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# Starbucks and the New Federalism: The Court's Answer to Globalization

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# Notes & Comments

## STARBUCKS AND THE NEW FEDERALISM: THE COURT'S ANSWER TO GLOBALIZATION

*Robert Knowles\**

### I. INTRODUCTION

During the World Trade Organization (WTO) meeting in Seattle in December of 1999, a few dozen self-proclaimed anarchists smashed shop windows and looted downtown locations of major international chains such as Starbucks and The Gap.<sup>1</sup> While most observers properly condemned such antics, the attention paid to these riots obscured the significance of the peaceful protests that drew more than thirty thousand to Seattle.<sup>2</sup> This eclectic group of demonstrators, comprised of environmentalists, blue-collar union workers and their leaders, and the religious—"Roman Catholic nuns and priests, liberal Protestants, progressive evangelicals, Jews and Buddhists"—expressed concern at the growing power of the WTO and other unelected international organizations.<sup>3</sup>

Globalization, the effects of which inspired the demonstrations in Seattle, shapes the post-Cold War world. Journalist Thomas Friedman defined globalization as the worldwide "inexorable integration of markets, nation-states and technologies" driven by free-market capitalism and having a widespread homogenizing effect on cultures.<sup>4</sup> Along with other kinds of integration comes a demand for the integration of laws.<sup>5</sup> Yet, as Friedman observes, while globalization enables nations to innovate and thrive, it also produces a powerful backlash from those who are left behind by the new international system.<sup>6</sup>

Many Americans are troubled by the authority of entities such as the WTO, which has promulgated rules on a broad range of important issues

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<sup>1</sup> Timothy Egan, *Talks and Turmoil: The Violence; Black Masks Lead to Pointed Fingers in Seattle*, N.Y. TIMES, Dec. 2, 1999, at A1.

<sup>2</sup> *Id.*

<sup>3</sup> Diane Butler Bass, *Religious Join Global 'Greens': Another WTO Lesson*, SEATTLE POST-INTELLIGENCER, Jan. 7, 2000, at A13.

<sup>4</sup> THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 9 (2d ed. 2000). This book provides an excellent, if overly optimistic, introduction to globalization.

<sup>5</sup> See *infra* subpart II.C.

<sup>6</sup> FRIEDMAN, *supra* note 4, at 9.

since it was created by the General Agreement on Tariffs and Trade (GATT) in 1994.<sup>7</sup> These concerns are not based on irrational fears of worldwide tyranny under the United Nations enforced by black helicopters. Rather, they result from a sense of powerlessness amid the perception that important decisions are being made farther and farther away from local and democratically accountable governments. Wharton School globalization expert Stephen J. Kobrin put it this way: "When all politics is local, your vote matters. But when the power shifts to these transnational spheres, there are no elections and there is no one to vote for."<sup>8</sup>

At least ostensibly, the agreements binding the United States to sweeping international rules and regulations are treaties. The Constitution vests with the president and the Senate the power to make treaties, and it requires two-thirds of the Senate to approve any treaty.<sup>9</sup> Only recently, however, have treaties begun to regulate matters previously thought to be entirely domestic.<sup>10</sup> At the same time, recent developments have virtually eliminated the states' role in treaty-making, as the president only rarely consults the Senate when treaties are negotiated, and Congress ignores the two-thirds requirement when it approves agreements such as the GATT through ordinary legislation.<sup>11</sup> A clear trend has emerged: the concentration of decision-making power in the hands of the national government, and even international bodies, at the expense of state governments.

