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# DOMESTIC RELATIONS, *MISSOURI v. HOLLAND*, AND THE NEW FEDERALISM

Mark Strasser\*

## INTRODUCTION

Over the past several years, the United States Supreme Court has been limiting Congress's power under the Commerce Clause and under Section 5 of the Fourteenth Amendment.<sup>1</sup> During this same period, the Court has emphasized the importance of state sovereignty and has expanded the constitutional protections afforded the states under the Tenth and Eleventh Amendments.<sup>2</sup> These developments notwithstanding, commentators seem confident that the treaty power is and will remain virtually plenary, even if the federal government might make use of it to severely undermine the dignity and sovereignty of the states.<sup>3</sup> That confidence is misplaced. While it is difficult to predict what the Court would do were an appropriate opportunity to present itself, the doctrinal explanations that would be necessary to support a much less robust treaty power would be much easier to make than most commentators seem to realize, even if one brackets recent developments in constitutional law. If one takes those developments into account, however, it is difficult to understand how the Court could fail to limit the treaty power were core areas of state law at issue.

This Article does not suggest that the Court should limit the federal government's ability to make international agreements because doing so would best account for the developing treaty jurisprudence or would most contribute to peace and harmony at home or abroad. On the contrary, the claim here is that the Court seems likely to limit the treaty power, notwithstanding the developing jurisprudence in that area and notwithstanding what might best promote the interests of the Nation or the world because the Court would otherwise have to do an abrupt about-face with respect to its own state sovereignty jurisprudence. The Court would make a

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\* Trustees Professor of Law, Capital University Law School. I would like to thank Professor James Beattie for his helpful discussions of these and related issues.

<sup>1</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (striking down provisions in the Violence Against Women Act because Congress had exceeded its powers under the Commerce Clause and under section 5 of the Fourteenth Amendment in passing those provisions).

<sup>2</sup> See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *New York v. United States*, 505 U.S. 144 (1992);

<sup>3</sup> For example, see generally David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000).

mockery of its own recent paeans to the dignity of the states were it to hold that the federal government could supplant core areas of state law via treaty or executive agreement.

Part I of this Article describes the different kinds of international agreements that might be made, and some of the limitations that might be imposed to limit the force of those agreements. Part II discusses the Court's view that family law is paradigmatic of what is reserved for the states to regulate, and why the current Court is likely to suggest that some aspects of state family law cannot be supplanted by the federal government even via international agreement. The Article concludes that current commentators seem not to appreciate the degree to which the Court's dual-sovereignty jurisprudence has changed current constitutional law. It simply is not credible to argue that the robust state sovereignty recently recognized by the Court imposes no constraints on the exercise of the treaty power. Unless the composition or the judicial philosophy of the Court changes, the only plausible prediction is that the Court will impose constraints on the treaty power, best interests of the Nation or the world notwithstanding, if it believes that the dignity and sovereign status of the states would otherwise suffer.

## I. ON MAKING AND INTERPRETING TREATIES

The power to make international agreements itself requires elaboration because it encompasses several kinds of international agreements, each of which will have the force of law if not in violation of constitutional guarantees. As to whether a particular international agreement passes constitutional muster, this will depend upon how that treaty is construed and upon the kinds of limitations imposed by the Constitution on the power to make such agreements.

Commentators suggest that *Missouri v. Holland*<sup>4</sup> and *United States v. Curtiss-Wright Export Corp.*<sup>5</sup> establish the virtually plenary nature of the treaty power and, thus, that the only limitations on the reach of a treaty will be imposed by the language and interpretation of the document itself.<sup>6</sup> Yet, this is not the best characterization of those cases even bracketing current state sovereignty jurisprudence and certainly cannot plausibly be offered in light of that jurisprudence. The better interpretation suggests that the treaty power is subject to as yet unarticulated constitutional limitations.

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<sup>4</sup> 252 U.S. 416 (1920) (holding that in pursuance of a valid treaty, the government could act under authority of the Constitution, Article VI).

<sup>5</sup> 299 U.S. 304 (1936) (holding the power to make decisions regarding international affairs was vested in the President).

<sup>6</sup> See *infra* notes 76–147 and accompanying text (discussing these cases).

### A. The Treaty Power

As an initial matter, it is helpful to understand what kinds of international agreements might be made.<sup>7</sup> The President might make an international agreement (1) which has not been approved by the House of Representatives or the Senate, making a “sole executive agreement,”<sup>8</sup> (2) which has been approved by majority vote in both the House and the Senate, making a “congressional-executive agreement,”<sup>9</sup> or (3) which has been ratified by a two-thirds vote in the Senate, making a “treaty”<sup>10</sup> as described in the Constitution.<sup>11</sup> Each of these agreements can

<sup>7</sup> David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791 (1998). There are basically three procedures which are used . . . Under the treaty mode, the President negotiates an agreement and then seeks the advice and consent of the Senate. . . . Under the congressional-executive agreement procedure, in contrast, the President may conclude an agreement under the authority of an act of Congress, which, like all other legislation, must be approved by simple majorities in both houses. Finally, the President sometimes concludes unilateral executive agreements on his sole authority.

*Id.* at 1798.

<sup>8</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) (1986) [hereinafter RESTATEMENT (THIRD)] (“[T]he President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.”); see also Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 398 (1998) (“Executive agreements concluded by the President alone are referred to as ‘sole executive agreements.’”).

<sup>9</sup> See RESTATEMENT (THIRD), *supra* note 8, § 303(2) (“[T]he President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution.”); see also Bradley, *supra* note 8, at 398 (“Executive agreements approved in advance or after the fact by a majority of both houses of Congress are referred to as ‘congressional-executive agreements.’”).

<sup>10</sup> The word “treaty” is itself ambiguous. See *Weinberger v. Rossi*, 456 U.S. 25, 29–30 (1982) (noting that under international law, “treaty” refers to an international agreement concluded between sovereigns without specifying the manner in which it was concluded); Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998).

Any written agreement between two or more states governed by international law is a treaty for purposes of international law. International law does not distinguish between Article II treaties that have been approved by two-thirds of the Senate and executive agreements that are signed by the President either with, or without, the approval of a majority of both houses of Congress. Thus, Article II treaties and executive agreements bind the United States under international law with equal force.

*Id.* at 726.

<sup>11</sup> See U.S. CONST. art. II, § 2, cl. 2 (“[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 . . .”); *Doe v. Braden*, 57 U.S. 635, 657 (1853) (“By the Constitution of the

have the force of law as long as existing constitutional constraints have been respected.<sup>12</sup>

While these are all ways in which international agreements may be made, there may be important differences among them. For example, it may be that an international agreement would be valid if made by the President and ratified by the Senate, but would not be valid if made without that ratification or, perhaps, without the consent of the Congress. The President's authority to make agreements without either congressional or Senate (super-majority) approval is limited to those kinds of issues that are within his or her independent powers<sup>13</sup> — a separate issue beyond the scope of the discussion here involves how to delimit those powers.<sup>14</sup>

Suppose that the focus is on the differences, if any, between the permissible scope of a congressional-executive agreement and of a treaty, narrowly defined. Views of many commentators to the contrary,<sup>15</sup> the permissible range of the latter

United States, the President has the power, by and with the advice and consent of the Senate, to make treaties provided two thirds of the Senators present concur.”); RESTATEMENT (THIRD), *supra* note 8, § 303(1) (“[T]he President, with the advice and consent of the Senate, may make any international agreement of the United States in the form of a treaty.”); *see also* Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 965 (2001) (noting that “the Constitution itself provides only for treaties,” i.e., only international agreements ratified by a two-thirds vote in the Senate); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 768 (2001) (discussing the “lack of convincing textual or structural support” for congressional-executive agreements).

<sup>12</sup> *See* RESTATEMENT (THIRD), *supra* note 8, § 303 cmt. j (“Sole executive agreements within the President’s constitutional authority are law of the United States and supreme over State law.”). However, sole executive agreements may not be supreme over federal law. *See* Paul, *supra* note 10, at 727 (“A sole executive agreement could supersede inconsistent state law, but never federal law.”). Treaties and congressional-executive agreements supersede both state and federal law. *See* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 805 (1995) (“[T]here is no significant difference between the legal effect of a congressional-executive agreement and the classical treaty approved by two-thirds of the Senate.”).

<sup>13</sup> *See* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1266–67 (1995) (“[I]t is necessary to draw boundaries . . . between those types of international agreements that the President may, acting alone, make binding on the United States and those agreements — ‘treaties’ — that the President must submit for Senate or . . . [perhaps] congressional approval.”); *see also* Spiro, *supra* note 11, at 1005 n.208 (“Limitations on the president’s power to undertake sole executive agreements — to subjects within his independent powers — have rendered their use non-coextensive with that of the congressional-executive agreement.”).

<sup>14</sup> For an articulation of the President’s duties, *see* U.S. CONST. art. II, §§ 2–3.

<sup>15</sup> *See* RESTATEMENT (THIRD), *supra* note 8, § 303 cmt. e (noting that the “prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.”).

may well be wider than the permissible range of the former.<sup>16</sup> The treaty power is an enumerated power,<sup>17</sup> the use of which requires approval by two-thirds of the Senate rather than by a simple majority in both houses. If Congress, rather than the Senate, is to be the body giving its imprimatur to an agreement at hand, it must do so pursuant to a different power,<sup>18</sup> for example, regulating commerce with foreign nations,<sup>19</sup> defining and punishing violations of international law,<sup>20</sup> or, perhaps, passing laws to enable the federal government to execute those powers given it by the Constitution.<sup>21</sup>

The claim here is not that the Constitution requires the Court to distinguish between treaties and congressional-executive agreements<sup>22</sup> — there is room within the existing treaty jurisprudence for the Court to say that the President's foreign affairs power is plenary<sup>23</sup> so that the President, perhaps in conjunction with Congress,<sup>24</sup> could completely subvert state law as long as this was done pursuant to

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<sup>16</sup> See Yoo, *supra* note 11, at 762 (offering a "clear dividing line that demarcates the situations in which treaties must be the sole instrument of national policy, and those that can be dealt with by the congressional-executive agreement"); Note, *Restructuring the Modern Treaty Power*, 114 HARV. L. REV. 2479–80 (2001) ("[T]he collapse of the domestic-international distinction has created new federalism concerns that should be addressed by applying the Court's recent state sovereignty decisions to congressional-executive agreements, but not to formal treaties."); cf. Spiro, *supra* note 11, at 1001 (pointing out that some argue that those international agreements implicating core state-level authority should require Senate ratification).

<sup>17</sup> See U.S. CONST. art. II, § 2 cl. 2.

<sup>18</sup> See Yoo, *supra* note 11, at 764 (arguing that the "normal statutory mode must [only] be used to approve international agreements that regulate matters within Congress's Article I powers"); see generally U.S. CONST. art. I, § 8.

<sup>19</sup> See U.S. CONST. art. I, § 8, cl. 3.

<sup>20</sup> See U.S. CONST. art. I, § 8, cl. 10.

<sup>21</sup> See U.S. CONST. art. I, § 8, cl. 18.

<sup>22</sup> The Constitution nowhere mentions congressional-executive agreements. See Spiro, *supra* note 11, at 962 (noting that congressional-executive agreements are not mentioned in the Constitution).

<sup>23</sup> Cf. *Clinton v. City of New York*, 524 U.S. 417, 445 (1998) ("[T]his Court has recognized that in the foreign affairs arena, the President has 'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.'" (citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936))); *N.Y. Times Co. v. United States*, 403 U.S. 713, 741 (1971) ("[I]t is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief."); *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (discussing the "conduct of diplomatic and foreign affairs, for which the President is exclusively responsible"); *Chicago & Southern Air Lines v. Waterman Corp.*, 333 U.S. 103, 109 (1948) (describing the President as "the Nation's organ in foreign affairs").

<sup>24</sup> See *Itel Containers Intern. Corp. v. Huddleston*, 507 U.S. 60, 85 (1993) ("The constitutional power over foreign affairs is shared by Congress and the President."); Regan

an agreement with another nation. However, it is extremely unlikely that the Court would so hold. What is much more likely is that the Court would (1) construe the foreign affairs powers of both the President and the Congress as limited in some way, and (2) suggest that an international agreement ratified by two-thirds of the Senate might cover some things that could not otherwise be covered. The justifications for the latter position would be that (a) no language in the Constitution is superfluous and the requirement for super-majority Senate ratification would be superfluous were there no difference between congressional-executive agreements and treaties,<sup>25</sup> and (b) failing to distinguish between approval by majority vote in both houses of Congress and approval by two-thirds of the Senate would not take into account the structure of the Constitution.<sup>26</sup> Thus, it is suggested here that were an appropriate opportunity to arise, the Court might well modify the existing treaty jurisprudence by (1) distinguishing among international agreements with respect to the permissible contents of each, and (2) limiting the reach of the most potentially far-ranging kind of international agreement — a treaty ratified by two-thirds of the Senate.

