalism limitations on the treaty power. The second step is a rational basis test in which the court asks whether there is some valid international purpose for which the treaty could plausibly have been passed. This test would incorporate elements of the Court's more rigorous applications of rational basis, such as *City of Cleburne v. Cleburne Living Center*[340] and *Romer v. Evans*.[341] Under such standards, a treaty would not pass scrutiny if grossly ill tailored to meet any plausible international purpose. The thrust of this second step is that courts should not strike down treaties unless they are reasonably certain that there is no legitimate international purpose that could have driven it, in which case it would clearly be a pretext for passing domestic legislation.

i. *First Step: The Threshold Inquiry*

In examining any treaty, courts should first decide whether the treaty is one that even raises reasonable suspicion of pretext. They should do this by asking whether, had the treaty been passed as domestic legislation, it would exceed Congress's Article I powers. If the domestic requirements of a treaty could have been passed as Article I legislation, then it is highly unlikely that the political branches are using a treaty as a pretext to circumvent federalism limits on the powers of Congress.[342] If there is no suspicion of pretext, then the court can uphold the treaty without further inquiry or embarrassment to the political branches. The vast majority of treaties would pass this inquiry with no difficulty. Moreover, the transparency and predictability of the threshold inquiry would likely deter most frivolous litigation, minimizing the chance the treaty process would be held up in the courts.

---

340 473 U.S. 432 (1985).

341 517 U.S. 620 (1996).

342 In theory, it is possible to have a treaty that is pretextual that nonetheless falls within Article I powers. One can imagine that legislators might want political cover for passing unpopular legislation, and perhaps passing legislation required by a treaty might be more politically explainable than voting for pure domestic legislation. Alternatively, perhaps a piece of legislation has overwhelming support in the Senate but lacks votes in the House. Would such pretextual uses of the treaty power violate the Constitution? These are legitimate concerns that could raise important separation-of-powers questions. They do not, however, raise the federalism concerns tackled in this Article; such uses of the treaty power are not pretexts for usurping the authority of the *states*.

ii. *Second Step: International Purpose and "Rational Basis with Bite"*

For those treaties that exceed Article I powers under the threshold inquiry, the court should then apply a "reasonable international purpose" test. The court would consider whether there is any benefit to concluding an international agreement as opposed to enacting domestic legislation. This inquiry into the benefit of concluding an international agreement ought to be broadly conceived, including securing foreign cooperation, solving a collective action problem, or strengthening shared normative commitments.[343]

In determining whether a treaty is sufficiently connected to a reasonable international purpose, courts can utilize a rational basis test. This merits some clarification as scholars generally agree that, although the Court does not acknowledge that it is doing so, it applies at least two distinct types of rational basis test, one significantly less deferential than the other.[344] Traditionally, rational basis is an extremely deferential standard, developed as it was in *Carolene Products* to reverse the Court's practice of striking down federal economic regulation under the Equal Protection Clause.[345] Under traditional rational basis, the Court does not demand that defenders of a law present its actual purpose, but any conceivable or hypothetical "legitimate pur-

---

343 Human rights treaties, even if they have no enforcement mechanism, articulate international standards that carry significant moral authority. Those standards can be used to induce change in domestic governments or to lock in existing domestic standards against future deviation. If countries merely enacted these standards in domestic legislation, they would lose this mutual reinforcement effect. *See* Oona Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOL. 588, 592–94 (2007).

344 *See, e.g.*, Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 WASH. L. REV. 281, 282 (2011) [hereinafter Farrell, *Two Versions of Rational-Basis Review*] ("Although rationality review purports to be one standard, it has two faces that use different methods and produce conflicting results."); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 358 (1999) [hereinafter Farrell, *Successful Rational Basis Claims*] ("This results effectively in two sets of rationality cases, one deferential and one heightened . . . ."); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 482 (2004) (referencing "two seemingly distinct approaches"); Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 897, 897 (2005) (noting the "blatant—but unacknowledged—misapplication of the test in select cases to achieve preferred outcomes"); Richard B. Sapphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591 *passim* (1999) (noting the existence of a second order rational basis review); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 & n.11 (1987) (noting the insertion of "teeth" in the rational basis test in certain instances); Nancy M. Reininger, Note, City of Cleburne v. Cleburne Living Center*: Rational Basis with a Bite?*, 20 U.S.F. L. REV. 927 *passim* (1986) (arguing that the Supreme Court sometimes uses a "rational basis with bite" test).

345 *See supra* text accompanying notes 109–11.

pose."[346] Furthermore, in identifying a "rational relationship" between the law and a "legitimate purpose," the Court does not look for an actual relation but merely one that a reasonable legislature could have believed. Under this deferential standard, the Court need not examine evidence of purpose or factual relationship.[347] "[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it"[348]—a virtually impossible burden to meet, as any law could have an infinite number of post hoc justifications.[349]

In an article that endeavors to survey all of the Court's rational basis decisions from 1973 to May 1996,[350] Robert Farrell notes that 100 out of 110 cases were decided in favor of the defendant.[351] Fallon argues that the ten plaintiff cases were decided under a more rigorous standard.[352] In the plaintiff victories, the Court looked for evidence of the real purpose of the law and examined the record to determine whether there was an actual connection to a legitimate purpose.[353] In determining actual purpose, the Court might have examined several aspects of the record, including "a statement of purpose within the statute itself, . . . [the] legislative history, . . . the effects of a law, . . . [and] the historical background [and sequence of events] leading up to the adoption of a law . . . ."[354] The Court applied a particularly aggressive rational basis test in *United States Department of Agriculture v.*

---

346 *See* Farrell, *Successful Rational Basis Claims*, *supra* note 344, at 359 ("[T]he Court does not insist that the defenders of the law identify the actual purpose of the law, but rather, only a conceivable, and sometimes hypothesized, purpose." (footnote omitted)).

347 *See id.*

348 Heller v. Doe, 509 U.S. 312, 320 (1993) (internal quotation marks omitted) (citing Lehnhausen v. Lake Store Auto Parts Co., 410 U.S. 356, 364 (1973)).

349 For example, in *Railway Express Agency v. New York*, 336 U.S. 106 (1949), the Court upheld a New York City traffic regulation that banned advertising on vehicles unless the vehicle was engaged in the business it advertised. The Court hypothesized that the local authorities may have concluded that vehicles that advertised their own businesses posed less of a traffic problem than those that advertised third-party businesses and declined to evaluate evidence that such a judgment actually took place or could be supported by any facts. *Id.* at 110 ("The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case."). Moreover, although the Court observed that the billboards in Times Square posed a greater traffic hazard than advertising on vehicles, it did not see underinclusiveness as a problem under the Equal Protection Clause. *Id.* ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all." (citation omitted)).

350 *See* Farrell, *Successful Rational Basis Claims*, *supra* note 344, at 416.

351 *Id.*

352 *See id.* at 357–58, 411 ("Since the Court is ordinarily so deferential in rationality cases, what is it about the ten cases discussed in this Article that required a different kind of scrutiny and a different result?").

353 *See id.* at 360.

354 Farrell, *Two Versions of Rational-Basis Review*, *supra* note 344, at 288–89 (footnotes omitted).

Moreno, in which it struck down a regulation denying food stamps to households containing unrelated persons.[355] The Court began by looking at the Food Stamp Act's purposes—strengthening the agricultural economy and alleviating hunger and malnutrition[356]—and found that Congress's classification was "clearly irrelevant" to both.[357] It then examined the sparse legislative history and found a conference report reference and a Senate floor statement suggesting that the amendment's purpose was to exclude hippies.[358] The Court then invalidated the amendment because "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest."[359] Thus, the Court applies more stringent standards when it wants to strike a measure down but is unwilling to resort to heightened scrutiny.