Nevertheless, as the centripetal force of globalization pulls nations' laws toward a worldwide standard, another trend in the United States pulls in the opposite direction—the Supreme Court's recent revival of federalism limitations on the power of the national government.<sup>12</sup> Several months be-

<sup>7</sup> The WTO was created after the Uruguay Round of negotiations of the General Agreement on Tariffs and Trade (GATT). See Final Act Embodying Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125, 1144 (1994). The WTO is, in part, a dispute settlement body that adjudicates trade disputes among nations and passes judgment on national laws relating to trade. See *id.* One of the objections to the latest GATT agreement is that it imposes standards on various state regulatory powers—such as banking, insurance, and local tax-breaks and incentives—that have been useful for policy experimentation. See *infra* subpart II.C. For detailed descriptions of the WTO dispute resolution system and its potential jurisdictional reach, see ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* (1996); Arie Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 NW. J. INT'L L. & BUS. 775 (1996-97); Hannes L. Schloemann & Stefan Ohloff, "Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 AM. J. INT'L L. 424 (1999).

<sup>8</sup> FRIEDMAN, *supra* note 4, at 191.

<sup>9</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>10</sup> See *infra* subpart II.C.

<sup>11</sup> See *infra* subpart II.B (explaining the declining role of states in treaty making); *infra* notes 35-52 and accompanying text (describing how states were originally thought to have a role in treaty making).

<sup>12</sup> Federalism addresses the amount of power respectively allocated to the states and the national government. The Court's federalism jurisprudence is discussed in Part III. The Court's revival of federalism has generated a tremendous amount of scholarship. For an excellent, concise source of arguments for and against federalism, see DAVID SHAPIRO, *FEDERALISM: A DIALOGUE* 122-23 (1994).

fore the Seattle riots, Justice Kennedy's opinion in *Alden v. Maine* articulated a broad framework for this "new federalism," which had begun in the early 1990s.<sup>13</sup> In *Alden*, a five-member majority—Chief Justice Rehnquist and Justices Kennedy, Scalia, Thomas, and O'Connor—held that Congress may not, pursuant to any of its powers under Article I of the Constitution, subject a state against its will to a lawsuit by a citizen.<sup>14</sup> In words that would have cheered the Seattle demonstrators, Justice Kennedy wrote that the people, in establishing the constitution as a federal system, rejected the idea that the "will of the people in all instances is expressed by the central power, the one most remote from their control."<sup>15</sup>

In 1999, the same majority also severely constrained the ability of Congress to subject states to such suits pursuant to its power under Section Five of the Fourteenth Amendment—even when an arm of the state participates in the marketplace as a business.<sup>16</sup> In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court held that the State of Florida could not be sued for patent infringement when a Florida state agency used a means of college financing patented by a private company.<sup>17</sup> In a companion case, *College Savings Bank v. Florida Prepaid*

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Some recent advocates of a strong judicial role in enforcing federalism believe that federal courts should eschew bright-line rules in favor of stringent review of the legislative process to make sure that Congress gave sufficiently serious attention to federalism concerns. See Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2181 (1998). Jackson believes that courts should review "the adequacy of congressional process to justify assertions of federal power." Jackson, *supra*, at 2258. Gardbaum believes that courts should police "Congress's deliberative processes and its reasons for regulating" to make sure that the federal government action has been adequately justified. Gardbaum, *supra*, at 799. As Part II explains, however, the Treaty Power presents a unique problem that calls for more rigid enforcement of federalism limitations by the Court. In addition, the Court's most recent federalism decisions set down exactly the kind of bright-line rules rejected by Jackson and Gardbaum. See *infra* Part III.

<sup>13</sup> 527 U.S. 706 (1999) (holding that Maine state probation officers could not sue the state in Maine courts for alleged violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-216(b), 203(x)); *Printz v. United States*, 521 U.S. 898 (1997) (declaring invalid a statute commandeering state executive officials); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (placing limits on Congress's power to enact civil rights legislation under § 5 of the Fourteenth Amendment); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that the Commerce Clause does not give Congress the power to override states' Eleventh Amendment immunity from suit in federal court); *New York v. United States*, 505 U.S. 44 (1996) (holding that Congress may not force a state legislature to choose between adopting federal regulations or taking title of toxic waste); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down a portion of the Gun Free Schools Act as exceeding Congress's power under the Commerce Clause).

<sup>14</sup> See *Alden*, 527 U.S. at 712; see also discussion *infra* Part II.

<sup>15</sup> *Id.* at 759.