### *B. Construing Treaties*

Suppose that a treaty has been signed by the President and ratified by the Senate. Such a treaty will have to be interpreted. When construing treaties, courts have adopted certain rules of thumb. In *Nielsen v. Johnson*,<sup>27</sup> the Court suggested that treaties “are to be liberally construed so as to effect the apparent intention of the parties.”<sup>28</sup> The Court explained: “When a treaty provision fairly admits of two

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v. Wald, 468 U.S. 222, 262 (1984) (Powell, J., dissenting) (“It is the responsibility of the President and Congress to determine the course of the Nation’s foreign affairs.”); *Zschemig v. Miller*, 389 U.S. 429, 432 (1968) (discussing “the field of foreign affairs which the Constitution entrusts to the President and the Congress”); *United States v. Minnesota*, 270 U.S. 181, 201 (1926) (“Under the Constitution the treaty-making power resides in the President and Senate, and when through their action a treaty is made and proclaimed it becomes a law of the United States.”).

<sup>25</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it.”).

<sup>26</sup> See Yoo, *supra* note 11, at 822 (suggesting that distinguishing in this way would better account for the structure of the Constitution).

<sup>27</sup> 279 U.S. 47 (1929).

<sup>28</sup> *Id.* at 51 (citing *Jordan v. Tashiro*, 278 U.S. 123 (1928)); see also *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (“It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them.”); *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1879) (“Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred.”).

constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred."<sup>29</sup> This is true even if the more liberal construction would conflict with state law, whereas the narrower construction would not.<sup>30</sup> Further, where there is such a conflict, the treaty provisions, rather than state law, must be respected.<sup>31</sup>

In order for a treaty to displace state or federal law, it must be in effect. A treaty will not be in effect if it is non-self-executing and the necessary implementing legislation has not yet been passed.<sup>32</sup> An international agreement will be treated as non-self-executing and thus not displacing state or federal law "(a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, (b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or (c) if implementing legislation is constitutionally required."<sup>33</sup> Thus, the treaty (a) might itself not be intended to be self-executing, or (b) the Senate might only be willing to ratify it if it is non-self-executing, or (c) regardless of the intent of the treaty framers or the Senate members, the Constitution might preclude it from being ratified as a self-executing document.

The California Supreme Court explained how to determine whether a treaty was intended to be self-executing: First, "courts look to the intent of the signatory parties as manifested by the language of the instrument."<sup>34</sup> Where the language is not dispositive, the courts can consider "the circumstances surrounding [the treaty's] execution."<sup>35</sup> The California court explained, "In order for a treaty

<sup>29</sup> *Nielsen*, 279 U.S. at 52 (citing *Asakura v. Seattle*, 265 U.S. 332 (1924)).

<sup>30</sup> *See id.* ("[A]nd as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments.").

<sup>31</sup> *See United States v. Pink*, 315 U.S. 203, 230–31 (1942) ("But state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement." (citing *Nielsen v. Johnson*, 279 U.S. 47 (1929))); *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504 (1847), *overruled in part by Leisy v. Hardin*, 135 U.S. 100 (1890).

[A] law of Congress regulating commerce with foreign nations, or among the several States, is the supreme law; and if the law of a State is in conflict with it, the law of Congress must prevail, and the State law cease to operate so far as it is repugnant to the law of the United States.

*Id.* at 574.

<sup>32</sup> *See* RESTATEMENT (THIRD), *supra* note 8, § 111(3).

<sup>33</sup> *Id.* § 111(4).

<sup>34</sup> *Sei Fujii v. State*, 242 P.2d 617, 620 (Cal. 1952).

<sup>35</sup> *Id.*; *see also Zicherman v. Korean Air Lines*, 516 U.S. 217 (1996).

Because a treaty ratified by the United States is not only the law of this land, *see* U.S. Const., Art. II, § 2, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and



provision to be operative without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts."<sup>36</sup> If the framers themselves did not intend the treaty to have the force of law even after ratification, then the ratified treaty will require further implementing legislation to have that effect.

A treaty that is not intended to be self-executing and enforceable in the courts absent further legislative action may nonetheless serve useful functions.<sup>37</sup> For example, the treaty may be aspirational.<sup>38</sup> Thus, it may set goals towards which countries will aim, even if the failure to reach such goals would not constitute a treaty violation.

Many treaties are not intended in and of themselves to impose a new legal standard. As the United States Supreme Court explained in *Chae Chan Ping v. United States*,<sup>39</sup> a treaty "is often merely promissory in its character, requiring legislation to carry its stipulations into effect."<sup>40</sup> The Court made the same point in *Prigg v. Pennsylvania*:<sup>41</sup> "Treaties made between the United States and foreign powers often contain special provisions, which do not execute themselves, but require the interposition of Congress to carry them into effect."<sup>42</sup> Assuming that a non-self-executing treaty has been made in accord with the requirements of the Constitution, Congress can pass the necessary implementing legislation pursuant to the Necessary and Proper Clause to make the treaty have the force of law.<sup>43</sup>

drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties.

*Id.* at 226.

<sup>36</sup> *Sei Fujii*, 242 P.2d at 620.

<sup>37</sup> See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

When a country ratifies a treaty, it may do so for purely disingenuous reasons (simply to gain the expressive benefit), for aspirational reasons (because the government or a part thereof is truly committed to the norms embodied in the treaty and wishes to commit the country thereto), or for self-interested reasons (perhaps because political or economic benefits are tied to ratification).

*Id.* at 2022.

<sup>38</sup> See Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 805 (2002) ("International agreements and treaties often have an aspirational (rather than rule-making) quality.").

<sup>39</sup> 130 U.S. 581 (1889).

<sup>40</sup> *Id.* at 600; see also Yoo, *supra* note 11, at 797 (describing "the view that most treaties are non-self-executing; in other words, that they do not exert a domestic legal effect unless Congress implements their terms by statute. . .").

<sup>41</sup> 41 U.S. 539 (1842).

<sup>42</sup> *Id.* at 619.

<sup>43</sup> See U.S. CONST. art. 1, § 8; *Neely v. Henkel*, 180 U.S. 109 (1901).

The power of Congress to make all laws necessary and proper for carrying into

Whether a treaty is merely promissory or, instead, self-executing can have important implications. Consider a statute which "in the absence of treaty, withholds all interests in real property from aliens who are ineligible to citizenship under federal naturalization laws."<sup>44</sup> In *Sei Fujii v. State*,<sup>45</sup> a California appellate court examined such a statute and held that it was void because it was in conflict with the Charter of the United Nations,<sup>46</sup> which had been ratified by the United States.<sup>47</sup> The California Supreme Court affirmed that the statute was invalid, but based its decision on other grounds.<sup>48</sup> The California high court pointed out that the provisions of the Charter were not self-executing,<sup>49</sup> and thus did not impose any legal obligations.<sup>50</sup> Because the Charter imposed no obligations, it could neither be

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execution as well the powers enumerated in Section 8 of article I of the Constitution, as all others vested in the Government of the United States, or in any Department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power.

*Id.* at 121; *see also* Golove, *supra* note 3, at 1311 ("[T]here has never been any question but that Congress has the power under the Necessary and Proper Clause to implement any (constitutional) treaty made by the President and Senate."); Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 49 (1997) ("The Necessary and Proper Clause empowers Congress to enact legislation implementing a valid international treaty, just as it may implement other federal powers.").

<sup>44</sup> *Sei Fujii v. State*, 242 P.2d 617, 624 (Cal. 1952); *see also* *Oyama v. California*, 332 U.S. 633, 636 (1948) ("In broad outline, the Alien Land Law forbids aliens ineligible for American citizenship to acquire, own, occupy, lease, or transfer agricultural land.").

<sup>45</sup> 217 P.2d 481 (Cal. App. 1950), *vacated by* 242 P.2d 617 (Cal. 1952).

<sup>46</sup> A perusal of the Charter renders it manifest that restrictions contained in the Alien Land Law are in direct conflict with the plain terms of the Charter above quoted and with the purposes announced therein by its framers. It is incompatible with Article 17 of the Declaration of Human Rights which proclaims the right of everyone to own property . . . The Alien Land Laws must therefore yield to the treaty as the superior authority.

*Id.* at 488; *see also* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 411 (2000) (discussing the concern "that the U.N. Charter would preempt state laws by virtue of the Supremacy Clause").

<sup>47</sup> *See Sei Fujii*, 217 P.2d at 486.

<sup>48</sup> *See Sei Fujii*, 242 P.2d at 630 ("[W]e hold that the alien land law is invalid as in violation of the Fourteenth Amendment.").

<sup>49</sup> *Id.* at 620 ("[T]he provisions of the preamble and of Article 1 of the charter which are claimed to be in conflict with the alien land law are not self-executing."); *see also* *Foster v. Neilson*, 27 U.S. 253, 313-14 (1829) ("A treaty . . . does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.") *overruled in part by* *U.S. v. Percheman*, 32 U.S. 51 (1833).

<sup>50</sup> *Sei Fujii*, 242 P.2d at 620-21 ("[T]he provisions . . . do not purport to impose legal obligations on the individual member nations or to create rights in private persons.").

said that the Charter provisions had become the supreme law of the land nor that the state law had been rendered invalid on supremacy grounds.<sup>51</sup> Instead, the court struck down the statute as a violation of federal constitutional guarantees.<sup>52</sup> By so holding, the California court was able to strike down an invidiously motivated statute, which both deprived individuals of important rights and was likely a source of continuing international embarrassment,<sup>53</sup> but at the same time did not subject state laws to the requirements of the Charter, which are arguably more demanding than the Fourteenth Amendment.

### *C. Ratification and RUDs*

A non-self-executing treaty becomes effective when implementing legislation has been passed.<sup>54</sup> However, when passing implementing legislation, Congress can articulate reservations,<sup>55</sup> understandings,<sup>56</sup> and declarations<sup>57</sup> (RUDs) to limit the force of the treaty.<sup>58</sup> By the same token, the Senate, when ratifying a treaty, can

<sup>51</sup> See U.S. CONST. art. VI, § 1, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.").

<sup>52</sup> *Sei Fujii*, 242 P.2d at 630 ("[W]e hold that the alien land law is invalid as in violation of the Fourteenth Amendment.").

<sup>53</sup> *Oyama v. California*, 332 U.S. 633, 672 (1948) (Murphy, J., concurring) ("[T]he Alien Land Law from its inception has proved an embarrassment to the United States Government.").

<sup>54</sup> See RESTATEMENT (THIRD), *supra* note 8, § 111(3) ("[A] 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation.").

<sup>55</sup> Only certain reservations will be permitted. See *id.* § 313(1) ("A state may enter a reservation to a multilateral international agreement unless: (a) reservations are prohibited by the agreement, (b) the agreement provides that only specified reservations not including the reservation in question may be made, or (c) the reservation is incompatible with the object and purpose of the agreement.").

<sup>56</sup> See *id.* § 314(2) ("When the Senate gives its advice and consent to a treaty on the basis of a particular understanding of its meaning, the President, if he makes the treaty, must do so on the basis of the Senate's understanding.").

<sup>57</sup> See *id.* § 313 cmt. g:

When signing or adhering to an international agreement, a state may make a unilateral declaration that does not purport to be a reservation. Whatever it is called, it constitutes a reservation in fact if it purports to exclude, limit, or modify the state's legal obligation. Sometimes, however, a declaration purports to be an "understanding," an interpretation of the agreement in a particular respect. Such an interpretive declaration is not a reservation if it reflects the accepted view of the agreement.

<sup>58</sup> See Bradley & Goldsmith, *supra* note 46, at 400–01 ("Beginning in the 1970s, the treaty makers . . . ratif[ied] the treaties with a set of conditions. These conditions take the form of reservations, understandings, and declarations — collectively, 'RUDs' — to U.S. ratification.").

enter RUDs and, in fact, there is a current trend to do so when ratifying human rights treaties.<sup>59</sup>

The trend to enter RUDs is traced back to the 1950s when Ohio Senator Bricker proposed various amendments to Article VI.<sup>60</sup> These amendments would have limited the contents of the treaties that might be signed,<sup>61</sup> prevented treaties from being self-executing,<sup>62</sup> or would have denied supremacy to treaties over federal or state law,<sup>63</sup> thereby, for example, preventing human rights treaties from forcing states to end segregation.<sup>64</sup> Some commentators suggest that Senator Bricker's goal of limiting the force of treaties has been realized as a matter of fact, because the United States frequently only signs treaties after entering RUDs to undercut the force of the treaty being ratified.<sup>65</sup>

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<sup>59</sup> See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995) ("[T]he United States has attached to each of its [human rights convention] ratifications a 'package' of reservations, understandings and declarations (RUDs)") (editorial comments).

<sup>60</sup> Bradley, *supra* note 8, at 426–27.

<sup>61</sup> There were numerous versions of the 'Bricker Amendment,' one of which provided that "[a] treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty."

*Id.*

<sup>62</sup> Bradley & Goldsmith, *supra* note 46, at 412–13 ("In general, the proposed amendments were intended to preclude treaties from being self-executing and to make clear that treaties would not override the reserved powers of the states. Some versions also would have restricted the use of executive agreements.").