For a rational basis test to have legitimacy, it must apply the same standards regardless of the outcome. To devise an appropriate rational basis test for the treaty power, it is important to give the test teeth with which to strike down obviously pretextual treaties but not to make the test so stringent that it amounts to de facto heightened scrutiny. On the one hand, the plaintiff's burden of refuting every conceivable legitimate purpose under traditional rational basis seems all but impossible. On the other hand, evidentiary and separation-of-powers considerations counsel against scrutinizing legislative history for illicit purposes. Our proposed approach would allow courts to examine the record to search for possible legitimate purposes (but not for illicit ones) and for evidence of a connection between the measure and any legitimate purpose put forward. A court should credit any legitimate purpose advanced in the record—even a post hoc rationalization—to which the treaty happens to be reasonably well suited. A court should be able to strike down a treaty only if it finds the treaty grossly ill tailored to any legitimate purpose available in the record. Thus, the Court shows appropriate deference to the political branches and uses legislative history, unreliable as it is, only to give them the benefit of the doubt. The standard for showing pretext does not require refuting every possible legitimate purpose, but it does require showing that none of the purposes forwarded in the course of the litigation is rationally related to the measures in the treaty.

---

355 413 U.S. 528, 529 (1973).

356 *See id.* at 533–34 (citing 7 U.S.C. § 2011 (1971)).

357 *Id.* at 534.

358 *See id.* (citing H.R. REP. NO. 91-1793, at 8 (1970) (Conf. Rep.); 116 CONG. REC. 44439 (1970) (statement of Sen. Holland)).

359 *Id.*

City of Cleburne v. Cleburne Living Center[360] and *Romer v. Evans*[361] point to the possibility of striking such a balance. In both cases, state government measures particularly burdened a defined group of citizens, all the while stating a neutral rationale. The Court applied a rational basis test. However, unlike in traditional rational basis, the Court demanded not only that there be a legitimate government purpose but also that the law's relationship to that purpose not be so attenuated or ill tailored as to betray pretext.[362] As Justice Kennedy, writing for the majority, reasoned in *Romer*, "[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[363] In both *Cleburne* and *Romer*, the Court abstained from using legislative history to find evidence of unconstitutional motivation but took into account social realities in assessing the rationality of the state measures. Both cases considered justifications offered by the government bodies, but both relied exclusively on the text and the anticipated impact to impugn those justifications. The "rational basis with bite"[364] requirement allowed the Court to see the obvious fact that the stated rationales for state measures in both cases were mere pretexts for prejudice against mentally disabled individuals[365] and animus against gays and lesbians.[366]

To illustrate by example, consider the facts in *Missouri v. Holland*. The Court would have begun with the threshold inquiry of whether the Migratory Bird Treaty Act exceeded the Article I powers of Congress. It evidently did, as shown by the earlier federal district court decision striking down the Weeks-McLean Act.[367] This would have prompted the Court to examine whether or not the treaty and its implementing legislation were rationally related to a reasonably conceivable international purpose. Clearly they were: preserving a migratory species that passes through both countries is a reasonable interna-

---

360 473 U.S. 432 (1985).

361 517 U.S. 620 (1996).

362 *See id.* at 635 ("The breadth of the amendment is so far removed from [the State's] justifications that we find it impossible to credit them."); *Cleburne*, 473 U.S. at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." (citations omitted)).

363 *Romer*, 517 U.S. at 633 (citation omitted); *see also Cleburne*, 472 U.S. at 450 ("The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . . .").

364 Farrell, *Successful Rational Basis Claims*, *supra* note 344, at 358 (crediting Gerald Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972), with identifying the Court's use of "a heightened rationality review with 'bite'").

365 *See id.* at 300–01.

366 *See id.* at 301–02.

367 *See supra* notes 67–75 and accompanying text.

tional purpose, and a treaty with Canada evidently served this purpose. If for some reason the Court had had trouble discerning a valid international purpose from the face of the treaty, it could have turned to the record and to legislative history in particular for guidance. If, however, the United States had signed a treaty with Canada regulating hunting of the migratory birds *only in the United States*, the Court might have still identified a valid purpose (cooperating to preserve the species) but would have likely found the means employed (a one-sided treaty) so ill tailored to the putative purpose as to fail rational basis scrutiny. Assuming that no other legitimate purposes advanced in the record were better related to the means employed, the Court could have struck the treaty down as pretextual.

The combination of an expansive international purpose requirement and a moderate "rational basis with bite" requirement avoids the invasive and perhaps impossible task of discerning the political branches' *actual* motivation while allowing courts to examine substance to strike down treaties that it can demonstrate with reasonable certainty are pretextual.

One might criticize this proposed test as smuggling through the back door what we earlier rejected as unworkable—a subject-matter test. Indeed, the third variation on the subject-matter test requires that valid treaties must be rationally related to some objectively discernible foreign policy goal.[368] Yet the pretext test is more specific and limited than the subject-matter test in that it is specifically designed to strike down only treaties passed as pretexts for domestic legislation beyond Congress's Article I powers. First, it has no need to examine a treaty that, regardless of subject matter, is almost certainly not pretextual. Second, the pretext test only asks whether a treaty fulfills some legitimate international purpose available in the record. Only clearly pretextual exercises of the treaty power would fail to pass this test.

This raises a second criticism: It seems that most pretextual treaties are likely to have some legitimate international purpose available in the record. What is the point, then, of a pretext test that would fail to prevent many, indeed perhaps any, treaties? The pretext test as outlined here does have an important sphere of application. Occasionally, laws do get passed whose justifications are so obviously pretextual that they fail serious rational basis tests. *City of Cleburne* and *Romer* are cases in point. The ability of the courts to step in when the political branches are so far afield of rational constitutional behavior is a valuable safeguard against abuses of government power.

368 *See supra* text accompanying notes 273–77.

At the same time, we agree that the role of the courts is extremely limited even in applying the pretext text. Indeed, as we have seen in this Part, the courts in general play a very limited role in checking excessive uses of the treaty power. The most significant protections against abuses of the treaty power are not found in court-enforced doctrines. Instead, the real checks are embedded in the Treaty Clause itself. These checks are the subject of the next Part.

III
Structural, Political, and Diplomatic Checks

As the preceding discussion reveals, debates over the scope of the treaty power have erupted periodically throughout U.S. history, from the Founding through the present. These debates reveal a persistent unease with the expansive scope of the Treaty Power and its potential to encroach on state sovereignty, undermining the principles of federalism. In recent years, these federalism concerns have once again risen to prominence.

And yet, the worst fears of those concerned with the treaty power's potential to infringe on state sovereignty have largely failed to materialize.[369] In the decades following *Holland*, the federal government made no attempt to use the treaty power to push through New Deal legislation that the Court would likely strike down.[370] Similarly, in the post-World War II era, the government did not seize upon the new generation of human rights treaties to usurp traditional areas of state regulation. Indeed, in no case since *Holland* has a court found that legislation that would otherwise be an invalid exercise of federal power was valid on the basis of the treaty power alone.[371] Given the opportunity provided by the Court in *Holland*, it might even be considered puzzling that the political branches have apparently declined Justice Holmes' invitation to expand their power through the Treaty Clause.

There is an obvious answer to this puzzle, however, and it is the key to understanding why the courts have had few occasions in the course of our history to address the legitimate scope of the treaty power. Put simply, the exercise of the treaty power is subject to substantial internal constraints—structural, political, and diplomatic—that effectively regulate the federal government's use of that power, rendering court-enforced legal checks largely unnecessary.

These checks internal to the functioning of the Treaty Power have created nuanced mechanisms for accommodating federalism val-

369 *See supra* Part I.C.2.

370 *See supra* Part I.C.1.

371 *See* Peter J. Spiro, *Resurrecting* Missouri v. Holland, 73 Mo. L. Rev. 1029, 1029 (2008).

ues without court involvement. The accommodation takes two forms: what we call top-down federalism and bottom-up federalism. Top-down federalism occurs when the federal government intentionally abstains from intruding on state sovereignty by modifying or withholding consent from treaties that implicate core federalism values. Bottom-up federalism occurs when states have asserted an independent role in the international lawmaking process, becoming active players in the process of generating international law. The result is a flexible system in which federal and state governments interact to preserve the boundary between their respective areas of sovereignty.