<sup>16</sup> See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (striking down federal unfair competition legislation as applied to states because it was not remedial, as required by § 5 of the Fourteenth Amendment); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (holding that Florida cannot be sued for alleged patent infringement resulting from the actions of a state agency in using a patented methodology for calculating amounts to be paid under annuity contracts to finance college expenses).

<sup>17</sup> *Fla. Prepaid*, 527 U.S. 627.

*Postsecondary Education Expense Board*, the Court held that Florida did not waive its sovereign immunity when an arm of the state allegedly engaged in unfair competition by misrepresenting its own program.<sup>18</sup>

In 2000, the Court continued to enforce federalism limitations with a vengeance. In *Kimel v. Florida Board of Regents*, the Court struck down a provision of the Age Discrimination in Employment Act of 1967 that enabled state employees to sue states, holding that Congress lacked the power to abrogate state sovereign immunity, even under the Fourteenth Amendment.<sup>19</sup> In *United States v. Morrison*, the Court sent the message that Congress's exercise of the commerce power must correspond at least loosely with interstate commerce by striking down the Violence Against Women Act (VAWA), which created a cause of action in federal courts for crimes of violence motivated by gender.<sup>20</sup> The *Morrison* decision is especially significant because it reaffirms the case that started it all—*United States v. Lopez*.<sup>21</sup> *Lopez* represented the first time in nearly sixty years that the Court struck down a statute as exceeding Congress's power under the Commerce Clause.<sup>22</sup>

So far, the treaty power remains untouched by the Court's new federalism. Since the Supreme Court's 1920 decision in *Missouri v. Holland*,<sup>23</sup> most scholars have assumed that the treaty power is not limited by concerns of federalism.<sup>24</sup> According to the prevailing view, the president and the

<sup>18</sup> *Coll. Sav. Bank*, 527 U.S. 666.

<sup>19</sup> 120 S. Ct. 631, 650 (2000).

<sup>20</sup> 120 S. Ct. 1740 (2000); 42 U.S.C. § 13981 (1994).

<sup>21</sup> 514 U.S. 549 (1995).

<sup>22</sup> The last time the Court had struck down a federal statute as exceeding the commerce power was in *Carter v. Carter Coal*, 298 U.S. 238, 316 (1936) (holding that a statute regulating coal industry labor practices governed mining and production, not commerce).

<sup>23</sup> 252 U.S. 416 (1920) (upholding a treaty with Great Britain regulating the hunting of migratory birds, even though Congress may have lacked the power to regulate the matter under its Article I powers).

<sup>24</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1987) [hereinafter RESTATEMENT (THIRD)]. Although the Restatement position reflects the majority view, it is not without its critics. Recently, Professor Curtis Bradley argued that although *Missouri* was easily subject to a much narrower interpretation, subsequent decisions by the Supreme Court and lower courts actually broadened it. Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 425-26 (1998). According to Bradley, the expansion of the subject matter of treaties (permitted by courts interpreting *Missouri*) is part of an historically contingent twentieth-century "internationalist conception" of foreign affairs that contradicts the design of the Constitution by rejecting federalism concerns. *Id.* at 391. A return to a "dualist" conception of foreign affairs would at least require that *Missouri*'s holding be narrowly interpreted. *Id.* at 458-59. I agree with this view, and this Comment is in part an effort to bolster the position of Bradley and others through the examination of the most recent Supreme Court decisions and the perspective of a conversational model of democracy.