<sup>63</sup> See Paul, *supra* note 10, at 703 ("The Bricker Amendment, which took various forms during the early 1950s, would have amended Article VI of the Constitution to deny the supremacy of treaties or executive agreements over state or federal law.").

<sup>64</sup> See Ackerman & Golove, *supra* note 12, at 898 ("Brickerites sought an explicit amendment overruling this decision, warning their colleagues that liberals might otherwise override racially discriminatory state laws by ratifying human rights treaties."); Henkin, *supra* note 59, at 348 ("The campaign for the Bricker Amendment apparently represented a move by anti-civil-rights and 'states' rights' forces to seek to prevent — in particular — bringing an end to racial discrimination and segregation by international treaty.").

<sup>65</sup> See Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI-KENT L. REV. 515, 516 (1991) ("[T]he non-self-executing declaration and others of its ilk could undermine the efficacy of the treaties to which they apply, both within the United States and in terms of the potential for the United States to exercise constructive influence abroad."); Henkin, *supra* note 59, at 341:

As a result of . . . [its RUDs], U.S. ratification has been described as specious, meretricious, hypocritical. Many U.S. supporters of ratification are of the view that elements in the package of RUDs distort the treaty-making process under the United States Constitution, in ways that echo the "Bricker Amendment," thought dead and buried forty years ago.

See also Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 665 (2001) ("Although the Bricker Amendment did not become law, some

Suppose, however, that the United States Senate ratified a human rights treaty without entering RUDs. Suppose further that the treaty was self-executing and, if valid, would modify state law in areas traditionally reserved for the states. At least one question would be whether the federal government would have had the power to enter into such an agreement. After all, no treaty will be valid if it violates constitutional guarantees.<sup>66</sup> If the Constitution precludes treaties that impermissibly regulate matters which are reserved for the states, then such treaties will be held void and of no legal effect.<sup>67</sup> As the Court explained in *Reid v. Covert*,<sup>68</sup> “no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.”<sup>69</sup>

In *United States v. Pink*,<sup>70</sup> the Court made clear that “treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy,”<sup>71</sup> thus suggesting a constitutional preference not to infringe on the sovereignty of the States. Of course, as the *Pink* Court made known, where national policy is clearly implicated and the intent to supplant state law is clear, the

believe it has become fact — through practices of the Senate that consistently limit the application of international laws by reference to federalism.”).

<sup>66</sup> See *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620–21 (1870) (“It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument.”); *Doe v. Braden*, 57 U.S. (16 How.) 635, 657 (1854) (“The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States.”); see also *RESTATEMENT (THIRD)*, *supra* note 8, § 115(3) (“A rule of international law or a provision of an international agreement of the United States will not be given effect as law in the United States if it is inconsistent with the United States Constitution.”).

<sup>67</sup> See *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504, 588 (1847) (“The federal government is supreme in the exercise of powers delegated to it, but beyond this its acts are unconstitutional and void.”) *overruled in part by* *Leisy v. Hardin*, 135 U.S. 100 (1890); *Smith v. Turner*, 48 U.S. (7 How.) 283, 507 (1849) (Daniel, J., dissenting):

Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, in order to be valid, must be made within the scope of the same powers; for there can be no authority of the United States, save what is derived mediately or immediately, and regularly and legitimately, from the Constitution. A treaty no more than an ordinary statute can arbitrarily cede away any one right of a State, or of any citizen of a State.

*Id.* (citing *Doe ex dem Stark v. Gildart*, 6 Miss. 606, 5 How. 606, 613 (1841)).

<sup>68</sup> 354 U.S. 1 (1957).

<sup>69</sup> *Id.* at 16; see also *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) (explaining that the power to make treaties is restricted “by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations”).

<sup>70</sup> 315 U.S. 203 (1942).

<sup>71</sup> *Id.* at 230 (citing *Guaranty Trust Co. v. United States*, 304 U.S. 126, 143 (1938)).

provisions of a valid treaty must be given effect.<sup>72</sup> Yet, the question at issue here is whether the hypothetical human rights treaty described above would in fact be valid,<sup>73</sup> and thus whether state or federal law would in fact have been supplanted.

#### D. Missouri v. Holland

Traditionally, scholars cite *Missouri v. Holland*<sup>74</sup> to establish that treaties may address any subject.<sup>75</sup> Commentators seem to suggest that were the Court to overrule *Holland*, the treaty power might then be delimited, but that the federal government's power to circumvent federalism restrictions pursuant to the treaty power is safe as long as *Holland* remains good law.<sup>76</sup> Yet, it is not at all clear that

<sup>72</sup> See *id.* at 230–31 (“[S]tate law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement.”).

<sup>73</sup> See RESTATEMENT (THIRD), *supra* note 8, § 302(2) (“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.”); see also *The Cherokee Tobacco*, 78 U.S. 616, 620–21 (1870) (“[A] treaty cannot change the Constitution or be held valid if it be in violation of that instrument.”); *Smith v. Turner*, 48 U.S. (7 How.) 283, 507 (1849) (Daniel, J., dissenting):

Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, in order to be valid, must be made within the scope of the same powers; for there can be no authority of the United States, save what is derived mediately or immediately, and regularly and legitimately, from the Constitution.

*Id.*

<sup>74</sup> 252 U.S. 416 (1920) (holding that in pursuance of a valid treaty, the government could act under authority of the Constitution, Article VI).

<sup>75</sup> Damrosch, *supra* note 65, at 530:

By virtue of . . . the authoritative decision of the Supreme Court in *Missouri v. Holland* . . . our constitutional law is clear: the treaty-makers may make supreme law binding on the states as to any subject, and notions of states' rights should not be asserted as impediments to the full implementation of treaty obligations.

But see Ann Althouse, *A Response to Professor Woolhandler's "Treaties, Self-Execution, and the Public Law Litigation Model"*, 42 VA. J. INT'L L. 789, 792 (2002) (“*Missouri v. Holland* is an enigma that permits its readers to see what they would like to see. It strikes me as wishful thinking to conclude that ideas about federalism play no role in interpreting the scope of the treaty power.”).

<sup>76</sup> See Spiro, *supra* note 11, at 1005 (suggesting that federalism restrictions might no longer be circumvented were *Holland* overruled); Robert Knowles, Note, *Starbucks and the New Federalism, The Court's Answer to Globalization*, 95 NW. U. L. REV. 735, 777 (2001) (“If *Missouri v. Holland* remains good law, very little can prevent a torrent of international standards from wiping out state prerogatives.”); cf. Yoo, *supra* note 11, at 827 (discussing “*Holland's* expansive language [which] . . . seems to assert without any textual basis that the federal government can act outside of its enumerated powers. . .”).

*Holland* must be read so broadly, and extremely unlikely that the current Court would so construe it.

At issue in *Holland* was a treaty with Great Britain<sup>77</sup> protecting migratory birds.<sup>78</sup> Congress had previously attempted to pass legislation to effect that same end, but that legislation had been struck down by two lower courts.<sup>79</sup> Thus, in *United States v. Shauver*,<sup>80</sup> a federal district court in Arkansas considered whether Congress had the power to pass migratory bird legislation.<sup>81</sup> Although willing to grant that "only by national legislation can migratory wild game and fish be preserved to the people,"<sup>82</sup> the court was not persuaded that Congress therefore had the power to pass the protective legislation. The court concluded that Congress did not have that power,<sup>83</sup> and that a constitutional amendment would be required to afford Congress that power.<sup>84</sup> By the same token, in *United States v. McCullagh*,<sup>85</sup> a federal district court in Kansas denied that Congress could regulate migratory birds by invoking its commerce power.<sup>86</sup> The court understood that the act might be quite beneficial, but cautioned:

[N]o matter how laudable the purpose of Congress in the passage of the act in question may have been, or how great the ultimate end sought thereby to be attained for the common good, such end does not justify the means employed, if it be found on examination to lie beyond constitutional bounds.<sup>87</sup>

The *McCullagh* court concluded that Congress had exceeded constitutional bounds when passing the statute that protected the migratory birds.<sup>88</sup>

To illustrate that Congress may be precluded from passing even beneficial legislation, the *McCullagh* court noted that there could be "no doubt but that a

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<sup>77</sup> See *Holland*, 252 U.S. at 431.

<sup>78</sup> See *id.*

<sup>79</sup> See *id.* at 432 (citing *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914) and *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915)).

<sup>80</sup> 214 F. 154 (E.D. Ark. 1914).

<sup>81</sup> See *id.* at 156.

<sup>82</sup> *Id.* at 160.

<sup>83</sup> See *id.* ("The court is unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game when in a state, and is therefore forced to the conclusion that the act is unconstitutional.").

<sup>84</sup> See *id.*; see also *McCullagh*, 221 F. at 291 ("[T]he only proper course lies in amendment of the Constitution.").

<sup>85</sup> 221 F. 288 (D. Kan. 1915).

<sup>86</sup> See *id.* at 292.

<sup>87</sup> *Id.* at 290-91.

<sup>88</sup> *Id.* at 296.

uniform system of laws on the subjects of marriage and divorce in this country would terminate many serious evils and accomplish inestimable good."<sup>89</sup> Were Congress to have the power to pass such laws, "a few comparatively simple provisions would accomplish this much desired result."<sup>90</sup> However, the court suggested, it was so clear that this was not within congressional power that it had never even been attempted, much less accomplished.<sup>91</sup>

Refusing to address the substantive merits of *McCullagh* and *Shauver*, the *Holland* Court instead suggested that whether those cases "were decided rightly or not they cannot be accepted as a test of the treaty power."<sup>92</sup> Writing for the Court, Justice Holmes suggested that "there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could,"<sup>93</sup> making it clear that Congress could regulate some areas in pursuance of a treaty that it could not otherwise permissibly regulate.

The *Holland* Court cited *Andrews v. Andrews*<sup>94</sup> with approval.<sup>95</sup> At issue in *Andrews* was whether a divorce granted in South Dakota had to be accorded full faith and credit by Massachusetts when the divorce had allegedly been secured by a Massachusetts domiciliary falsely claiming to be domiciled in South Dakota.<sup>96</sup> Recognizing that "the Constitution of the United States confers no power whatever upon the government of the United States to regulate marriage in the States, or its dissolution,"<sup>97</sup> the *Andrews* Court worried that a limitation on the power of Massachusetts to decide whether or not to recognize the divorce would have dire results.<sup>98</sup> The Court noted that it would be disastrous were it to "come to pass that the governments, state and Federal, are bereft by the operation of the Constitution of the United States of a power which must belong to and somewhere reside in every civilized government,"<sup>99</sup> apparently believing that forcing Massachusetts to recognize the decree would somehow deprive it of the power to make decisions

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<sup>89</sup> *Id.* at 291.

<sup>90</sup> *Id.*

<sup>91</sup> *See id.*

<sup>92</sup> *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

<sup>93</sup> *Id.*; see also Carlos Manuel Vazquez, Breard, Printz, and the Treaty Power, 70 U. COLO. L. REV. 1317, 1342 (1999) ("The fact is that the power to make treaties is not just the power to make laws on the same subjects by other means; it is the power to make laws on subjects not otherwise falling within Congress's legislative power.").

<sup>94</sup> 188 U.S. 14 (1903), *overruled by* *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

<sup>95</sup> *See Holland*, 252 U.S. at 433.

<sup>96</sup> *See Andrews*, 188 U.S. at 37–38.

<sup>97</sup> *Id.* at 32.

<sup>98</sup> The Court rejected that the Full Faith and Credit Clause required Massachusetts to recognize the South Dakota decree, arguing that such a claim "must rest on the assumption that the Constitution has destroyed those rights of local self-government which it was its purpose to preserve." *Id.* at 33.

<sup>99</sup> *Id.* at 32–33.



regarding the validity of marriages. Because the federal government clearly did not have the power to regulate marriage and divorce,<sup>100</sup> depriving the state of that power would allegedly mean that *no* government would have the power to regulate marital relations. Yet, such a result would be absurd, since the power at issue is a paradigmatic governmental function.<sup>101</sup>

The point here is not to claim that *Andrews* is still good law,<sup>102</sup> since the Court has subsequently made clear that divorce decrees granted in one state are entitled to full faith and credit in all of the states absent fraud or lack of jurisdiction.<sup>103</sup> Rather, the point here is that *Andrews* suggests that the state has certain powers, the federal government has other powers, and that a power inherent in the notion of government must be possessed by one or the other, if not both. Yet, to say that a particular power is inherent in the nature of government does not address which government must possess it, especially in a system that incorporates dual sovereignty. It is thus unclear whether the *Holland* Court — which cited *Andrews* with approval<sup>104</sup> and which made clear that the treaty power was not limited to those powers contained in Article I<sup>105</sup> — really thought the treaty power plenary so that, for example, the federal government could make an international agreement and thereby supplant state marriage laws involving citizens of those very states.<sup>106</sup>

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<sup>100</sup> See *supra* note 97 and accompanying text.

<sup>101</sup> The Court seemed to believe that Massachusetts would have been deprived of the power to regulate marriage if it could be forced to recognize a foreign decree awarding a Massachusetts domiciliary a divorce. See *Andrews*, 188 U.S. at 32.