A. Internal Constraints on the Treaty Power

Internal constraints on the treaty power fall into three broad categories. First are the structural checks written into the Constitution by the Framers. The Framers crafted the Treaty Clause's advice and consent requirement with the express purpose of giving the states a voice in the treaty-making process and screening out treaties that failed to garner widespread support. Second are the ordinary political checks of democratic governance. These checks encourage elected lawmakers to use their power consistent with their constitutional authority and with widely held views about federalism. Third are the diplomatic checks inherent to treaty making. The process of negotiating and concluding an agreement with a foreign sovereign necessarily tempers the potential for abuse of the treaty power. Here we review each of these constraints in turn.

1. *Structural Checks*

The Framers were acutely aware that the treaty power would have serious implications for states' rights. As discussed in Part I, delegates to the Philadelphia Convention and the various State ratifying conventions voiced concerns that the federal government would unfairly favor regional interests or, worse, that it would use the Treaty Clause to "dismember the empire."[372] The memory of the proposed treaty with Spain, which would have sacrificed important Southern interests in favor of Northern industry, was fresh in their minds.[373]

At the same time, they recognized the necessity of a unified national treaty power to the fledgling nation's ability to conduct its international affairs.[374] The solution they devised was not to create judicially enforceable limits on the treaty power but rather to give the states a direct voice in international lawmaking through the structure

372 3 DEBATES, *supra* note 13, at 509 (statement of George Mason); *see supra* Part I.
373 *See* Hathaway, *supra* note 9, at 1276–85.
374 *See supra* Part I.A.2.

of the Treaty Clause.[375] Thus, the requirements of that Clause were crafted precisely to answer federalism concerns.[376]

First, the Framers chose to grant a role in treaty making to the Senate, whose members they understood to be the representatives of the states.[377] The small states insisted on vesting this power in the Senate so that they would have an equal voice in treaty making.[378] Moreover, because the senators answered directly to the state legislatures, they could be trusted to guard the states' institutional prerogatives against federal encroachment. For example, James Madison remarked that because "[t]he Senate will be elected absolutely and exclusively by the State legislatures," it "will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them."[379] Similarly, Alexander Hamilton argued that "the senators will constantly be attended with a reflection that their future existence is absolutely in the power of the states. Will not this form a powerful check?"[380] Through their

---

375 *See* Hathaway, *supra* note 9, at 1282 (noting that the Constitutional Convention gave shared treaty-making power to the President and the Senate, widely seen as representing the states).

376 *See* Golove, *supra* note 9, at 1135 (stating that the Framers recognized that treaties affected state interests and therefore vested part of the treaty-making power in the Senate); *see also* Hathaway, *supra* note 9, at 1282–84 (explaining that the Framers crafted the Treaty Clause to ensure that a minority of states held a veto over any proposed treaty in order to address federalism concerns).

377 *See supra* notes 40–44 and accompanying text. *See generally* Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 176–79 (1997) (explaining the envisioned institutional role of the Senate in the eyes of the Framers).

378 William R. Davie explained at the North Carolina ratifying convention that the small states' concerns

> made it indispensable to give to the senators, as representatives of states, the power of making, or rather ratifying, treaties. Although it militates against every idea of just proportion that the little state of Rhode Island should have the same suffrage with Virginia, or the great commonwealth of Massachusetts, yet the small states would not consent to confederate without an equal voice in the formation of treaties.

4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 120 (Jonathan Elliot ed., 2d ed. 1859) [hereinafter 4 DEBATES] (statement of William R. Davie at the North Carolina Ratifying Convention).

379 *See, e.g.*, THE FEDERALIST NO. 45 (James Madison).

380 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 317–18 (Jonathan Elliot ed., 2d ed. 1859) [hereinafter 2 DEBATES] (statement of Alexander Hamilton at the New York Ratifying Convention); *see also* Solomon Slonim, *Congressional-Executive Agreements*, 14 COLUM. J. TRANSNAT'L L. 434, 436 (1975) ("[T]he full record of the Constitutional Convention . . . demonstrates quite convincingly that the underlying consideration prompting the delegates to vest the treaty-making power in the Senate was the desire of the States to retain maximal control over foreign affairs.").

representatives in the Senate, therefore, the states would retain a bulwark against federal overreach.

Second, the Framers required that a treaty garner the support of a hefty two-thirds of Senators present.[381] As discussed previously, this requirement ensured that a determined minority could defeat any proposed treaty.[382] This would prevent the federal government from enacting a treaty that sacrificed the interests of a minority of states in favor of those of a slim majority, as had been threatened in the defeated treaty with Spain.[383] More fundamentally, the difficulty of gaining the assent of two-thirds of the Senate would guard against bad faith exercises of the treaty power and guarantee that a treaty could pass only with widespread support.[384]

Third, the Framers divided treaty-making authority between the President and Senate so they would serve as checks on one another. No treaty could pass without gaining the support of both political branches. James Wilson, for example, argued that, "[n]either the President nor the Senate, solely, can complete a treaty; they are checks up on each other, and are so balanced as to produce security to the people."[385] Charles Cotesworth Pinckney argued that "political caution and republican jealousy rendered it improper for us to vest [the treaty power] in the President alone."[386] Similarly, James Madison insisted: "Here are two distinct and independent branches, which must agree to every treaty."[387] Thus, the President and Senate, with their different interests and constituencies, would serve as checks on one another.

The view that structural checks are the primary federalism safeguard is not unique to international lawmaking. Herbert Wechsler famously argued that, even in the domestic arena, the courts have little role to play in enforcing federalism because "the national political process in the United States . . . is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states."[388] Wechsler pointed out that any act of Congress bears the imprimatur of the states because of their role in selecting the mem-

---

381 *See* U.S. CONST. art. II, § 2, cl. 2.

382 *See supra* Part I.A.1.

383 *See supra* notes 37–39 and accompanying text; *see also* Hathaway, *supra* note 9, at 1281–86 (explaining the circumstances surrounding the defeated treaty with Spain).

384 *See* Vázquez, *Second Holding*, *supra* note 225, at 964.

385 2 DEBATES, *supra* note 380, at 507 (statement of James Wilson at the Pennsylvania ratifying convention).

386 4 DEBATES, *supra* note 378, at 265 (statement of Charles Cotesworth Pinckney at the South Carolina ratifying convention).

387 3 DEBATES, *supra* note 13, at 347 (statement of James Madison at the Virginia ratifying convention).

388 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, 558 (1954).

bers of the legislative and executive branches. The Senate in particular, due to the equality it affords to large and small states, "cannot fail to function as the guardian of state interests as such."[389]

The Supreme Court briefly adopted Wechsler's view in *Garcia v. San Antonio Metropolitan Transit Authority*, in which it upheld the Fair Labor Standards Act against a Commerce Clause challenge.[390] Citing Wechsler, the Court argued that, "the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority."[391] Wechsler's insight is even more relevant to treaties than to ordinary legislation because of the enhanced role of the Senate and the supermajority requirement.

In the domestic context, Wechsler's thesis has not gone unquestioned. In recent decades, the Court has abandoned *Garcia*'s deferential posture and has reasserted the judicial role in policing federalism.[392] Furthermore, Wechsler's critics have argued that the political process is effective at protecting some, but not all, of the federalism interests enshrined in the Constitution. Larry Kramer, for example, argues that Wechsler failed to draw the crucial distinction between "ensuring that national lawmakers are responsive to geographically narrow *interests*, and protecting the governance prerogatives of state and local *institutions*."[393] The Seventeenth Amendment,

---

389 *Id.* at 548. He concluded by arguing for judicial deference to Congressional interpretation of federalism: "[T]he Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress." *Id.* at 559 (footnote omitted); *see also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 176 (1980) ("Numerous structural aspects of the national political system serve to assure that states' rights will not be trampled . . . ."); Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1308 (1999) ("[T]he Constitution principally safeguards state interests not through judicially enforceable sovereignty federalism barriers, but through various mechanisms that give states a disproportionate voice in framing federal policy.").

390 *See* 469 U.S. 528, 530–31 (1985).

391 *Id.* at 552. It concluded that judicial scrutiny is generally unnecessary: "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* The Court proceeded to uphold the Act on the basis of "respect for the reach of congressional power within the federal system." *Id.* at 557.