For some recent scholarship supporting the prevailing view of the treaty power as unlimited by federalism concerns, see LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 442 n.2 (2d ed. 1996); Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 530 (1991); Thomas Healy, Note, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726, 1731 (1998). Healy observes that even the Supreme Court's federalism decisions prior to 1999 suggest the Court would overturn *Missouri*. Nonetheless, he argues that such a decision would under-

Senate, acting pursuant to the Treaty Clause, can regulate traditional state activities to an extent that Congress alone, acting under enumerated powers such as the Commerce Clause, cannot.<sup>25</sup>

As long as Congress's Article I powers were deemed virtually unlimited—from the New Deal until recently—no need arose to test the holding of *Missouri v. Holland*. However, the Court's most recent decisions make it clear that the comprehensive revival of federalism will continue.<sup>26</sup> Meanwhile, scholars have proposed ways in which the treaty power's unique immunity from federalism under *Missouri* could be used to pass legislation that would otherwise be unconstitutional as encroaching on state prerogatives. For example, Professor Gerald Neuman has proposed that the Religious Freedom Restoration Act (RFRA)<sup>27</sup> could pass constitutional muster as an implementation of the International Covenant on Civil and Political Rights (ICCPR).<sup>28</sup> Similarly, scholars have suggested that treaties might be used to outlaw the death penalty and that "federalism concerns would prove no bar to the preemption of state law" under such a treaty.<sup>29</sup>

As the Seattle riots suggest, these issues will occupy the attention of people other than academics. Rapid globalization makes it all but certain that the uniqueness of the treaty power will clash with the growing legitimacy of the "new federalism." This Comment argues that the new federalism should prevail. Negotiations in far-flung locations, rather than at town meetings, will more likely determine the rights and responsibilities of American citizens in

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mine the ability of the federal government to conduct foreign policy effectively and would in general be harmful to American interests. *Id.* at 1749-50. To illustrate, Healy notes that the Vienna Convention, which grants an alien arrestee the right to contact her home country's consulate, may conflict with state laws. The refusal of local law enforcement officers in the United States to carry out this provision, Healy argues, would endanger American citizens abroad. *Id.* at 1750-51; Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, § 1(b), 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention]. For discussion of a recent case involving the failure to grant rights to a foreign national under this provision of the Vienna Convention, see *infra* notes 230-33 and accompanying text. Cf. 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) (concluding from an historical study that few subject matter limitations apply to the treaty power, but state sovereignty limitations probably do apply).

<sup>25</sup> See, e.g., HENKIN, *supra* note 24, at 442 n.2.

<sup>26</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999).

<sup>27</sup> 42 U.S.C. §§ 2000bb-2000bb-4 (1994). The statute prohibited federal or state regulations that substantially burdened the exercise of religion without a compelling government interest, and then only if the least restrictive means were used.

<sup>28</sup> See Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 49-53 (1997); International Covenant on Civil and Political Rights, Dec. 19, 1966, S. EXEC. DOC. E, 95-2, (1978), 999 U.N.T.S. 171. The relevant provisions of the treaty state that the right "to manifest [one's] religion or belief in worship" is a right that may only be limited when "necessary to protect public safety, order, health, or morals" or "the fundamental rights and freedoms of others." *Id.* at art. 18(3). The Supreme Court had struck down RFRA as exceeding Congress's power to enact civil rights legislation under § 5 of the Fourteenth Amendment. See *City of Boerne v. Flores*, 521 U.S. 567 (1997).

<sup>29</sup> Michael H. Posner & Peter J. Spiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209, 1213 n.24 (1993).

the twenty-first century. The Court, however, through its power to enforce constitutional limitations on national power while reinforcing the role of the states, may provide one answer to the excesses of globalization.

This Comment briefly recounts the development of the treaty power and explores the justifications for exempting it from states' rights limitations, concluding that the holding of *Missouri* is inconsistent with the new federalism jurisprudence of the Supreme Court and that a treaty power exception cannot be justified in an era of globalization. Part II recounts the development of the treaty power and the ways treaty making has changed since the framing. Subpart II.C describes the expanding subject matter of treaties and analyzes examples of proposed and ratified treaties that may conflict with states' rights. Part III examines the Supreme Court's new federalism in light of *Alden* and other recent decisions, delineating the potential impact of significant federalism cases on the treaty power. This Part concludes that the Supreme Court's recent jurisprudence suggests its willingness to overrule *Missouri v. Holland* or narrowly interpret its holding. Part IV considers the arguments for maintaining the treaty power exception to federalism limitations. Finally, Part V argues for the value of judicial enforcement of federalism. This Part concludes that, under a conversational model of democracy, federalism provides the best opportunity for restoring citizen confidence by bestowing respect on state government.