<sup>102</sup> *Andrews* was overruled by *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

<sup>103</sup> See *Williams v. North Carolina*, 317 U.S. 287, 303 (1942).

[W]hen a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter.

<sup>104</sup> See *supra* note 95 and accompanying text.

<sup>105</sup> See *supra* notes 92–93 and accompanying text.

<sup>106</sup> A separate issue would be raised were there an international agreement to cover the marriages of citizens of other countries. See *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, and agreement with respect to the rights and privileges of citizens of the United States in foreign countries, and of the nationals of such countries within the United States.”); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875):

The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government.

*Id.*; Ann Woolhandler, *Treaties, Self-Execution, and the Public Law Litigation Model*, 42 VA. J. INT’L L. 757, 778 (2002) (“The nineteenth-century cases . . . demonstrate a willingness to provide aliens with rights comparable to those that the courts were willing to enforce for

*Andrews* made very clear that regulation of marriage and divorce was a state, rather than a federal, matter and there is absolutely no indication in *Holland* that the Court had changed its view on that point. Indeed, the *Holland* Court suggested, "What was said in [*Andrews*] with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act,"<sup>107</sup> thus leaving open the possibility that the federal government would sometimes *not* have the power to act where the state was competent to act.

Recognizing that "the great body of private relations usually fall within the control of the State,"<sup>108</sup> the *Holland* Court then noted that "a treaty may override its [the state's] power."<sup>109</sup> The Court thereby reaffirmed that *some*, but not necessarily all, matters normally left to the states will permissibly be subjects of treaties. Yet, the *Holland* Court also made clear that there are some limitations on the treaty power, since a treaty must "not contravene any prohibitory words to be found in the Constitution."<sup>110</sup> While such a limitation does not cabin the treaty power very much,<sup>111</sup> it would prevent a treaty from limiting First Amendment protections<sup>112</sup> and might prevent a treaty from encroaching on other areas as well. Thus, commentators' claims to the contrary notwithstanding,<sup>113</sup> the Court seems to have lots of room for limiting (or, perhaps, recharacterizing) the treaty power even without overruling *Holland*.<sup>114</sup>

Those construing *Holland* broadly point to the Court's refusal to find that the migratory bird treaty at issue was "forbidden by some invisible radiation from the

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domestic litigants."); cf. Vazquez, *supra* note 93, at 1338:

[I]t is clear that the treatment of aliens has long been regarded as an appropriate subject of negotiation between the United States and the countries of which the aliens are nationals. Treaties giving aliens certain rights date back to the beginning of our history and have long been applied to the states.

<sup>107</sup> *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

<sup>108</sup> *Id.* at 434.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 433.

<sup>111</sup> See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 70 (1999) ("Direct prohibitions on the conduct of the federal government are few and far between in the constitutional text.").

<sup>112</sup> See *Boos v. Barry*, 485 U.S. 312, 324 (1988) (holding that the First Amendment trumped the dignity interest of foreign officials).

<sup>113</sup> See Henkin, *supra* note 59, at 345 ("There are no significant 'states' rights' limitations on the treaty power."); Neuman, *supra* note 43, at 46–47 (reading *Holland* as establishing that the treaty power is plenary); Vazquez, *supra* note 93, at 1343 ("[U]nless *Missouri v. Holland* is reconsidered, it appears that there are no limits on the treaty power grounded in state sovereignty.").

<sup>114</sup> But see Neuman, *supra* note 43, at 47–48 ("The Supreme Court's reinvigoration of the inherent limits of the Commerce Clause in *Lopez* is unlikely to foreshadow so radical a change. . . . The present Court shows no evidence of any intent to hamstring the international relations of the United States in this manner.").

general terms of the Tenth Amendment.”<sup>115</sup> Yet, there, the Court was not talking about whether the treaty-making power as a general matter was constrained by Tenth Amendment radiations, but only whether that particular treaty was so constrained. It is thus too strong to claim that *Holland* held that the Tenth Amendment does not constrain the treaty power.

At least two issues are raised by *Holland*: (1) does the treaty power give the federal government *as a whole* the power to regulate in areas in which it otherwise could not; and (2) if so, what are the limitations on that additional power?<sup>116</sup> Consider Justice Holmes’s point that “there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could.”<sup>117</sup> Justice Holmes might merely have been offering the kind of analysis offered by Justice Jackson in *Youngstown Sheet and Tube Co. v. Sawyer*,<sup>118</sup> namely, that the treaty power would include all things that are appropriately subject to either presidential or congressional power,<sup>119</sup> whereas Congress can only enact legislation pursuant to its own powers. On this understanding, *Holland* would not be expanding the treaty power beyond what is otherwise reserved for the federal government,<sup>120</sup> even if it is going beyond what it

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<sup>115</sup> *Holland*, 252 U.S. at 434. See Neuman, *supra* note 43, at 46 (“The reach of the separately enumerated treaty power to matters ordinarily of local concern, free from any ‘invisible radiation from the general terms of the Tenth Amendment,’ was settled in *Missouri v. Holland*.”); Vazquez, *supra* note 93, at 1337–38 (“But the Court’s holding in *Missouri v. Holland* that the treaty power is not limited by any ‘invisible radiation’ from the Tenth Amendment has survived.”); Yoo, *supra* note 11, at 850 (discussing *Holland*’s grant of broader powers to impose obligations free from the “invisible radiations” of the Tenth Amendment).

<sup>116</sup> See Golove, *supra* note 3, at 1087–88 (discussing differing views of the treaty power).

<sup>117</sup> *Holland*, 252 U.S. at 433.

<sup>118</sup> 343 U.S. 579 (1952).

<sup>119</sup> See *id.* at 635 (Jackson, J., concurring in judgment and opinion of the Court) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”); see also *Dames & Moore v. Regan*, 453 U.S. 654, 668–69 (1981) (“When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress.”).

<sup>120</sup> Cf. *United States v. Pink*, 315 U.S. 203, 233–34 (1942) (“Power over external affairs is . . . vested in the national government exclusively. . . . And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.”) (emphasis added).

reserved for Congress.<sup>121</sup> Thus, it is possible to read *Holland* as much less expansive than most commentators would claim.

The *Holland* Court pointed out that “[a]cts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States.”<sup>122</sup> The question then becomes, when is a treaty made under the authority of the United States? The answer to that question might be: (1) as long as the correct procedural rules are followed, or (2) as long as the treaty deals with particular subjects, or (3) as long as the treaty reaches matters appropriately regulated by the United States (that is, the federal government as a whole) rather than, for example, only those appropriately regulated by Congress.<sup>123</sup> Doubtless, there are other possible interpretations as well.<sup>124</sup> The *Holland* Court understood that the opinion left this matter unresolved but refused to address it, instead merely pointing out that “[i]t is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention.”<sup>125</sup> Thus, *Holland* could be read as suggesting that the treaty power: (1) is plenary, (2) permits the federal government as a whole to regulate areas that it could not otherwise regulate,<sup>126</sup> or (3) permits Congress to regulate more than it could under Article I, but does not permit the federal government to regulate anything that it could not otherwise regulate.<sup>127</sup>

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<sup>121</sup> Some commentators do not seem to appreciate the difference between the treaty power expanding the federal power more generally and expanding Congress's power in particular. See Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1279 (1999) (reading *Holland* as declaring “that the federal government could take action in the name of the treaty power that it might not be able to undertake through its domestic authority”).

<sup>122</sup> *Holland*, 252 U.S. at 433; see also *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889) (“By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land.”).

<sup>123</sup> (2) and (3) need not be coextensive, since (3) may be determined by considering whether the government is acting in light of an enumerated power, rather than the subject matter of a particular treaty.

<sup>124</sup> For example, it might be argued that the “authority of the United States,” stated in *Holland* is suggesting that the implementation of treaties requires congressional, rather than mere Senate, approval. But see *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (“Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision.”).

<sup>125</sup> *Holland*, 252 U.S. at 433.

<sup>126</sup> See Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630, 1645 (1999) (“*Missouri v. Holland* stands for the basic proposition that the Treaty Clause of Article II confers a substantive enumerated power of the federal government.”).

<sup>127</sup> See *supra* notes 117–21 and accompanying text.

Even if *Holland* need not be construed as establishing that the treaty power is plenary, *United States v. Curtiss-Wright Export Corp.*<sup>128</sup> has been so interpreted.<sup>129</sup> Writing for the Court in *Curtiss-Wright*, Justice Sutherland distinguished between the government's powers over foreign and domestic affairs,<sup>130</sup> explaining that those powers differed both with respect to their nature and their sources.<sup>131</sup> Justice Sutherland argued that a narrow construction of the federal powers was appropriate with respect to domestic affairs because those powers otherwise belonged to the states.<sup>132</sup> However, he reasoned, because "the states severally never possessed international powers, such powers could not have been carved from the mass of state powers;"<sup>133</sup> thus, with respect to foreign affairs, there was no need to worry

<sup>128</sup> 299 U.S. 304 (1936).

<sup>129</sup> See Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127, 1131 (1999) ("Justice Sutherland's majority opinion in *Curtiss-Wright* represents the apex of the doctrine of plenary executive power over foreign affairs."); Golove, *supra* note 3, at 1088–89 n.36 (suggesting that the *Curtiss-Wright* "view strongly implies that the treaty power is plenary and is not subject to 'reserved' powers limitations of any kind"); Note, *supra* note 16, at 2499 (stating that the *Curtiss-Wright* view "militates against imposing federalism limitations on either form of international agreement"); Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 379 (2000) ("*Curtiss-Wright* is a striking departure from the usual view of constitutional law, which holds that the federal government is one of enumerated powers"); cf. Knowles, *supra* note 76.

[T]here are obstacles to translating the holding of *Lopez* from the commerce power to the treaty power. First, the treaty power may not be a delegated power at all but, rather, a power reserved to the federal government. In *United States v. Curtiss-Wright Export Corp.*, Justice Sutherland wrote that the treaty power was never an enumerated power because it never belonged to the states.

*Id.* at 767; Thomas Healy, Note, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726, 1742 (1998) (stating that in *Curtiss-Wright*, "the Court declared that foreign affairs powers are not 'enumerated powers' and are therefore not denied to the federal government if not enumerated").

<sup>130</sup> *Curtiss-Wright*, 299 U.S. at 315:

It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

<sup>131</sup> *Id.* ("The two classes of powers are different, both in respect of their origin and their nature.").

<sup>132</sup> *Id.* at 316 (stating that internal affairs, "the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states" (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 294 (1936))).

<sup>133</sup> *Id.*

about whether the federal government would be encroaching upon an area that had been reserved for the states.

Justice Sutherland suggested that “the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution,”<sup>134</sup> since they “obviously were transmitted to the United States from some other source.”<sup>135</sup> For purposes here, Justice Sutherland’s claim about the source of those powers need not be discussed.<sup>136</sup> Rather, what is important is that the *Curtiss-Wright* Court was careful to explain what those foreign affairs powers were — the “powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties.”<sup>137</sup> These are the powers which, even “if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.”<sup>138</sup> Indeed, when discussing “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations,”<sup>139</sup> the *Curtiss-Wright* Court pointed out that this power, “like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.”<sup>140</sup>

Justice Sutherland’s *Curtiss-Wright* opinion is more easily understood if one also considers another opinion that he authored that same year, *Carter v. Carter Coal Co.*<sup>141</sup> In *Carter Coal*, Justice Sutherland explained that the “powers which the general government may exercise are only those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers.”<sup>142</sup> He noted that states having differing laws in a variety of areas had “resulted in injurious confusion and embarrassment,”<sup>143</sup> and specifically mentioned that “state laws with respect to marriage and divorce present a case in point.”<sup>144</sup> While noting that the Commission on Uniform State Laws had had some success in bringing about uniformity among the states in this area of the law,<sup>145</sup> Justice Sutherland realized that it would have been more efficient to achieve

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<sup>134</sup> *Id.* at 318.

<sup>135</sup> *Id.* at 316.

<sup>136</sup> For the suggestion that neither the Court nor many commentators would endorse Justice Sutherland’s view, see Golove, *supra* note 3, at 1088–89 n.36.

<sup>137</sup> *Curtiss-Wright*, 299 U.S. at 318.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 320; see also Yoo, *supra* note 11, at 814 (suggesting that under *Curtiss-Wright*, “the President is constitutionally responsible for the conduct of foreign policy”).

<sup>140</sup> *Curtiss-Wright*, 299 U.S. at 320.

<sup>141</sup> 298 U.S. 238 (1936).

<sup>142</sup> *Id.* at 291.