392 *See* United States v. Morrison, 529 U.S. 598, 601, 613–14 (2000) (holding that Congress exceeded its Commerce Clause power when it provided remedies for victims of gender-motivated crimes of violence and that the judiciary ultimately determines what activities "come under the constitutional [Commerce Clause] power of Congress"); *see also* United States v. Lopez, 514 U.S. 549, 567–68 (1995) (invalidating Congress's Gun-Free School Zones Act for falling outside the bounds of Congress's Commerce Clause power).

393 Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 222 (2000); *see also* Lynn A. Baker, *Putting the Safeguards Back into the*

which provided for the popular election of senators,[394] arguably removed the structural incentive for Senators to be solicitous toward state institutional prerogatives.[395]

However, although the Senate is now elected directly, senators are still of course representatives of their states; they are elected, after all, by a statewide electorate, and must be responsive to the desires of their constituency. It is far from clear that the proper federalism concern is with the interests of state legislatures than it is with state electorates. Moreover, the supermajority requirement in treaty making provides an additional level of protection for state interests. Any proposed treaty must convince two-thirds of the senators not only that it is substantively advantageous to the United States but also that it is an appropriate exercise of federal power. Treaties, moreover, are created by the Senate and President alone (the House of Representatives is excluded from the process)—hence, states each have equal representation in the treaty-making process.[396] A minority of senators holding particularly strong views on states' rights, therefore, could derail a treaty, even one that enjoyed overwhelming majority support. Indeed, if anything, the process is *too* protective of state interests.[397]

2. *Political Checks*

In addition to the structural checks specific to the Treaty Clause, the federal government's treaty making is, of course, subject to the usual political check—reelection. Any President engaging in blatant abuse of the treaty power could suffer serious political repercussions. The Framers relied in part on the President's nationwide constituency as a political check. For example, George Nicholas of Virginia argued: "The consent of the President is a very great security. He is elected by the people at large. He will not have the local interests which the members of Congress may have. If he deviates from his duty, he is responsible to his constituents."[398] Likewise, one third of the Senate faces reelection every two years and so is frequently held

---

Political Safeguards of Federalism, 46 VILL. L. REV. 951, 954–56 (2001) (noting that vertical and horizontal aggrandizement are additional distinctions that one can draw between the threats to state sovereignty).

394 *See* U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote.").

395 *See* Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 673 (1999) (arguing that, prior to the ratification of the Seventeenth Amendment, the Senate, then "elected by popularly-elected state legislatures," protected federalism).

396 *See* U.S. CONST. art. II. § 2, cl. 2.

397 *See* Hathaway, *supra* note 9, at 1307–38.

398 *See* 3 DEBATES, *supra* note 13, at 240 (statement of George Nicholas of Virginia).

accountable for its activities.[399] According to James Madison, the Senate's biennial turnover meant that a President seeking to abuse the Treaty Power could not long "seduce a part of the Senate to a participation in his crimes."[400] Thus, according to the Framers' design, democratic political checks would work in tandem with the structural features of the Treaty Clause to constrain the federal government within permissible exercises of its authority.

The political checks have been extremely effective in preventing all but those few treaties with overwhelming support from being submitted to and approved by the Senate. This effect can be seen, first, in the small number of Article II treaties approved each year. From 1997 to 2010, the United States entered a mere 202 Article II treaties—averaging roughly fifteen per year.[401] Moreover, the number of treaties approved each year has remained roughly flat since the Founding of the country despite an immense increase in other forms of international lawmaking.[402]

The role of political checks in protecting federalism concerns can also be seen in the kinds of treaties that are more likely to be approved or rejected. Our empirical research of recent treaty practice in the United States suggests that if it is difficult to gain approval for an Article II treaty in the Senate, it is even more difficult to gain approval of treaties that might pose federalism concerns.[403] The bare statistics might at first suggest that the Senate does little to screen treaties—it approved 202 of the 216 treaties (94%) transmitted by the President from 1997 through 2010.[404] However the disaggregated data presents a more complex picture.[405]

First, the Senate is less likely to approve global, multilateral treaties—a class of treaties for which federalism concerns are most frequently raised.[406] Of the 216 treaties transmitted from 1997 through

---

399 *See id.* at 516 (statement of James Madison at the Virginia ratifying convention).

400 *Id.*

401 These figures are derived from the Library of Congress THOMAS database. *Search Treaties*, LIBRARY OF CONGRESS THOMAS, http://thomas.loc.gov/home/treaties/treaties.html (last visited Nov. 16, 2012).

402 *See* Hathaway, *supra* note 9, at 1288.

403 We compiled a database of every treaty submitted to the Senate from the 105th through the 111th Congress. Using the Library of Congress THOMAS database and the Government Printing Office Congressional Documents website, we coded each treaty for ratification status and multi- versus bilateral status. *See id.*; *Congressional Documents*, GPO U.S. GOVERNMENT PRINTING OFFICE, http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CDOC&browsePath=108&isCollapsed=true&leafLevelBrowse=false&ycord=0 (last visited Nov. 16, 2012).

404 *See Congressional Documents*, *supra* note 403.

405 *See id.*

406 This assumption is typical in analysis of treaty data. *See, e.g.*, David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1984–85 (2003) (highlighting that the passage rate for multilateral treaties is significantly lower

2010, seventy-one were global, multilateral treaties; of those seventy-one, the Senate approved only nine unconditionally.[407] Moreover, eleven of the fourteen treaties to which the Senate did not consent were multilateral agreements.[408]

Second, the political checks' effectiveness can be seen in the United States' participation in the twenty-five "core group of multilateral treaties"[409] identified by the U.N. Secretary General as "most central to the spirit and goals of the Charter of the United Nations."[410] These global, multilateral treaties—over half of which relate to human rights—are often cited as posing particular federalism concerns. Of those twenty-five treaties, the President has signed twenty (80%), and submitted seventeen (68%) to the Senate. The Senate gave its advice and consent to only twelve (48%), and placed explicitly federalism-oriented Reservations, Understandings, or Declarations (RUDs) on four of the treaties it approved.[411] Of the eight "core treaties" the United States has joined without federalism RUDs, six relate to armed conflict or genocide and so are unlikely to interfere with state interests.[412] The remaining two treaties have been tailored to avoid conflicts with state sovereignty. In ratifying the U.N. Convention to Combat Desertification, the Senate added an understanding that "no changes" to existing laws "will be required to meet [U.S.] obligations under Articles 4 or 5 of the Convention"—namely, those

---

than the rate for bilateral treaties). Indeed, concerns about global human rights treaties and the United Nations were the impetus for the Bricker Amendment. *See* Spiro, *supra* note 371, at 1031; *supra* notes 125–31 and accompanying text.

407 Unconditional treaties are those accepted without Reservations, Understandings, or Declarations (RUDs). RUDs, of course, are not a perfect measure of the Senate's concern for states' rights because they may concern issues unrelated to federalism. *See* Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 262 (2001) (suggesting that proponents of RUDs may not attempt to preserve state rights because ratification of RUDs occurs with the advice and consent of the Senate, not the House). Nevertheless, the presence of RUDs reflects the Senate's reluctance to accept treaties that interfere with existing law.

408 These figures are derived from the Library of Congress THOMAS database. *See Search Treaties*, *supra* note 401.

409 *Multilateral Treaty Framework: Core Group of Multilateral Treaties Deposited with the Secretary-General Representative of the Organization's Key Objectives*, THE MILLENNIUM ASSEMBLY OF THE UNITED NATIONS: SECRETARY GENERAL, http://www.un.org/millennium/law/treaties.htm (last visited Oct. 21, 2012).

410 Letter from Kofi Annan, U.N. Sec'y Gen., to the Millennium Assembly of the United Nations (May 15, 2000), *available at* http://www.un.org/millennium/law/sgletter.htm.

411 These data are based on our research in the United Nations Treaty Collection database and the Library of Congress THOMAS database. *See Multilateral Treaties Deposited with the Secretary-General*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ParticipationStatus.aspx (last visited Oct. 21, 2012); *Search Treaties*, *supra* note 401.

412 *See Multilateral Treaties Deposited with the Secretary-General*, *supra* note 411; *Search Treaties*, *supra* note 401.

articles affecting domestic law.[413] The final treaty, the Protocol Relating to the Status of Refugees, has a "Federal Clause" *within the text of the treaty* specifying that its obligations apply only to the federal government, which is required to make a "favourable recommendation" to its constituent states but need not enact binding law to ensure their compliance.[414] Thus, at every stage of the treaty negotiation and ratification process, the political checks operated to screen out treaties for which federalism concerns were most likely to be raised.