## II. THE EVOLVING TREATY POWER

The Constitution provides that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."<sup>30</sup> The inclusion of the Treaty Clause within Article II gives it special significance: it provides a unique and independent grant of power to the federal government.<sup>31</sup> Over time, however, its uniqueness has increased. From the time of the nation's founding to the 1940s, the treaty power developed from a rarely utilized mechanism for concluding agreements with foreign nations to a potential tool for circumventing the limits placed on federal domestic powers.

This Part describes how the making of international agreements has changed since the Constitution was written. As it concludes, the foreign affairs power of the national government continues to encroach on traditional state prerogatives and to overwhelm the protections provided for the states by the text of the Constitution. Subpart A discusses the scope of the treaty power, noting that the Court held it to be immune from the Constitution's implied limits on federal power. Subpart B discusses other kinds of international agreements that have begun to replace the formal treaty despite re-

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<sup>30</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>31</sup> See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 808 (1995) ("The Founders established a very complex law-making machine: one system for constitutional amendment, another for treaty-making, a third for statute-making.").

taining the status of treaties. For instance, congressional-executive agreements, passed by simple majorities of both houses and signed by the president, are one means of circumventing the formal requirement of two-thirds majority Senate approval. These agreements reduce the political protection afforded the states through their representatives in the Senate. Subpart C discusses how the range of subjects governed by treaties exceeds the Framers' vision for the treaty power. This subpart explains that treaties are no longer limited to matters of extraterritorial concern and discusses some of the ways that treaties now seek to govern matters traditionally thought to be the exclusive domain of the states. Ultimately, this Part concludes that the weakening of the states' influence in the treaty process and the blurring of the distinction between domestic and foreign affairs effectively removes all justifications for a treaty power exception from federalism concerns.

#### *A. The Treaty Power's Immunity from Federalism Limitations*

All powers vested in the national government by the Constitution are at least theoretically limited.<sup>32</sup> The principle that national government power cannot intrude upon the zone of activity exclusively reserved to the states is implied in the structure of the Constitution.<sup>33</sup> Nothing in the text of the treaty clause in Article II suggests that the national government's power to make treaties is any broader than its Article I powers. Yet by 1920, the Supreme Court had declared that the treaty power was uniquely unconstrained by states' rights.<sup>34</sup> This subpart argues that the treaty power exception was a vague, unwarranted departure from the Framers' intent.

The materials relating to the drafting of the Constitution contain almost no discussion of the scope of the treaty power.<sup>35</sup> Instead, the Federal Convention debates centered on the process by which a treaty would be enacted—whether the House of Representatives should be involved and what proportion of the Senate should be required for approval.<sup>36</sup> However, the Framers did clearly express two concerns: First, the states should be strongly represented in the process of negotiating and approving treaties; and second, the government should exercise the treaty power only rarely.

The processes for negotiating and approving treaties discussed during the Federal Convention reflected a substantive concern for protecting states'

<sup>32</sup> Federalism addresses the amount of power respectively allocated to the states and the national government. The Court's federalism jurisprudence is discussed in Part III.

<sup>33</sup> This concept is referred to as "state sovereignty federalism." See *infra* subpart III.A.

<sup>34</sup> See *Missouri v. Holland*, 252 U.S. 416, 433-34 (1920).

<sup>35</sup> Bradley, *supra* note 24, at 410; see also Shakelford Miller, *The Treaty Making Power*, 41 AM. L. REV. 527, 529 (1907) ("At no time . . . did the convention discuss the scope or extent of the power; it merely considered the question as to where the power should be lodged—who should exercise it. The same is true as to the 'Federalist' . . .").