<sup>143</sup> *Id.* at 292.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 293.

that same result in another way. However, he knew of no "easier and constitutional way to these desirable results through congressional action."<sup>146</sup> While Justice Sutherland was not addressing foreign affairs powers in *Carter Coal*, the opinion suggests that family law is one of those areas that falls within domestic affairs. As Justice Sutherland made clear in *Curtiss-Wright*, federal powers regarding domestic affairs are to be given a narrow construction.<sup>147</sup>

While the Court has never specified the limitations on the treaty power, it has often hinted that such limitations exist. For example, the Court in *Geofroy v. Riggs*<sup>148</sup> discussed the treaty power restraints found in the Constitution itself and, in addition, "those arising from the nature of the government itself and of that of the states." In *Holmes v. Jennison*,<sup>149</sup> Chief Justice Taney suggested that the possible subjects of the treaty power had to be "consistent with the nature of our institutions, and the distribution of powers between the general and state governments."<sup>150</sup> Indeed, even the *Holland* Court hinted that there might be federalism constraints on the treaty power. When considering what limitations might be imposed on the treaty power by the Tenth Amendment, Justice Holmes suggested that the Court "must consider what this country has become in deciding what that amendment has reserved."<sup>151</sup> However, consideration of what the country and its relation to the rest of the world have become might lead to very different conclusions, depending upon whether the growing interdependence of the world<sup>152</sup> is thought to militate in favor of or against augmentation of federal power. Just as the Court in *United States v. Lopez*<sup>153</sup> rejected the "[g]overnment's 'national productivity' reasoning"<sup>154</sup> because under it "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody) for example,"<sup>155</sup> the Court might well reject that world interdependence would permit the federal government to reach core state areas under the theory that their regulation might have international implications.<sup>156</sup>

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<sup>146</sup> *Id.*

<sup>147</sup> See *supra* note 132 and accompanying text.

<sup>148</sup> *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

<sup>149</sup> 39 U.S. 540 (1840).

<sup>150</sup> *Id.* at 569.

<sup>151</sup> *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

<sup>152</sup> Cf. *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) (discussing "this interdependent world of ours," and the implications that this interdependence has for congressional power).

<sup>153</sup> 514 U.S. 549 (1995).

<sup>154</sup> *Id.* at 564.

<sup>155</sup> *Id.*

<sup>156</sup> See Bradley, *supra* note 8, at 426 (suggesting that even under *Holland* the Tenth Amendment might not be irrelevant).

The *Lopez* Court struck down the Gun-Free School Zones Act because its passage exceeded Congress's authority under the Commerce Clause.<sup>157</sup> Starting with "first principles,"<sup>158</sup> such as that the "Constitution creates a Federal Government of enumerated powers,"<sup>159</sup> the *Lopez* Court suggested that the "limitations on the commerce power are inherent in the very language of the Commerce Clause."<sup>160</sup> The current Court would likely adopt an analogous tack in the context under discussion here, demarcating the particular areas that are within "foreign affairs,"<sup>161</sup> and offering the specific contours of the treaty power, fearing that it would otherwise be "difficult to perceive any limitations on federal power."<sup>162</sup>

Perhaps the Court would follow the lead of the *Holland* Court and consider whether the treaty involved "a national interest of very nearly the first magnitude"<sup>163</sup> or, perhaps, adopt some other method to determine which treaties might be made. However, it simply is not credible to believe that the current Court would put no limits on the treaty power.

In *Lopez*, the Court noted that:

[A] determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender "legal uncertainty."<sup>164</sup>

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<sup>157</sup> *Lopez*, 514 U.S. at 551.

<sup>158</sup> *Id.* at 552.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 553 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194–95 (1824)).

<sup>161</sup> *Cf. id.* at 558 (discussing "three broad categories of activity that Congress may regulate under its commerce power").

<sup>162</sup> *Id.* at 564.

<sup>163</sup> *Missouri v. Holland*, 252 U.S. 416, 435 (1920); see also Michael J. Gerhardt, *Federal Environmental Regulation in a Post-Lopez World: Some Questions and Answers*, 30 ENVTL. L. REP. 10980, 11011 (2000) ("At least in some parts of the country, migratory birds are unquestionably a resource shared by the United States and its neighboring countries. As such, they constitute an appropriate subject of international treaties."); Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 774 (2002) ("In *Missouri v. Holland*, the Court upheld the Migratory Bird Treaty Act as a necessary and proper means of executing Congress' Treaty Power. The Court stated that the conservation of endangered wildlife was a 'national interest of very nearly the first magnitude.'").

<sup>164</sup> *Lopez*, 514 U.S. at 566.



So, too, the Court would likely adopt some method, however legally uncertain, for distinguishing between appropriate and inappropriate uses of the treaty power. While it will be difficult to draw a clear line specifying which subjects are permissibly made the subjects of treaties and which are not because they are reserved for the states, the Court has not permitted similar worries to prevent it from limiting the power of the federal government.<sup>165</sup>

In his *Lopez* concurrence, Justice Kennedy recognized that in a sense “any conduct in this interdependent world of ours has an ultimate commercial origin or consequence.”<sup>166</sup> Yet, the Court imposed clear limits on Congress’s commerce power,<sup>167</sup> notwithstanding that everything is at least arguably linked to commerce. This bodes poorly for the claim that the treaty power should be plenary, because there is an important sense in which anything might affect international relations; the Court might admit that interconnectedness but nonetheless deny that therefore the treaty power is, or should be, plenary.

Were the current Court to decide whether the federal government has plenary treaty power under the current treaty jurisprudence, the Court would likely read *Holland* as suggesting that the Tenth Amendment offers (unspecified) substantive constraints on the treaty power and *Curtiss-Wright* as recognizing a clear difference between foreign and domestic powers<sup>168</sup> when describing the foreign powers as plenary.<sup>169</sup> Of course, implicit in such an analysis is the assumption that the foreign and domestic powers can be neatly distinguished,<sup>170</sup> which may simply be false.<sup>171</sup>

<sup>165</sup> See *id.* at 558–59.

<sup>166</sup> *Id.* at 580 (Kennedy, J., concurring).

<sup>167</sup> See *id.* at 558–59:

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power.

- [1] Congress may regulate the use of the channels of interstate commerce.
- [2] Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.
- [3] Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.

(citations omitted); cf. *Leisy v. Hardin*, 135 U.S. 100, 125 (1890) (“[T]here is difficulty in drawing the line between the municipal powers of the one government [i.e., the state government] and the commercial powers of the other [i.e., the congress].”).

<sup>168</sup> See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 321 (1936) (discussing the “marked difference between foreign affairs and domestic affairs”).

<sup>169</sup> Cf. *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (“[T]reaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations.”).

<sup>170</sup> See *United States v. Belmont*, 301 U.S. 324, 330 (1937) (“Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government.”); *Chae Chan Ping v. United States*, 130 U.S. 581, 605–06 (1889) (discussing “[t]he control of local matters being left to local authorities, and national matters

For example, it may not be possible to make a direct appeal to subject matter to make the relevant distinction; as the Second Circuit Court of Appeals has noted, “the Constitution does not require that an international agreement deal only with ‘matters of international concern.’”<sup>172</sup>

Yet, even if there are no clear subject matter limits on the treaty power, that does not mean that the power is plenary. To see what kind of limits might be placed on the treaty power, it will be helpful to examine the Court’s developing Commerce Clause jurisprudence more closely.

## II. REGULATION OF DOMESTIC RELATIONS AS PARADIGMATIC STATE POWER

Over the past several years, the Court has been narrowing Congress’s power under the Commerce Clause.<sup>173</sup> While not offering bright lines,<sup>174</sup> the Court has

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being entrusted to the government of the Union.”); Bradley, *supra* note 8, at 391 (“For much of this century, American foreign affairs law has assumed that there is a sharp distinction between what is foreign and what is domestic, between what is external and what is internal.”); Note, *supra* note 16.

The Framers vested the treaty power exclusively in the national government on the rationale that in international as opposed to domestic affairs, the government should be national rather than federal. As noted above, state sovereignty imposed no limit on the breadth of the treaty power; rather, any limit came from the definition of a “treaty.” The Framers’ fears that the treaty power would encroach on state sovereignty were assuaged by their common understanding that treaties were instruments of foreign as opposed to domestic affairs.

*Id.* at 2481–82. Justice Thomas seems to believe that matters of national concern can be distinguished fairly readily from those of merely local concern. See *Lopez*, 514 U.S. at 596 (Thomas, J., concurring) (“[T]he Constitution commits matters of ‘national’ concern to Congress and leaves ‘local’ matters to the States. . . . The matters of national concern are enumerated in the Constitution: war, taxes, patents, and copyrights, uniform rules of naturalization and bankruptcy, types of commerce, and so on.”).

<sup>171</sup> See Bradley, *supra* note 8.

As [the] decision [in *United States v. Lue*] illustrates, the line between what is domestic and what is international is difficult to define, the scope of what can plausibly be labeled international has grown substantially in recent years, and courts as a result are unlikely to restrict the treaty power much, if at all, based on this distinction. If federalism is to be protected in the treaty context, another approach must be found.

*Id.* at 455–56.

<sup>172</sup> *United States v. Lue*, 134 F.3d 79, 83 (2d Cir. 1998) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmt. c (1986)); see also Yoo, *supra* note 11, at 772 (noting that according to “standard internationalist thought,” treaties and congressional executive agreements “are not restricted by any subject matter limitations”).

<sup>173</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (striking down a civil provision in the Violence Against Women Act as beyond the commerce power); *United*

made quite clear that Congress's power is more limited than might have been thought from a cursory reading of *Wickard v. Filburn*.<sup>175</sup> Thus, it is simply no longer true that Congress's power under the Commerce Clause is virtually plenary,<sup>176</sup> and those seeking to determine whether there are limits on the Treaty Clause may well have to take the limitations on the Commerce Clause into account.

### *A. Family Law as a State Concern*

In several of the Court's recent decisions in which Congress's power under the Commerce Clause has been narrowed, the Court suggested that domestic relations law is paradigmatic of what has been left to the states.<sup>177</sup> On first blush, one might think the Court is adopting what Professor Merritt has termed the "territorial model of federalism."<sup>178</sup> Professor Merritt explains:

This model recognizes that there is a discernible boundary between the subjects fit for national regulation and those reserved for state governance. Territorialists argue that the national government is supreme in some areas, while states reign sovereign in others. Adherents of this model, for example, might declare that the national government directs foreign affairs while the states control domestic relations.<sup>179</sup>

Professor Merritt and others have rejected that the territorial model accounts for contemporary federalism jurisprudence because Congress invokes its commerce or

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*States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act of 1990 as beyond the commerce power).

<sup>174</sup> See *supra* note 159 and accompanying text.

<sup>175</sup> 317 U.S. 111 (1942) (finding that Congress was authorized under its Commerce power to impose wheat quotas). See *Lopez*, 514 U.S. at 560 (describing *Wickard* as "the most far reaching example of Commerce Clause authority over intrastate activity").

<sup>176</sup> Before *Lopez*, this analysis was generally accepted. See, e.g., Ackerman & Golove, *supra* note 12, at 857 (discussing the "post-New Deal world in which the powers of Congress are virtually plenary").

<sup>177</sup> See *infra* notes 197–99 and accompanying text; cf. *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868) ("To [the states] nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved.").

<sup>178</sup> See Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1564 (1994).

<sup>179</sup> *Id.* at 1564.

spending powers<sup>180</sup> to pass legislation that clearly affects the family.<sup>181</sup> Yet, the issue remains for two distinct reasons:

- 1) The Court has been narrowing the range of matters which Congress may regulate under the Commerce Clause and may well adopt the same stance with respect to the Spending Clause when presented with such an opportunity. Indeed, some commentators suggest that the Court's federalism jurisprudence cannot be implemented unless the Court imposes meaningful constraints on Congress's spending power.<sup>182</sup>

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<sup>180</sup> See Homer H. Clarke, Jr., *Children and the Constitution*, 1992 U. ILL. L. REV. 1 (1992).

Congress preempted an important segment of the law relating to children by enacting, as part of the Social Security Act, extensive provisions governing the establishment and enforcement of child support. States must comply with these provisions in order to receive federal grants for Aid to Families with Dependent Children (AFDC). By thus bypassing state sovereignty over a subject traditionally within the province of the states, Congress has enacted what is substantially a nationwide child support enforcement system.

*Id.* at 3; see also Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL'Y & L. 541, 543 (1998) ("In taking on its new, broad role in child support matters, Congress has exercised its 'spending power' primarily under Article I of the Constitution.").

<sup>181</sup> See Merritt, *supra* note 178, at 1565 ("The territorial model of federalism is problematic because it conflicts with modern concepts of Congress' power under the Commerce Clause, Spending Clause, and other constitutional provisions."); see also Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1995).

Over the last century, federalism had evolved from being a structural constraint on the powers of the federal government to a pragmatic accommodation of the interdependent relationship between the national and state governments. And as the chains of state sovereignty fell away, family law had emerged in recent years as an important arena of national interest, increasingly governed by national legislation and increasingly presided over by federal courts. Indeed, prior to the current Supreme Court term, one might easily have concluded that we were witnessing the inevitable surrender of perhaps the last remaining substantive legal area within the states' exclusive control.

*Id.* at 1788–89; Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 824 (1998) ("Why permit the national government to preempt virtually all significant regulatory fields, leaving the state governments with no significant jurisdiction remaining to them, while strictly forbidding the national government from imposing even modest regulatory responsibilities on state officials?"). But see *Equal Employment Opportunity Comm'n v. Wyoming*, 460 U.S. 226, 273 (1983) (Powell, J., dissenting) ("It is clear beyond question that state sovereignty always has been a basic assumption of American political theory. Although its contours have changed over two centuries, state sovereignty remains a fundamental component of our system that this Court has recognized time and time again.").