It appears, therefore, that the Treaty Clause's requirements continue to provide a robust check against the treaties where federalism concerns are most salient. The Senate is sensitive to federalism concerns and has proven willing to block, delay, or impose limiting conditions on treaties likely to impinge on state sovereignty. In this environment, it is unlikely that a treaty designed solely to usurp state power could both gain the President's endorsement and survive the rigorous test of senatorial advice and consent.[415] Political actors concerned with their reelection have a strong incentive not to be perceived as transgressing the limits of their constitutional authority. This powerful check, built into the Treaty Clause by the Framers, remains an effective limitation on the treaty power.

3. *Diplomatic Checks*

A further check on the treaty power is the necessity of finding a treaty partner. Article II treaties, unlike domestic legislation, "must have the consent of a foreign nation."[416] That nation must be willing to bind itself publicly to the terms of the treaty, thereby exposing itself to international legal liability. Thus, the requirement of finding a treaty partner serves as an independent constraint on the federal government's exercise of the treaty power.[417] Most important, it poses a significant obstacle to any attempt to use a treaty as a "mock mar-

---

413 *United Nations Convention to Combat Desertification*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-10&chapter=27&lang=en#EndDec (last visited Oct. 21, 2012) (scroll down to "Declarations").

414 Protocol Relating to the Status of Refugees art. VI, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. In addition, the transmittal package for the Convention on the Rights of Persons with Disabilities, which is currently under consideration in the Senate, includes an express federalism RUD. Letter of Transmittal, UN Convention on the Rights of Persons with Disabilities, S. Treaty Doc. No. 112-7, at 1 (2012), http://www.gpo.gov/fdsys/pkg/CDOC-112tdoc7/pdf/CDOC-112tdoc7.pdf.

415 *See* Hathaway, *supra* note 9, at 1312 ("It is clear that an extraordinary level of consensus is required to conclude an Article II treaty.").

416 THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE COMPOSED ORIGINALLY FOR THE USE OF THE SENATE OF THE UNITED STATES § 52, *reprinted in* JEFFERSON'S PARLIAMENTARY WRITINGS 420 (Wilbur S. Howell ed., 1988).

417 *See* Hathaway, *supra* note 9, at 1344 ("The necessity of a foreign partner willing to enter an agreement of mutual interest serves as both a justification for and a limit on the treaty power.").

riage"[418]—a pure pretext for circumventing domestic law limitations. In such cases, the United States would likely have difficulty finding a willing treaty partner.[419]

First, any potential treaty partner would face serious reputational consequences both at home and abroad from entering into this type of "mock marriage." Its government would risk being viewed as a weak player by other nations. Its leaders, if perceived as overly deferential to U.S. interests, would risk losing domestic political support.[420] It is likely that those reputational consequences will, in most cases, outweigh any pressure or inducement from the United States.

Second, even a willing treaty partner would be subject to domestic procedural checks on its ability to enter a treaty with the United States. Most states provide for the same procedural checks on international lawmaking as they do on domestic lawmaking. As of 2007, 124 countries required the same voting threshold in the legislature for treaties as for domestic laws.[421] Fifty-nine countries, including the United States, had different voting thresholds for treaties than for domestic laws in at least one house of the legislature.[422] But all these countries—the vast majority of the world's nations—require at least a majority of one house of the legislature to ratify a treaty, and many require more.[423] Thus, any proposed pretextual treaty would face the additional barrier of the treaty partner's domestic political system. Even if the United States could persuade a foreign government to enter a pretextual treaty, therefore, it is unlikely that the foreign government could clear the domestic procedural hurdles necessary to ratify that treaty.

To be sure, the diplomatic check is not a complete or perfect check. There might be instances in which the executive might per-

---

418 HENKIN, *supra* note 61, at 185.

419 Mark Tushnet has pointed out the absurdity of this scenario:

> One must imagine U.S. officials approaching some foreign partner, saying, "Look, could you do us a favor? We want to do something, (for example, regulate land use, or eliminate the death penalty for juveniles) that the Supreme Court won't let us do on our own. But if you sign on to an agreement that obligates us to do it, then everything would be hunky-dory under our Constitution." . . . Why would the negotiating partner simply do the U.S. treaty-makers a favor?

Mark Tushnet, *Federalism and International Human Rights in the New Constitutional Order*, 47 WAYNE L. REV. 841, 862 & n.99 (2001).

420 *See* Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 503 (2005) ("Where powerful political constituencies in the state have staked out a clear position on issues related to the treaty, the government knows that domestic political support will be affected by the decision to commit to or refrain from committing to the treaty.").

421 *See* Hathaway, *supra* note 9, at 1272.

422 *See id.*

423 For a comparative summary of domestic procedures for international lawmaking, see Hathaway, *supra* note 9, at 1271–74.

suade another country to sign a treaty in an effort to circumvent our constitutional structure. Yet, these cases are likely to be rare. Combined with the other checks on the treaty power—particularly the structural and political checks described above—the need to find a treaty partner serves a constraint on the federal government's ability to enter treaties whose true purpose is to enable domestic legislation beyond the scope of the enumerated powers.

B. Federalism Accommodation in Practice

The system of structural, political and diplomatic checks described above accommodates federalism values without judicial intervention. First, there is top-down federalism accommodation: The political branches abstain from entering treaties that might intrude on the domains reserved to the states, even when they have the constitutional authority to do so. They do so by modifying the treaty language or by withholding consent from international treaties that implicate federalism. Second, there is bottom-up federalism accommodation: The states themselves assert an independent role in international lawmaking, particularly in traditional areas of state sovereignty. Together, these systems of federalism accommodation effectively protect federalism values.

1. *Top-Down Federalism*

Early treaties that failed to achieve the consent of the Senate for federalism reasons show how the Constitution's structural and political checks protect federalism interests from the top down. Consider, for example, the 1824 Slave Trade Convention with Great Britain. In response to the growing humanitarian movement in the United States and pressure from Great Britain, the House had passed a resolution urging President Monroe to negotiate a treaty with the European powers for the suppression of the slave trade.[424] The resulting agreement declared slave trading an act of piracy and gave the parties a mutual right of search and capture in the other's territorial waters.[425] President Monroe submitted it to the Senate on April 30, 1824, expecting it to sail through the ratification process.

However, some Senators from the southern states were wary of the Convention, believing it to be the first step toward abolishing slavery in the states.[426] This concern for states' rights, combined with par-

---

424 *See* W. STULL HOLT, TREATIES DEFEATED BY THE SENATE 41–42 (1933).

425 *See* Richard E. Webb, *Treaty-Making and the President's Obligation to Seek the Advice and Consent of the Senate with Special Reference to the Vietnam Peace Negotiations*, 31 OHIO ST. L.J. 490, 497–98 (1970).

426 *See id.*

tisan rancor, put its prospects for ratification in serious doubt.[427] Upon learning that the Convention was foundering in the Senate, Monroe transmitted a special message pleading with the Senate: "It cannot be disguised, that the rejection of this convention cannot fail to have a very injurious influence on the good understanding between the two governments on all these points."[428] The next day, the Senate ratified the Convention. However, it had amended the treaty so as to assure that it would never gain the assent of Great Britain. Whereas the original version provided for *reciprocal* rights of search and capture, the amended version only provided those rights in the British territories of the West Indies and the neutral coasts of Africa, and not in the waters off the United States.[429] The Senate had succeeded in defeating a treaty that would potentially encroach on state sovereignty.