<sup>182</sup> See Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 198 (2001) ("Congress's largely unfettered spending power undermines the Constitution's protections for state autonomy."); Robert H. Bork & Daniel E. Troy, *Locating*

- 2) Those federal statutes affecting the family which the Court has upheld have not been characterized as regulating marriage, divorce, and child custody. A federal statute characterized as regulating these core areas might well not be upheld.

An example of the tack discussed in (2) is provided in the analysis offered to establish the constitutionality of the Child Support Recovery Act (CSRA),<sup>183</sup> which imposes criminal penalties on parents who fail to pay court-ordered child support when that child lives in another state. While the Act is clearly related to the family, it has been upheld in the circuits because the Act “falls within Congress’s power to regulate a ‘thing’ in interstate commerce”<sup>184</sup> or, perhaps, because of Congress’s power to regulate the failure of an individual to fulfill his or her duty to put something into interstate commerce.<sup>185</sup>

In *United States v. Faasse*,<sup>186</sup> the Sixth Circuit Court of Appeals upheld the CSRA, denying that the statute “regulate[d] a traditional area of family law best left

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*the Boundaries: The Scope of Congress’s Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL’Y 849, 893 n.168 (2002) (“Although Congress can plainly put conditions on the grants it makes to the States, there must be limits on its exercise of the Spending Clause power as well.”).

<sup>183</sup> 18 U.S.C. § 228 (2000).

<sup>184</sup> *United States v. Faasse*, 265 F.3d 475, 481 (6th Cir. 2001); *see also* *United States v. Johnson*, 114 F.3d 476 (4th Cir. 1997).

Specifically, we agree with those circuits which have held that the CSRA properly regulates, as a “thing in interstate commerce,” the obligation created by state-court child support orders when, as the Act requires, and as is the situation in this case, the obligated parent and the dependent child reside in different states.

*Id.* at 480; *cf.* *Reno v. Condon*, 528 U.S. 141, 148 (2000) (“The United States bases its Commerce Clause argument on the fact that the personal, identifying information that the DPPA [Driver’s Privacy Protection Act] regulates is a ‘thin[g] in interstate commerce,’ and that the sale or release of that information in interstate commerce is therefore a proper subject of congressional regulation.” (citing *United States v. Lopez*, 514 U.S. 549, 558–59 (1995))).

<sup>185</sup> *See Faasse*, 265 F.3d at 486 (“[I]t is immaterial that the CSRA regulates a defendant’s failure to put a thing in commerce.”); *see also* *United States v. Black*, 125 F.3d 454, 460 (7th Cir. 1997) (“[A] parent’s intentional failure to pay child support constitutes a conscious impediment to interstate commerce that Congress can criminalize just as it has other impediments to interstate commerce.”) (citing *United States v. Mussari*, 95 F.3d 787, 790 (9th Cir. 1996)); *United States v. Sage*, 92 F.3d 101 (2d Cir. 1996).

Sage argues that the Act is not within the Commerce Clause power. . . because it concerns not the sending of money interstate but the failure to send money . . . If Congress can take measures under the Commerce Clause to foster potential interstate commerce, it surely has power to prevent the frustration of an obligation to engage in commerce.

*Id.* at 105–06.

<sup>186</sup> 265 F.3d 475 (6th Cir. 2001).

to the states.”<sup>187</sup> The court noted both that the statute “regulates *inter-*, not *intra-* state economic activity”<sup>188</sup> and that the statute did not even “purport to regulate the non-economic activities associated with marriage, divorce, or childrearing under the guise that, in the aggregate, such activities substantially affect interstate commerce.”<sup>189</sup> The *Faasse* court thus upheld the statute without somehow implying that Congress had limitless powers under the Commerce Clause<sup>190</sup> and, further, showed how the Act did not involve an attempt by Congress to usurp the core functions of the state with respect to marriage, divorce, and custody.<sup>191</sup>

To illustrate how the Court might analyze a treaty involving family matters where the treaty was going to be upheld, consider how the lower courts have analyzed the International Child Abduction Remedies Act (ICARA),<sup>192</sup> which was passed to implement the Hague Convention on the Civil Aspects of International Child Abduction, Article 19.<sup>193</sup> The courts make it clear that under the ICARA, the courts are to determine whether an abduction has taken place rather than whether

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<sup>187</sup> *Faasse*, 265 F.3d at 487–88. A Sixth Circuit panel had previously held otherwise. See *United States v. Faasse*, 227 F.3d 660 (6th Cir. 2000), *vacated by* 234 F.3d 312 (6th Cir. 2000).

Put simply, the CSRA is not about recovery of child support payments avoided by interstate flight. Rather, the Act regulates, through the criminal law, obligations owed by one family member to another, using diversity of residence as a jurisdictional “hook.” This realization is troubling, for the States possess primary authority for defining and enforcing both the criminal law and the law of domestic relations.

*Id.* at 664.

<sup>188</sup> *Faasse*, 265 F.3d at 488.

<sup>189</sup> *Id.*; see also *Black*, 125 F.3d at 462 (“[T]he CSRA does not attempt to regulate domestic relations.”); *Sage*, 92 F.3d at 107 (“As noted above, the Act does not attempt to regulate domestic relations.”).

<sup>190</sup> *But see Faasse*, 265 F.3d at 494 (Batchelder, J., dissenting) (“The majority’s construction [of the commerce power] renders the commerce component meaningless. Such a reading violates the intent of the Framers, and transforms the Commerce Clause . . . into a virtually limitless federal police power, contrary to the Supreme Court’s recent holdings in *Lopez* and *Morrison*.”).

<sup>191</sup> *Cf. Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504 (1847).

A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. They appertain to the State sovereignty as exclusively as powers exclusively delegated appertain to the general government.

*Id.* at 588.

<sup>192</sup> See *Diorinou v. Mezitis*, 237 F.3d 133, 140 (2d Cir. 2001) (discussing the Hague Convention and its domestic implementing statute, ICARA); see also *Whallon v. Lynn*, 230 F.3d 450, 452 (1st Cir. 2000).

<sup>193</sup> See *Whallon*, 230 F.3d at 452 (discussing the Hague Convention).

an underlying custody award was correctly made.<sup>194</sup> As the Second Circuit noted in *Blondin v. Dubois*,<sup>195</sup> "the Hague Convention is not designed to resolve underlying custody disputes."<sup>196</sup>

In *United States v. Morrison*,<sup>197</sup> the Court worried that its upholding the civil provision in the Violence Against Women Act might imply that Congress would also regulate under the Commerce Clause "family law and other areas of traditional state regulation."<sup>198</sup> The Court expressed the same worry in *Lopez*, namely, were it to accept the government's reasoning, "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example."<sup>199</sup> The question at hand is whether the Court would have similar reservations with respect to treaties that it viewed as regulating those core areas of family law.

Some multilateral treaties are designed to protect human rights rather than, for example, secure commercial advantages.<sup>200</sup> Human rights are clearly a matter of international concern and thus would seem subject to treaty.<sup>201</sup> Yet, human rights treaties might also be thought to implicate paradigmatic family concerns<sup>202</sup> and thus

<sup>194</sup> See *Blondin v. Dubois*, 238 F.3d 153, 161 (2d Cir. 2001); *Diorinou*, 237 F.3d at 140.

<sup>195</sup> 238 F.3d 153 (2d Cir. 2001).

<sup>196</sup> *Id.* at 161.

<sup>197</sup> 529 U.S. 598 (2000).

<sup>198</sup> *Id.* at 615.

<sup>199</sup> *United States v. Lopez*, 514 U.S. 549, 564–65 (1995); see also *id.* at 585 (Thomas, J., concurring) ("[I]t seems to me that the power to regulate 'commerce' can by no means encompass authority . . . to regulate marriage."); Dailey, *supra* note 181, at 1789:

*Lopez* did not directly concern federal legislation on the family, yet the case provided the opportunity for an otherwise deeply divided Court to unite around the principle that family law constitutes a clearly defined realm of exclusive state regulatory authority. Both the majority and the dissent invoked the regulation of "marriage, divorce, and child custody" as a paradigmatic example of lawmaking power beyond the constitutional competence of the federal government.

<sup>200</sup> See Bradley, *supra* note 8, at 397 ("[T]here are today a host of multilateral human rights treaties that purport to confer a variety of rights that individuals can assert against their own governments.").

<sup>201</sup> Neuman, *supra* note 43, at 46–47:

Even if the grant of the treaty power includes some inherent limit requiring treaties to address matters of legitimate international concern, there can be no doubt today that human rights are among those matters. . . . The United States has not only made human rights conditions in other countries a major focus of its foreign policy, but has even explained military interventions in other countries by the need to protect the human rights of their own nationals. Reciprocal guarantees of human rights subject the United States to international scrutiny of its human rights record while facilitating American and international scrutiny of other countries' records.

<sup>202</sup> Cf. D. Marianne Brower Blair, *The Impact of Family Paradigms, Domestic Constitutions, and International Conventions on Disclosure of an Adopted Person's*

involve an area that is constitutionally committed to the states.<sup>203</sup> Professor Bradley suggests that ratification of the Convention on the Rights of the Child, for example, would undermine state regulation of family law because the Convention “purports to give children both certain procedural rights as well as substantive rights concerning such things as expression, belief, association, privacy, [and] education.”<sup>204</sup> Thus, the Court might suggest that the Senate could not ratify the Convention (at least without making the necessary RUDs) or that Congress could not pass implementing legislation (assuming that the Convention was not self-executing), precisely because it would thereby regulate an area reserved for the states.<sup>205</sup> The claim here, of course, is not that the effort to promote human rights within this country and abroad should be stopped,<sup>206</sup> but merely that those commentators who believe such treaties are immune from constitutional invalidation because they involve matters of national or international concern<sup>207</sup> are

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*Identities and Heritage: A Comparative Examination*, 22 MICH. J. INT’L L. 587, 642 (2001) (discussing how the “development of human rights treaties and customary norms, as well as the rapid growth of conventions regulating transnational relationships, has extended the impact of international law to the realm of family law”).

<sup>203</sup> See Bradley & Goldsmith, *supra* note 46, at 400 (“[C]onstitutional principles relating to federalism suggest that some matters [related to human rights] should be regulated by state, rather than federal, officials.”).

<sup>204</sup> Bradley, *supra* note 8, at 402 n.61; see also Clarke, Jr., *supra* note 180, at 36–38 (describing how the United Nations Conventions on the Rights of the Child might conflict with state law in some areas); Resnik, *supra* note 65, at 666 (“Federalism concerns have also been proffered as the rationale for the United States’s refusal to ratify the Convention on the Rights of the Child.”).

<sup>205</sup> See Susan Kilbourne, *The Convention on the Rights of the Child: Federalism Issues for the United States*, 5 GEO. J. FIGHTING POVERTY 327, 327 (1998):

The Convention on the Rights of the Child (Convention) deals almost exclusively with areas of law traditionally thought to be reserved to the states, and the Constitution affords the federal government only limited power to legislate in these areas of state concern. The question, therefore, is whether Congress has the power to pass legislation implementing the Convention on the Rights of the Child.

*Cf. Note, supra* note 16, at 2478 (“For example, the United States has signed or ratified agreements requiring extensive changes in areas including family law.”). The author of the Note cited the Convention on the Rights of the Child without discussing the required implementing legislation. *Id.* at 2478 n.2.

<sup>206</sup> See Golove, *supra* note 3, at 1302:

The United States enters human rights treaties in order to secure the promises of other states to abide by basic human rights standards. Obtaining these promises, and the enforcement mechanisms that accompany them, are widely recognized as national interests of the highest magnitude, implicating, *inter alia*, our national security and economic interests.

<sup>207</sup> See *id.* at 1260 (suggesting that *Holland* makes clear that treaties may be made as long as they “[deal] with a matter of national interest”).



not paying close enough attention to the Court's articulated dual-sovereignty jurisprudence.

### *B. The Tenth Amendment*

The Tenth Amendment to the United States Constitution reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>208</sup> Commentators seem convinced that the Tenth Amendment does not limit the reach of the treaty power at all.<sup>209</sup> Some of the lower courts have suggested that the Tenth Amendment does not pose much of an obstacle for treaties, although these courts are more guarded in how they describe the relevant jurisprudence. For example, in *United States v. Lue*,<sup>210</sup> the Second Circuit pointed out that "[s]ince the Treaty Power was delegated to the federal government, whatever is within its scope is not reserved to the states: the Tenth Amendment is not material."<sup>211</sup> The court explained, "Many matters, then, may appear to be 'reserved to the States' as regards domestic legislation if Congress does not have power to regulate them; but they are not reserved to the states so as to exclude their regulation by international agreement."<sup>212</sup>

The *Lue* Court's observation — that whatever is within the scope of the treaty power is clearly not reserved for the states — reflects the position articulated by the *Holland* Court. Justice Holmes had noted that for those seeking to establish the unconstitutionality of the migratory bird treaty, "it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly."<sup>213</sup> Both the *Holland* Court and the *Lue* Court were careful *not* to specify what is within the scope of the treaty power. While both courts made clear that some areas of the law might be subject to state control absent a treaty, and subject to federal law where

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<sup>208</sup> U.S. CONST. amend. X.

<sup>209</sup> See Neuman, *supra* note 43, at 46 ("The reach of the separately enumerated treaty power to matters ordinarily of local concern, free from any 'invisible radiation from the general terms of the Tenth Amendment,' was settled in *Missouri v. Holland*."); Vazquez, *supra* note 93, at 1319 (arguing that *Holland* held that there are no Tenth Amendment subject-matter limitations on the treaty power).

<sup>210</sup> 134 F.3d 79 (2d Cir. 1998).

<sup>211</sup> *Id.* at 85.

<sup>212</sup> *Id.*; cf. *Kolovrat v. Oregon*, 366 U.S. 187, 190 (1961) ("[S]tate policies as to the rights of aliens to inherit must give way under our Constitution's Supremacy Clause to 'overriding' federal treaties and conflicting arrangements."); *Clark v. Allen*, 331 U.S. 503, 508 (1947) ("If, therefore, the provisions of the treaty have not been superseded or abrogated, they prevail over any requirements of California law which conflict with them.") (citing *Hauenstein v. Lynham*, 100 U.S. 483, 488–90 (1879)).

<sup>213</sup> *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

a treaty is in place,<sup>214</sup> neither claimed that *all* areas normally subject to state control can appropriately be regulated by treaty.

The Restatement (Third) of the Foreign Relations Law of the United States suggests:

The power to make treaties conferred upon the President, subject to the advice and consent of the Senate, is a power delegated to the United States and is of status equal to that of other delegated powers of the United States under the Constitution. The United States also has authority to make international agreements other than treaties. Consequently, the Tenth Amendment, reserving to the several States the powers not delegated to the United States, does not limit the power to make treaties or other agreements.<sup>215</sup>

However, the Restatement and various commentators<sup>216</sup> fail to include qualifications that the *Holland* Court and the Second Circuit were careful to make; namely, that *whatever is in the scope* of the treaty power will not be protected by the Tenth Amendment, and that Congress can reach *some* areas by treaty that it could not otherwise reach.

To say that whatever is in the scope of the treaty power is not subject to Tenth Amendment limitations might rightly be criticized as merely asserting a truism and hence unhelpful. Yet, courts offer such truisms, at least in part, because of the example set by the United States Supreme Court. In *New York v. United States*,<sup>217</sup> the Court noted that “the text of the Tenth Amendment itself . . . is essentially a tautology”<sup>218</sup> because the powers of the state governments begin where the powers of the Federal government end.<sup>219</sup>

Were the Court’s view that the Tenth Amendment is simply a tautology, the Court would be implying that the Tenth Amendment does no work. Basically, one

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<sup>214</sup> See *supra* notes 92–93, 108–09 and accompanying text; see also *Webb v. O’Brien*, 263 U.S. 313, 321–22 (1923) (“In the absence of a treaty to the contrary, the State has power to deny to aliens the right to own land within its borders.”) (citing *Terrace v. Thompson*, 263 U.S. 197 (1923)); cf. *Terrace v. Thompson*, 263 U.S. 197, 217 (1923) (“[W]hile Congress has exclusive jurisdiction over immigration, naturalization and the disposal of the public domain, each State, in the absence of any treaty provision to the contrary, has power to deny to aliens the right to own land within its borders.”) (citing *Hauenstein*, 100 U.S. at 484, 488).

<sup>215</sup> See RESTATEMENT (THIRD), *supra* note 8, § 302 cmt. d.

<sup>216</sup> See, e.g., Golove, *supra* note 3, at 1088 (“If [the treaty power] is a separate ‘delegated’ power, then no question of ‘reserved’ powers under the Tenth Amendment can arise.”).

<sup>217</sup> 505 U.S. 144 (1992).

<sup>218</sup> *Id.* at 156–57.

<sup>219</sup> See Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 73 (1989) (“This approach to the Tenth Amendment assumes that the task is simply to describe the limits of federal power; whatever remains is state sovereignty.”).

would consult other parts of the Constitution to determine the powers of the federal government, and the Tenth Amendment would simply be an inert reminder that the states have powers too. Yet, the Court does not view the Tenth Amendment as a “dead letter”<sup>220</sup> but, instead, as a confirmation “that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.”<sup>221</sup> Thus, the Court might well be willing to suggest that the idea behind the Tenth Amendment, if not the text itself, imposes a limitation on the treaty power,<sup>222</sup> and would deny that *Holland* precludes a Tenth Amendment challenge to the treaty power.<sup>223</sup>

In *Alden v. Maine*,<sup>224</sup> the Court suggested that “the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today.”<sup>225</sup> The Court based its position on the understanding of “the Constitution’s structure, its history, and the authoritative interpretations by this Court.”<sup>226</sup> Certainly, the *Alden* majority’s interpretations of both the Constitution’s history and structure, and of the relevant jurisprudence are controversial and not shared by various members of the Court. For example, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, suggested in his *Alden* dissent that the “Court’s enhancement of the [Eleventh] Amendment [is] at odds with constitutional history and at war with the conception of divided sovereignty that is the essence of American federalism.”<sup>227</sup> Yet, the point here is not whether the *Alden* majority accurately reflects constitutional history or the developing state sovereignty jurisprudence, but only that the majority view

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<sup>220</sup> Cf. *Hill v. Colorado*, 530 U.S. 703, 748–49 (2000) (Scalia, J., dissenting) (“[I]f protecting people from unwelcome communications (the governmental interest the Court posits) is a compelling state interest, the First Amendment is a dead letter.”).

<sup>221</sup> *New York v. United States*, 505 U.S. 144, 157 (1992).

<sup>222</sup> Cf. *Printz v. United States*, 521 U.S. 898, 936 (1997) (Thomas, J., concurring) (“[T]he Tenth Amendment affirms the undeniable notion that under our Constitution, the Federal Government is one of enumerated, hence limited, powers.”); White, *supra* note 111, at 9: [An] assumption of the orthodox regime of constitutional foreign relations jurisprudence was that . . . the exercise of any foreign relations powers by the federal government needed to respect the reserved powers of the states under the structure of sovereignty created by the Constitution. Alongside the treaty-consciousness of orthodox constitutional foreign relations jurisprudence was a reserved-powers consciousness.

<sup>223</sup> Some commentators seem to read it that way. See, e.g., Vazquez, *supra* note 93, at 1319; Healy, *supra* note 129, at 1727 (discussing writers who believe “that the treaty power, unlike the Commerce Clause, is not limited by concerns of federalism. Instead, it gives the federal government plenary power to regulate matters of both national and local concern”).

<sup>224</sup> 527 U.S. 706 (1999).

<sup>225</sup> *Id.* at 713.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 760 (Souter, J., dissenting).

expressed in *Alden* is likely to have implications for the issues under discussion here.

Suppose that a case involving the treaty power were to implicate core areas of state regulation such as family law. It would not be surprising if the Court held that certain reserved powers of the states cannot be encroached upon by the federal government because otherwise the state's fundamental sovereignty would be undermined. The Court would explain that the "limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government . . . underscore the vital role reserved to the States by the constitutional design"<sup>228</sup> and that the Tenth "Amendment confirms the promise implicit in the original document"<sup>229</sup> that the federal government will not be permitted to usurp those powers. Following *Alden*, the Court would suggest that permitting Congress to circumvent state sovereignty via the treaty power would undermine "the sovereign status of the States . . . [and] the dignity and essential attributes inhering in that status."<sup>230</sup> The Court would conclude that certain core areas of state regulation cannot be reached by the federal government even via the treaty power.<sup>231</sup>

### C. Article II as Immunizer

Commentators suggest that because the treaty power is located in Article II<sup>232</sup> and the commerce power is located in Article I,<sup>233</sup> there is good reason to think that the former, unlike the latter, will not be limited because of federalism concerns.<sup>234</sup> For support, they can cite Justice Holmes's point in *Holland* that "there may be matters of the sharpest exigency for the national well being that an act of Congress

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<sup>228</sup> *Id.* at 713.

<sup>229</sup> *Id.* at 714.

<sup>230</sup> *Alden*, 527 U.S. at 714.

<sup>231</sup> *See id.* at 706–07.

<sup>232</sup> *See* U.S. CONST. art. II, § 2, cl. 2 ("[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.").

<sup>233</sup> *See* U.S. CONST. art. I, § 8, cl. 3 ("[The Congress shall have Power] to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

<sup>234</sup> *See, e.g.,* Golove, *supra* note 3, at 1081 ("A number of provisions are directly pertinent to the inquiry. Most important is the Treaty Clause itself, which resides not in Article I, but in Article II."); Yoo, *supra* note 11, at 818 ("As a textual matter, the Constitution locates treaties in Article II, which implies that they need not live within the same boundaries that contain Article I."); *id.* at 827 ("While treaties should not be self-executing in areas of plenary congressional authority, they should reach areas that lie outside of congressional powers due to Article I or Tenth Amendment limits."); Note, *supra* note 16, at 2481 ("Because the sovereignty guaranteed to the states under the Tenth Amendment is defined negatively, the specific textual delegation indicates that the Framers did not intend for the residual sovereignty of the states to be a limit on the treaty power.").

could not deal with but that a treaty followed by such an act could,"<sup>235</sup> which basically suggests that the treaty power is not limited in reach to those matters which Congress may regulate pursuant to its Article I powers.<sup>236</sup> Yet, the location of the power may be less helpful than originally thought. Neither Article I nor Article II explicitly gives the federal government the power to regulate family law, and it is not clear that the treaty power broadens the power of the federal government beyond its enumerated powers in Articles I and II.<sup>237</sup>

The *Alden* Court suggested that the states "retain 'a residuary and inviolable sovereignty'"<sup>238</sup> which must be respected. The Court might well hold a treaty unconstitutional if it did not "treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."<sup>239</sup> Just as the Court in *New York* suggested that the Tenth Amendment "directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power,"<sup>240</sup> the Court might make the same claim with respect to an Article II power.

The claim here is not that a limitation on the treaty power is mandated by the existing jurisprudence, but merely that the Court's current resolve to assure that the states will be accorded "the dignity that is consistent with their status as sovereign entities"<sup>241</sup> and the "'respect owed them as' joint sovereigns"<sup>242</sup> makes it very unlikely that the Court would agree that the treaty power is virtually plenary. The Court could hardly claim that the "Constitution preserves the sovereign status of the States . . . [by reserving for] them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that

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<sup>235</sup> *Missouri v. Holland*, 252 U.S. 416, 433 (1920); see also Vazquez, *supra* note 93, at 1342 ("The fact is that the power to make treaties is not just the power to make laws on the same subjects by other means; it is the power to make laws on subjects not otherwise falling within Congress's legislative power.").

<sup>236</sup> See Yoo, *supra* note 11, at 827 (offering *Holland* as a partial explanation and justification for the nonlimitation of the treaty power by the Tenth Amendment); see also John C. Yoo, Rejoinder, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2223-24 (1999) ("[T]he Supreme Court [in *Holland*] denied that the Tenth Amendment limited the treaty power's scope.").

<sup>237</sup> See *supra* notes 118-21 and accompanying text.

<sup>238</sup> *Alden v. Maine*, 527 U.S. 706, 715 (1999) (citing THE FEDERALIST No. 39 (James Madison)). For the language itself, see THE FEDERALIST No. 39, at 213 (James Madison) (Clinton Rossiter ed., 1961).

<sup>239</sup> *Alden*, 527 U.S. at 748.

<sup>240</sup> *New York v. United States*, 505 U.S. 144, 157 (1992).

<sup>241</sup> *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002).

<sup>242</sup> *Id.* at 765 (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

status”<sup>243</sup> if the Constitution would permit that sovereign status, dignity, and sovereignty to disappear whenever the treaty power was invoked.

The *Alden* Court noted that “in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution.”<sup>244</sup> The Court thereby recognized that Congress can, in some circumstances, make use of its Section 5 enforcement power under that amendment to “assert an authority over the States which would be otherwise unauthorized by the Constitution.”<sup>245</sup> Yet, the treaty power is an enumerated power discussed in the original Constitution and the *Alden* analysis suggests that the treaty power, like the other enumerated powers, would be subject to the constraints imposed by that original document.

Those advocating a broad construction of the treaty power would not be helped by the Court’s admission that the Fourteenth Amendment expanded federal power.<sup>246</sup> That additional “enforcement power is ‘remedial’ in nature”<sup>247</sup> and would not seem to affect the breadth of the treaty power, especially given the Court’s current trend towards restricting Congress’s powers under Section 5 of the Fourteenth Amendment.<sup>248</sup> Both because the current Court views the original Constitution as incorporating robust protections of state sovereignty and because the Court has been narrowing the change in the federal-state relationship brought about by the Civil War Amendments, the Court is extremely unlikely to accept the current view of most commentators regarding the breadth of the treaty power.