Another example is the series of treaties governing the property rights of aliens, another traditional area of state regulation. These treaties sought to remove the discriminatory inheritance laws in place in many European countries and U.S. states. The Supreme Court had ruled in the early nineteenth century that the federal government had authority to grant equal property rights to aliens through treaty, and the United States entered forty-four such treaties between 1778 and 1860.[430] However, the government did not make use of the full extent of its power under the Treaty Clause to regulate aliens' property rights. Only eight of those treaties guaranteed aliens equal right to inherit and possess property. The remainder provided only that where state law disqualified aliens from inheritance of real estate, they would be allowed to sell it within a given period.[431]

Moreover, as states' rights concerns became more prominent toward the end of that period, the Senate increasingly asserted its role as the guardian of their interests against federal encroachment. The first example was the Senate's refusal to ratify an 1835 convention with Switzerland, which would have allowed an alien heir "reasonable

---

427 *See* HOLT, *supra* note 424, at 46. Holt argues that political maneuvering rather than "fear of abolition" was the Senate's real motive. *Id.* However, he recognizes that that fear played a role. Quoting a British observer, he writes: "Three causes combined to excite this opposition. Disinclination to concede the right of search; apprehension of ulterior measures being in contemplation by Great Britain for effecting the total suppression of slavery in all Countries, and thirdly and principally, Party Spirit." *Id.* at 48.

428 *Id.* at 45.

429 *See id.* at 45–46.

430 *See* Hayden, *supra* note 64, at 567–68.

431 *See id.* at 568; *see also* Virginia V. Meekison, *Treaty Provisions for the Inheritance of Personal Property, Considered with Reference to* Clark v. Allen, 44 AM. J. INT'L L. 313, 319 (1950) ("Treaty provisions regarding real property were . . . carefully phrased to preserve the traditional right of a State to determine for itself who could and who could not acquire and hold land in its jurisdiction, but at the same time to protect the alien beneficiary from monetary loss.").

time" to dispose of property that the heir was barred by state law from inheriting.[432] In 1847, the Senate unanimously ratified a similar convention with Switzerland regulating only property rights.[433] However, only a few years later, the United States negotiated a general treaty of friendship, commerce, and extradition with the Swiss confederation. In 1850, President Fillmore submitted the treaty to the Senate with a message asking them to strike out the clause granting Swiss citizens equal rights to hold real estate: "This is not supposed to be a power properly to be exercised by the President and the Senate . . . . The authority naturally belongs to the State within whose limits the land may lie."[434] The Senate proceeded to strike out the terms relating to real property, leaving only the provisions relating to personal property intact. The Swiss returned the treaty with amendments providing that in those states where aliens could not inherit real estate, the heir would be accorded "a term of not less than three years to sell" the property.[435] The Senate struck that clause, replacing it with "such term as the laws of the State or Canton will permit."[436] Only in 1854, after these substantial amendments were in place, did the Senate ratify the treaty.[437] Indeed, in a total of seven instances between 1830 and 1860, the Senate rejected or amended treaties regulating real property rights of aliens.[438] In each of these examples, the political branches voluntarily refrained from intruding on state sovereignty, even where licensed to do so by the Supreme Court.

This pattern continued in the twentieth century. Only one year before it argued *Holland*, the United States negotiated the first "federal-state" treaty clause to be included in the Constitution of the International Labor Organization. That clause provides that a federal state is not obligated to comply with the treaty where compliance would conflict with its federal structure.[439] The government's insistence on this point reflects its judgment that, although the killing of migratory birds falls within the proper scope of the treaty power, the same may not be true of other subjects traditionally regulated by the states.

Since then, the political branches' efforts to accommodate federalism concerns have grown increasingly prominent.[440] Duncan Hollis

---

432 Hayden, *supra* note 64, at 572.

433 *See id.* at 574–75.

434 *Id.* at 575 (internal quotation marks omitted).

435 *Id.* at 576.

436 *Id.* at 577 (internal quotation marks omitted).

437 *See id.*

438 *See id.* at 584.

439 *See* Hollis, *supra* note 295, at 1368–69.

440 *See id.* at 1363 ("[E]xecutive self-restraint on federalism grounds has become an increasingly visible feature of U.S. treaty-making. In recent years, the executive—not the Court—has limited treaties from expanding federal law-making beyond Congress's legislative powers or interfering with activities traditionally regulated by the states.").

divides the forms of voluntary federalism accommodation into five types. First, the political branches have rejected treaties that would unduly impinge on state prerogatives. For example, the United States has resisted ratifying the International Covenant on Economic, Social and Cultural Rights, arguing that its provisions were, "in view of the nature of the United States federal system[,] . . . not acceptable."[441] The United States has not joined the U.N. Convention on the Rights of the Child because it focuses on areas "of almost exclusive state-level authority."[442]

Second, the government has sought to modify treaties to accommodate federalism concerns. In some cases, the political branches have negotiated federal-state clauses similar to the one found in the International Labor Organization Charter. For example, the 1967 Protocol to the Convention Relating to the Status of Refugees provides:

> In the case of a Federal or non-unitary State . . . with respect to those articles of the Convention . . . that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment.[443]

The Secretary of State's Report (July 25, 1968) that accompanied the President's transmittal of the Protocol to the Senate noted that "[b]y virtue of Article VI of the Protocol[,] . . . [s]tate laws would not be superseded by any provision of the Convention."[444]

In other cases, the government has sought to renegotiate the underlying treaty provisions to avoid implicating state law. For example, in negotiations over the Tobacco Convention, the United States insisted that the Convention only impose obligations on signatories "in areas of existing national jurisdiction as determined by national law."[445]

---

441 *Id.* at 1372–73 (quoting Letter of Submittal from Warren Christopher, Acting Secretary of State, to the President (Dec. 17, 1977).

442 Spiro, *supra* note 283, at 575 (footnote omitted).

443 Protocol Relating to the Status of Refugees art. 6(b), *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S 267.

444 Advisory Comm. on Int'l Law, U.S. Dep't of State, Memorandum Summarizing U.S. Views and Practice in Addressing Federalism Issues in Treaties (Nov. 8, 2002), *available at* http://state.gov/s/l/38637.htm [hereinafter State Dep't Memo].

445 Hollis, *supra* note 295, at 1377 (quoting World Health Organization, WHO Framework Convention on Tobacco Control art. 8 (May 21, 2003), *available at* http://www.who.int/tobacco/framework/download/en/index.html). On the other hand, the United States has sometimes declined to utilize federal-state clauses placed in treaties by other countries—for example, Article 40 of the Convention on the Civil Aspects of Interna-

Third, the political branches have modified U.S. consent to treaties through RUDs.[446] As discussed earlier, a RUD is an interpretative statement designed to clarify or elaborate the consenting party's understanding of a treaty.[447] Many RUDs specifically reference federalism as a limitation on U.S. consent.[448] For instance, the United States has attached RUDs to three prominent international human rights treaties: the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights (ICCPR), and the Covenant to Eliminate All Forms of Racial Discrimination (CERD).[449]

The U.S. ratification of the 1984 CAT included the following prototypical understanding:

> That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local govermncnts [sic]. Accordingly, in implementing articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention.[450]

This language, limiting the Convention to the "legislative and judicial jurisdiction" of the federal government,[451] is precisely designed to disallow provisions in a treaty that exceed the scope of Congress's Article I powers. Almost identical language is present in Senate reservations to the CERD[452] and the ICCPR.[453] Moreover, the U.S. ratifica-

---

tional Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89., which was included at the request of Canada.

446 *See supra* notes 411–14 and accompanying text.

447 *See* Hollis, *supra* note 295, at 1378–79; *supra* Part I.C.2 (describing RUDs).

448 *See* Vienna Convention on the Law of Treaties art. 2(l)(d), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, 681 (defining "reservation" as "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State").

449 *See* State Dep't Memo, *supra* note 444.

450 *Id.*

451 *Id.*

452 International Convention on the Elimination of All Forms of Racial Discrimination, S. TREATY DOC. 95-18 (June 24, 1994), *available at* http://thomas.loc.gov/cgi-bin/ntquery/z?trtys:095TD00018:%20 ("That the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.").

453 The International Covenant on Civil and Political Rights, S. TREATY DOC. 95–20, (Apr. 2, 1992), *available at* http://thomas.loc.gov/cgi-bin/ntquery/z?trtys:095TD00020:%20 ("That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the ex-

tion of the ICCPR was subject to reservations that more specifically implicated federalism concerns[454]—for example, a reservation concerning the right to impose capital punishment on juvenile offenders, a decision that falls within the traditional purview of the states.[455] Overall, these RUDs signal the political branches' unwillingness to accept treaty obligations that require them to modify state laws.

Scholars have interpreted this practice as, alternatively, a way to facilitate U.S. membership in the core human rights treaties without sacrificing federalism values[456] or the federal government's abdication of its responsibility for human rights.[457] In either case, the fact remains that the established practice of adding federalism RUDs represents an effort to avoid constitutional confrontation between the states and federal treaty power.

Fourth, the political branches sometimes leave states responsible for implementation of those treaty obligations that fall beyond Congress's enumerated powers.[458] For example, the United States has ratified two optional protocols to the Convention on the Rights of the Child as well as the Terrorist Bombings Convention, both of which impose obligations in traditional areas of state regulation. In each case, the executive explained that the United States was already in compliance with those obligations through existing state criminal law.[459]

Finally, the political branches have limited U.S. implementation and enforcement of treaties by declining to compel state agencies to carry out treaty obligations.[460] In *Sanitary District of Chicago v. United States*, the Supreme Court found that the executive has standing to sue a state agency "to carry out treaty obligations to a foreign power."[461] In practice, however, the government generally declines to do so. For example, in *Breard v. Greene*,[462] the Solicitor General argued that the government lacked the power to enforce the VCCR against the states because "our federal system imposes limits on the federal govern-

---

tent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.").

454 *See* Brad R. Roth, *Understanding the "Understanding": Federalism Constraints on Human Rights Implementation*, 47 WAYNE L. REV. 891, 891–92, 894 (2001).

455 *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 342 (1995).

456 *See* Hollis, *supra* note 295, at 1378, 1381.

457 *See* Spiro, *supra* note 283, at 567.

458 *See* Hollis, *supra* note 295, at 1382–83.

459 *See id.*

460 *See id.* at 1384–86.

461 266 U.S. 405, 425 (1925).

462 523 U.S. 371 (1998).

ment's ability to interfere with the criminal justice systems of the States."[463]

Granted, the political branches' accommodation of federalism has not been wholly consistent. The United States has joined treaties that impose obligations regarding traditional areas of state power. For example, the United States has ratified the Road Traffic Convention, providing for recognition of foreign drivers' licenses, the Convention on Contracts for the International Sale of Goods, which preempts state commercial law, and the U.N. Headquarters Agreement, which imposes obligations on state and local officials.[464] Nonetheless, the political branches have shown themselves highly attuned to federalism concerns. Even where courts have declined to impose obligatory limits, the political branches have themselves restrained the reach and scope of treaties in deference to federalism principles.

2. *Bottom-Up Federalism*

In addition to these forms of top-down federalism accommodation, the states have engaged in bottom-up federalism accommodation by playing a direct role in shaping U.S. compliance with international law. Contrary to the conventional wisdom that the federal government bears the sole responsibility for implementing its treaty obligations, the states are increasingly asserting their independent voice in areas such as private international law, consular relations, and even human rights. This state-level implementation often takes place in areas where the federal government has intentionally abstained from enforcing international obligations against the states, as described above. In some instances, however, states have taken the initiative to implement treaties to which the United States is not a party. These forms of state action in treaty implementation are often overlooked, yet constitute an integral part of the flexible system of federalism accommodation that we describe.

State-level implementation of treaty obligations generally follows one of three models. First, states may implement treaties to which the United States is a party but has not enforced against the states. This model is particularly prevalent in private international law.[465] For example, the Convention on the Form of an International Will (Washington Convention) was designed to harmonize systems for executing and recognizing wills—a subject that falls squarely within the areas of

---

463 Brief for the United States as Amicus Curiae Supporting Respondent at 51, Breard v. Greene, 523 U.S. 371 (1998) (No. 97-1390) (quoted in Hollis, *supra* note 295, at 1385).

464 *See* Hollis, *supra* note 295, at 1371–72.

465 *See* Julian G. Ku, *The Crucial Role of the States and Private International Law Treaties: A Model for Accommodating Globalization*, 73 MO. L. REV. 1063, 1067 (2008).

traditional state regulation.[466] The treaty's proponents recognized that the Convention would implicate federalism concerns.[467] As initially envisioned, therefore, both the federal government and the states were to pass separate implementing legislation. The federal legislation would provide for the execution of international wills abroad and for the recognition of international wills in the United States, while each state would be free to decide whether to adopt the Uniform International Wills Act, which provided for testators to execute international wills within its territory.[468] The Senate gave its advice and consent in 1992, but Congress never passed federal implementing legislation, and the President has withheld ratification until it does so.[469] Nonetheless, as of 2008, twenty states had implemented it by independently enacting the Uniform International Wills Act.[470]

This model has also appeared in the area of consular relations. Numerous early treaties allowed a foreign consul to administer the estates of a national who died intestate in the receiving state, while others required consular notification whenever a citizen of one party died without heirs in the territory of another.[471] Although it had taken on these treaty obligations, the federal government took no steps to implement them. Rather, foreign consular officials addressed requests for notification directly to the state governments, and at least seven states adopted legislation requiring consular notification.[472]

A similar situation has emerged with respect to the VCCR. Article 36 of the VCCR requires that a foreign national placed under arrest be notified of the right to request that the foreign national's consular officials be notified at that time.[473] While the federal government has promulgated regulations making the VCCR binding on federal officials and the State Department has published detailed guidelines on its implementation at the federal, state, and local levels,[474] the United States has not enforced the VCCR's requirements against the states.[475] Instead, it relies on the states' voluntary compliance with the Conven-

---

466 *See* Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. Rev. 457, 501–04 (2004).

467 *See* Letter from George P. Shultz, Sec'y of State, to President Ronald Reagan (June 4, 1986), *available at* http://www.cabinetchone.com/website/will/message.html.

468 *See id.*

469 *See* Ku, *supra* note 465, at 1067.

470 *See id.*

471 *See* Willard L. Boyd, *Constitutional, Treaty, and Statutory Requirements of Probate Notification to Consuls and Aliens*, 47 Iowa L. Rev. 29, 30–32 (1961).

472 *See* Ku, *supra* note 465, at 482–83 & n.133.

473 *See* VCCR, *supra* note 185, at art. 36.1(b).

474 *See* 28 C.F.R. § 50.5(a)(1) (1967). *See generally* U.S. Dep't of State, Consular Notification and Access (3d ed. 2010), *available at* www.travel.state.gov/consularnotification.

475 *See* William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 Vand. J. Transnat'l L. 257, 260 (1998); Johanna Kalb, *Dynamic Federalism in Human Rights Treaty Implementation*, 84 Tul. L. Rev. 1025, 1039 (2010). The

tion's requirements. This strategy has at times resulted in noncompliance, for example in the highly publicized *Avena* decision in which the International Court of Justice (ICJ) found the United States in violation of the Convention because of Texas's failure to provide consular notification in a series of capital cases.[476] However, some states and localities have passed their own implementing legislation even in the absence of federal compulsion.[477] And despite Texas's failure to implement its obligations following the *Avena* case,[478] the lesser-known case of Osbaldo Torres offers a salient counterexample. Torres had been sentenced to death in Oklahoma and was one of the Mexican nationals whose case was considered in *Avena*. Following the ICJ judgment, the Oklahoma Court of Appeals stayed his execution and ordered an evidentiary hearing to determine whether he had been prejudiced by the VCCR violation.[479] On the same day, the Oklahoma governor commuted Torres's sentence to life without parole.[480]

Second, states may implement treaties through concurrent legislation that works in tandem with federal implementing legislation or a self-executing treaty. For example, as Julian Ku has described, Congress passed the International Civil Abduction Remedies Act to implement U.S. obligations under the Hague Convention on the Civil Aspects of International Child Abduction. Nonetheless, a number of states have adopted the Uniform Child Custody Enforcement Act, which allows them to implement the Hague Convention at the state level.[481] Similarly, most states have passed laws to implement the Convention Abolishing the Requirement of Legalization for Foreign Public Documents even though that Convention is likely self-executing.[482] In each of these cases, the state legislation applies concurrently with federal or treaty law. This practice allows states to protect their institutional prerogatives while still maintaining U.S. compliance with its international obligations.