### III. CONCLUSION

The Court has recognized that “the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court’s most difficult and celebrated cases.”<sup>249</sup> Yet, the difficulty in ascertaining constitutional lines has not prevented the Court from drawing them in the past, and there is no reason to think that this difficulty will dissuade the Court from drawing them with respect to the limitations on the treaty power.

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<sup>243</sup> *Alden*, 527 U.S. at 714.

<sup>244</sup> *Id.* at 756.

<sup>245</sup> *Id.*

<sup>246</sup> See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 637 (1999) (“[A]ppropriate” legislation pursuant to the Enforcement Clause of the Fourteenth Amendment could abrogate state sovereignty.”).

<sup>247</sup> *Id.* at 638.

<sup>248</sup> See *United States v. Morrison*, 529 U.S. 598, 625–26 (2000) (“[P]rophylactic legislation under §5 must have a ‘congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’”) (citing *Fla. Prepaid Bd.*, 527 U.S. at 639).

<sup>249</sup> *New York v. United States*, 505 U.S. 144, 155 (1992).

While clearly believing in the benefits of federalism,<sup>250</sup> the *New York* Court suggested that the Court's "task would be the same even if one could prove that federalism secured no advantages to anyone."<sup>251</sup> The Court explained that its task does not consist in "devising . . . [its] preferred system of government, but of understanding and applying the framework set forth in the Constitution."<sup>252</sup> Thus, the Court might well limit the treaty-making power, even if national and world interests might thereby be sacrificed,<sup>253</sup> on the theory that the Constitution must be amended if the Federal Government is to be permitted to regulate certain areas reserved for the states.

The *New York* Court recognized that "Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States."<sup>254</sup> In *Gregory v. Ashcroft*,<sup>255</sup> the Court suggested, "As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States . . . [and] Congress may legislate in areas traditionally regulated by the States."<sup>256</sup> Yet, the Court was not thereby suggesting that all areas of state law may be federally regulated.<sup>257</sup> Rather, precisely because Congress can *only* legislate in light

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<sup>250</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 457–60 (1991); see also *New York*, 505 U.S. at 157 ("The benefits of this federal structure have been extensively cataloged elsewhere.") (citing *Gregory*, 501 U.S. at 457–60).

<sup>251</sup> *New York*, 505 U.S. at 157.

<sup>252</sup> *Id.*

<sup>253</sup> Some commentators seem too optimistic that promotion of the national interest will suffice to give Congress the power. See, e.g., Damrosch, *supra* note 65, at 530 ("If a decision is made at the federal level, concurred in by two-thirds of the Senate, that the national interest would be served by entering into a treaty, then state-centered interests do not justify blunting federal judicial enforcement of an otherwise self-executing treaty.").

<sup>254</sup> *New York*, 505 U.S. at 162; see also Golove, *supra* note 3, at 1101:

[F]rom the beginning, treaties have invaded the most sensitive spheres of state autonomy and consequently have periodically provoked intense resentment and controversy. Indeed, the most serious conflicts have arisen from treaties affording rights to aliens and hence interfering with state and local policies concerning race — a subject which, to put it mildly, was at the core of traditional notions of state autonomy.

<sup>255</sup> 501 U.S. 452 (1991).

<sup>256</sup> *Id.* at 460.

<sup>257</sup> See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2231 (1998) ("The insistence on an articulable fixed boundary — of some 'enclave' for state regulation — and the government's inability to satisfy the Court that its theories provided any boundary between federal and state governmental authority, are central to understanding the *Lopez* turn.").

of one of its enumerated powers,<sup>258</sup> there may well be areas that Congress will be unable to regulate — even in pursuance of a treaty — notwithstanding that the treaty power exceeds the powers contained in Article I.

Even if the prediction offered here is correct, it is not at all clear how the Court will go about carving out a protected area. The Court might try to erect some sort of formal system to determine which areas were not subject to treaty,<sup>259</sup> although the Justices' differing commitments to formalistic approaches makes prediction perilous in this area.<sup>260</sup> In any event, the current Court takes federalism very seriously, having suggested that it is so basic that it is something every schoolchild knows<sup>261</sup> and that it offers basic protections against overreaching by both the state and federal governments.<sup>262</sup>

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<sup>258</sup> See *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."); *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers.").

<sup>259</sup> See Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 200 ("[T]he Court embraces 'doctrinal formalism,' by which I mean the Court takes a formalist approach to constructing a judicially enforceable doctrine."); cf. Resnik, *supra* note 65, at 619–20:

*Categorical federalism* is the term I offer for this form of reasoning. Categorical federalism's method first assumes that a particular rule of law regulates a single aspect of human action: Laws are described as about "the family," "crime," or "civil rights" as if laws were univocal and human interaction similarly one-dimensional. Second, categorical federalism relies on such identification to locate authority in state or national governments and then uses the identification as if to explain *why* power to regulate resides within one or another governmental structure. Third, categorical federalism has a presumption of exclusive control — to wit, if it is family law, it belongs only to the states. Categories are thus constructed around two sets of human activities, the subject matter of regulation and the locus of governance, with each assumed to have intelligible boundaries and autonomous spheres.

<sup>260</sup> See Caminker, *supra* note 259, at 245 ("[I]t is precisely Justice Scalia's devotion to doctrinal formalism that makes prediction hazardous here.").

<sup>261</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.").

<sup>262</sup> See *id.* at 458 ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); see also Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 18 (1988) ("The difficulty with this argument is that it overlooks the purpose of preserving state autonomy: the principal role of independent state governments is to check the power of the federal government.").



Even were the Court unwilling to reserve a particular area categorically for the states,<sup>263</sup> the Court at the very least would require Congress to have a “jurisdictional hook”<sup>264</sup> before regulating in areas traditionally reserved for the states, and would likely be quite unwilling to interpret open-ended congressional powers like the treaty power<sup>265</sup> very broadly.<sup>266</sup> The claim here is neither that the Court would be offering the “correct” view nor that the Court could justify its position by appealing to history, the structure of the Constitution, or even the Framers’ intent.<sup>267</sup>

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<sup>263</sup> Cf. Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 3 (discussing “[p]ower’ federalism, which seeks to articulate substantive limits on federal power, particularly on Congress’s power to supplant state regulatory authority by regulating private conduct *directly*”) (emphasis added).

<sup>264</sup> See *United States v. Kallestad*, 236 F.3d 225, 228–29 (5th Cir. 2000) (describing a federal pornography statute as containing a “jurisdictional hook” because it in some way made use of the mail or other forms of interstate transportation); see also *United States v. Buculei*, 262 F.3d 322, 328–29 (2001), *cert. denied*, 535 U.S. 963 (2002) (“[Section] 2251(a) contains an explicit jurisdictional element . . . [mandating] that the defendant ‘knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed[.]’”).

<sup>265</sup> See *In re Tiburcio Parrott*, 1 F. 481, 508 (D. Cal. 1880) (noting that “the treaty-making power is conferred by the constitution in unlimited terms”).

<sup>266</sup> Cf. Healy, *supra* note 129, at 1740:

[T]he Court independently identifies point X — the line of state sovereignty — and declares that federal action past this point is impermissible. . . . Indeed, [the Court] declares that protecting state sovereignty is essential to preserving liberty. It would seem difficult for the Court to surrender that sovereignty simply because Congress was clever enough to package the Brady Act in a treaty.

<sup>267</sup> See *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) (“To be sure, one conclusion that could be drawn from *The Federalist Papers* is that the balance between national and state power is entrusted in its entirety to the political process.”); Golove, *supra* note 3, at 1078:

Notwithstanding two hundred years of impassioned efforts by states’ rights advocates to deny the obvious, the text and structure of the Constitution, as well as original intent, leave little room for serious debate. Faced with overwhelming arguments against their view, states’ rights proponents have understandably chosen to retreat to arguments from first principles rather than attend to careful analysis of text and structure.

See also Robert Anderson IV, “*Ascertained in a Different Way*”: *The Treaty Power at the Crossroads of Contract, Compact, and Constitution*, 69 GEO. WASH. L. REV. 189, 194 (2001) (“The Framers, however, considered including a subject-matter limitation on the Treaty Power — and rejected it.”). But see Massey, *supra* note 219, at 95:

Furthermore, too much emphasis can be placed on *The Federalist*. *The Federalist* essays were basically newspaper propaganda designed to secure an immediate political result. Like all political campaigners, Hamilton may not have been above a little strategic prevarication; his principal co-author later admitted that *The Federalist* essays were branded with the “zeal of advocates.”

Nonetheless, it is most unlikely<sup>268</sup> that the Court will allow the treaty power to undermine the limitations that have been imposed on Congress's powers under the Commerce Clause<sup>269</sup> and Section 5 of the Fourteenth Amendment,<sup>270</sup> especially because the treaty power would be a very tempting route<sup>271</sup> by which to circumvent<sup>272</sup> what the current Court would likely suggest is reserved for the states.<sup>273</sup>

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<sup>268</sup> See Althouse, *supra* note 75, at 796 ("It is unlikely that today's Supreme Court would accept the general assertion that the treaty power simply transcends the limits of federalism."); Michael J. Podolsky, Comment, *U.S. Wetlands Policy, Legislation, and Case Law as Applied to the Wise Use Concept of the Ramsar Convention*, 52 CASE W. RES. L. REV. 627, 651–52 (2001) ("Notwithstanding conventional wisdom and the fact that *Missouri* remains good law, it is important to note that some commentators question the immunity of the treaty power from federalism limitations imposed on other federal powers such as the Commerce Clause.").

<sup>269</sup> See *supra* notes 158–60 and accompanying text (discussing the Court's indicia for the proper exercise of Congress's commerce power). But see Neuman, *supra* note 43, at 47–48 ("The Supreme Court's reinvigoration of the inherent limits of the Commerce Clause in *Lopez* is unlikely to foreshadow so radical a change.").

<sup>270</sup> See *Boerne v. Flores*, 521 U.S. 507, 530 (1997) ("While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved.").

<sup>271</sup> See Bradley, *supra* note 8, at 400:

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

<sup>272</sup> See Althouse, *supra* note 75, at 793:

Those who think there is no good reason to reserve anything for the states — perhaps the treaty litigation enthusiasts — may quickly pronounce the treaty power to be a means of circumventing the federalism limitations on commerce and Fourteenth Amendment power that recent case law has thrown in the path of litigants.

<sup>273</sup> Cf. White, *supra* note 111, at 10:

[A]n exercise in foreign relations policymaking undertaken by the federal government might not be squarely located within one of the enumerated federal foreign affairs powers, nor be properly analogized to one of them. If so, the exercise had the potential to radiate into the sphere of reserved state powers. Such action was constitutionally inappropriate, and judges would need to draw a boundary line to preserve the integrity of the constitutional design.

Citing *Missouri v. Holland*<sup>274</sup> and other cases,<sup>275</sup> commentators suggest that the treaty power is subject to, at most, a few constitutional constraints, for example, those specifically guaranteed by the Bill of Rights.<sup>276</sup> Yet, those cases do not clearly establish the virtually plenary nature of the treaty power, and the Court has been willing to ignore much clearer and more settled case law to implement its new-found federalism. The Court's recent rediscovery of the Tenth<sup>277</sup> and Eleventh<sup>278</sup> Amendments suggests that the common understanding of the breadth of the treaty power<sup>279</sup> may well have to be reexamined. If the Court continues to subscribe to its current states' rights jurisprudence,<sup>280</sup> then whole areas of law will likely be viewed as impermissible subjects of treaties, regrettable international consequences arising from such a position notwithstanding.

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<sup>274</sup> 252 U.S. 416 (1920).

<sup>275</sup> For example, both *Reid v. Covert*, 354 U.S. 1 (1957), and *Boos v. Barry*, 485 U.S. 312 (1988), are cited as cases limiting the reach of the treaty power.

<sup>276</sup> See *Reid*, 354 U.S. at 17:

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.

The *Reid* Court suggested that U.S. citizens were entitled to a civilian trial if being tried by a U.S. court for a criminal offense like murder. See *id.* at 20–21.

A different issue would be implicated if the individuals were being tried in a foreign court. See *Neely v. Henkel*, 180 U.S. 109, 123 (1901):

But such [United States] citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.

<sup>277</sup> In *New York v. United States*, 505 U.S. 144 (1992), the Court struck down a take-title provision of a statute designed to facilitate the siting of low-level radioactive wastes. In *Printz v. United States*, 521 U.S. 898 (1997), the Court struck down certain provisions of the Brady Bill which would have commandeered local law enforcement to do the bidding of Congress.

<sup>278</sup> In *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), the Court made clear that Congress's Article I powers could not be used to eliminate state sovereign immunity.

<sup>279</sup> See Bradley, *supra* note 8, at 393 (arguing that conventional wisdom suggests that "treaties and executive agreements are *not* thought to be limited either by subject matter or by the Tenth Amendment's reservation of powers to the states").

<sup>280</sup> See Yoo, *supra* note 11, at 817 (discussing the "Rehnquist Court's reinvigoration of federalism").