Finally, states implement obligations created by treaties to which the United States is not a party. In the private international law arena,

---

reason for this may be, in part, the anticommandeering concerns discussed above. *See supra* Part II.A.3.

476 *See* Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) (Avena), 2004 I.C.J. 128, ¶ 115–23 (Mar. 31).

477 *See, e.g.*, CAL. PENAL CODE § 834c (1999); FLA. STATE. ANN. §§ 901.26(3), 288.816(2)(f) (2004); OR. REV. STAT. § 181.642 (2005).

478 *See* Medellín v. Texas, 552 U.S. 491 (2008).

479 *See* Order Granting Stay of Execution and Remanding Case for Evidentiary Hearing, Torres v. State, No. PCD-04-442, 2004 WL 3711623, at *1 (Okla. Crim. App. May 13, 2004).

480 *See* Kalb, *supra* note 475, at 1047.

481 *See* Ku, *supra* note 465, at 1065.

482 *See id.*

the states have played an active role in adopting provisions of Conventions promulgated by the Hague Conference on Private International Law that have yet to be ratified by the United States. For example, forty-six states have adopted the Uniform Child Custody Jurisdiction and Enforcement Act, which implements a provision of the Hague Convention on Jurisdiction, Applicable Law, Recognition and Cooperation in Respect of Parental Responsibility and Measures of the Protection of Children.[483] Similarly, eighteen states have adopted the Uniform Probate Code, which contains provisions "in harmony with" the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.[484] Nineteen states have adopted the Uniform Trust Code, which provides choice of law rules "consistent with" the Hague Convention on the Law Applicable to Trusts and on their Recognition.[485]

In the human rights arena, subnational governments have begun to assert a role where the federal government has failed to act. For example, although the United States has not ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Los Angeles and San Francisco have made portions of it binding law.[486] By 2004 "forty-four U.S. cities, eighteen counties, and sixteen states had passed or considered legislation relating to CEDAW, with yet others contemplating action."[487] A number of cities, including Baltimore, Philadelphia, and Santa Cruz, have called on state officials to enact a moratorium on the death penalty in order to bring the United States into compliance with the Second Optional Protocol to the ICCPR, which the United States has not ratified.[488] Ten cities and five states, including New York, have passed resolutions in support of the Convention on the Rights of the Child (CRC).[489] Numerous cities have put in place human rights commissions designed to aid in the implementation and adoption of human rights treaties.[490] And the United States Conference of Mayors agreed to the Mayors Climate

483 *See id.* at 1068.

484 *See id.* at 1067–68.

485 *See id.* at 1068.

486 *See* Powell, *supra* note 407, at 277–79 (citing Local Implementation of the United Nationas Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), S.F. CAL. ADMIN. CODE, ch. 12K (2001), *available at* http://www.sfgov3.org/index.aspx?page=130). It is important to note, however, that a city ordinance is a purely voluntary undertaking by the local government and does not create a cause of action for private litigants.

487 Judith Resnik, *The Internationalism of American Federalism:* Missouri *and* Holland, 73 MO. L. REV. 1105, 1110 (2008).

488 *See* Powell, *supra* note 407, at 281–83.

489 *See* COLUMBIA LAW SCH., HUMAN RIGHTS INSTITUTE, STATE AND LOCAL HUMAN RIGHTS AGENCIES (2009), *available at* http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=153843.

490 *See id.*

Protection Agreement, which commits their cities to meeting Kyoto targets.[491] Currently, 1,054 cities, with a combined population of almost ninety-million people,[492] have signed onto this agreement. Similarly, in 2006, California signed into law the Global Warming Solutions Act, which effectively commits the state to their targets under Kyoto.[493] These trends signal a newfound assertiveness on the part of state and local governments in foreign affairs.

These forms of federalism accommodation—both top-down and bottom-up—demonstrate that the relationship between the federal government and the states in foreign affairs is complex and dynamic. This system has arisen largely without judicial intervention. The structural, political, and diplomatic checks described above have generated mechanisms for addressing federalism concerns through the political branches' own actions, without need for judicial intervention.

Conclusion

The *United States v. Bond* case with which this Article began has brought a long-simmering debate over the proper scope of the Treaty Clause back to the courts. Once again, the courts are asked to step in to decide the scope of the federal government's power to make treaties—and whether the federal government has the power to enact laws that fall outside the scope of the enumerated powers granted to it in Article I.

The federal government is a government of limited powers. The Tenth Amendment specifically provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[494] Hence, some perceive any increase in the power of the federal government as a deprivation of power from the states. Specifically, if the Treaty Clause gives the federal government power above and beyond that specifically provided for in Article I, it allows the federal government to infringe on those areas otherwise within the sole control of the states. That, in turn, it is feared, could open the door to abuse of this power—with the federal government circumventing constraints on its powers by enacting treaties and then legislating pursuant to them, at the expense of the states.

---

491 Resnik, *supra* note 487, at 1122.

492 *See List of Participating Mayors*, Mayors Climate Protection Center: The U.S. Conference of Mayors, http://usmayors.org/climateprotection/list.asp (last visited Nov. 16, 2012).

493 *See* Global Warming Solutions Act of 2006, CA Health & Safety Code § 25.5 (West 2006).

494 U.S. Const. amend. X.

Yet this cacophony of fears gives little credit to those who designed the Constitution. The Framers placed the treaty power outside of Article I precisely because the limits that applied to those enumerated powers were not meant to apply to the treaty power. In doing so, they were not turning a blind eye to the dangers of power run amok. Indeed, they were deeply suspicious of any unchecked power and sought to jealously guard the power of the states to act independent of the federal government. It was precisely these concerns that led them to design the Treaty Clause they did—one that vested the power to make treaties in the President, but only with the consent of two-thirds of the Senate. This supermajority bar is among the highest in the Constitution, exceeded only by the requirement that three-quarters of the states agree before the Constitution itself could be amended. This provision—one inherent in the design of the Treaty Clause itself—was designed precisely to gives states the very voice and control over the treaty-making process that critics fear the Treaty Clause threatens to deny them. This structural protection is reinforced, moreover, by political checks—the necessity that those with a role in making treaties must win reelection and thus be able to justify any decisions to the voters. It is also backed up by diplomatic checks—a treaty is not a treaty unless another sovereign state consents to it, and other states are unlikely to wish to wade into internal political struggles by entering a treaty understood to violate the fundamental constitutional allocation of power.

The Treaty Clause has served its purpose—perhaps too well.[495] It has prevented the passage of all but a handful of Article II treaties each year since the Founding. The political, structural, and diplomatic checks that the Framers put in place have served to create a system of federal accommodation that does not require intervention by the courts. Top-down federalism accommodates federalism concerns through self-restraint by the federal government institutions. The President and the Senate actively work to accommodate federalism concerns by rejecting treaties that would impinge on state prerogatives, modifying treaties to address federalism concerns, providing for state implementation of treaties, and by declining to compel state agencies to carry out treaty obligations. This operates alongside bottom-up federalism—accommodation of federalism concerns by states that play a direct and active role in shaping the international lawmaking process. In a variety of areas, states have been on the front lines of implementing treaties and thus played an active role in their interpretation and in determining when and how the treaty will affect the states.

---

495 *See* Hathaway, *supra* note 9, at 1307.

It is highly unlikely that a treaty that survives this process will fail any of the tests to which the courts might reasonably put it. The affirmative limits on the federal government's power protect against treaties that violate constitutional rights and structure, Eleventh Amendment immunity, and anticommandeering. Yet, it is hard to imagine that any treaty that fails these tests would survive the rough-and-tumble political process put in place by Article II. The same is true of the legal limits on implementing legislation—which must be necessary and proper to carrying out the treaty obligations. And any treaty that would fail the pretext test—even the more fully specified version outlined in this Article—would be unlikely to win the support of the President and Senate. In sum, the chance that a treaty will slip through the treaty-making process that violates these court-enforced limits remains small.

For those concerned about federalism, the conclusion that there is little role for the courts in the debate should be a cause not for despair but for celebration. The flexible system of accommodation that has grown up around the treaty power has proven extraordinarily effective at protecting against abuse of the federal treaty power. The treaty power binds itself more effectively than the courts ever could.