<sup>36</sup> Bradley, *supra* note 24, at 410.

rights.<sup>37</sup> The Framers selected the Senate, rather than the House, to approve treaties because each state would have equal representation in the Senate and the state legislatures would directly elect senators.<sup>38</sup> The Founders intended that the Senate would not only approve treaties, but also help negotiate them.<sup>39</sup> Indeed, they envisioned that the Senate would act as “a council-like body in direct and continuous consultation with the Executive on matters of foreign policy.”<sup>40</sup> Although critics of the Articles of Confederation had complained that treaties approved under them were impossible to enforce,<sup>41</sup> the Framers wished to preserve the treaty-making process, which required the assent of nine out of thirteen states.<sup>42</sup> They accomplished this preservation by requiring in the Constitution that two-thirds of the senators present approve a treaty.<sup>43</sup>

The Framers deliberately made the treaty process difficult because they believed that treaties should be made rarely and only for limited purposes. Perhaps they recognized the potential for abuse. It was the “prevailing mood at the Convention” that it should not be too easy to make treaties.<sup>44</sup> James Madison noted during the debate that treaties had been too easy to make under the Articles of Confederation.<sup>45</sup> Madison also concluded from “a clear and candid view” of the state ratification debates that its participants assumed the treaty power was limited in scope.<sup>46</sup> During the Virginia Ratifying Convention, for example, opponents of the Constitution argued

<sup>37</sup> *Id.* at 412.

<sup>38</sup> See, e.g., Notes of James Madison (Sept. 8, 1787), reprinted in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 507 (Max Farrand ed., rev. ed. 1937) [hereinafter Madison Convention Notes]; Notes of James Madison (Aug. 23, 1787), reprinted in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 392-93 [hereinafter Notes of James Madison]; Bradley, *supra* note 24, at 412. An early draft of the Constitution vested the power to make treaties with the Senate alone. See Notes of James Madison, *supra*, at 392-93. United States senators have been directly elected by the people of their respective states since the adoption of the Seventeenth Amendment in 1913. See U.S. CONST. amend. XVII.

<sup>39</sup> THE FEDERALIST No. 64, at 360-61 (John Jay) (Clinton Rossiter ed., 1961); Bradley, *supra* note 24, at 412. The Framers also chose the Senate to conduct and approve treaties because its members' six-year terms would allow greater long-term perspective and also because its smaller size was better suited to fast and secret negotiations with foreign nations. See Ackerman & Golove, *supra* note 31, at 810.

<sup>40</sup> Arthur Bestor, “Advice” from the Very Beginning, “Consent” When the End Is Achieved, 83 AM. J. INT’L L. 718, 726 (1989); see also HENKIN, *supra* note 24, at 177.

<sup>41</sup> See Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1644 (1997) (“[S]tate noncompliance with national treaty obligations [under the Articles of Confederation] undermined the national government’s ability to bargain effectively with foreign nations.”).

<sup>42</sup> See Articles of Confederation and Perpetual Union arts. IX, X; see also LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 49 (1990).

<sup>43</sup> See HENKIN, *supra* note 42, at 49.

<sup>44</sup> HENKIN, *supra* note 24, at 442 n.2.

<sup>45</sup> See Madison Convention Notes, *supra* note 38, at 548; see also Quincy Wright, *The Constitutionality of Treaties*, 13 AM. J. INT’L L. 242, 242 (1919) (“The framers of the American Constitution did not anticipate or desire the conclusion of many treaties.”).

<sup>46</sup> 5 ANNALS OF CONG. 777 (1796).

that the treaty power would encroach on states' rights.<sup>47</sup> In response, the Federalists assured them that the treaty power had limits. Edmund Randolph said that "neither the life nor property of any citizen, nor the particular right of any state, can be affected by a treaty."<sup>48</sup> Similarly, George Nichols reasoned that the national government did not have the power to enact a treaty "which shall be repugnant to the spirit of the Constitution, or inconsistent with the delegated powers."<sup>49</sup> After the Constitution was approved, Thomas Jefferson, during his term as Vice President (and President of the Senate) wrote, in a draft of the Senate's *Manual of Parliamentary Practice*, that the treaty power should be narrow in scope.<sup>50</sup> As Jefferson noted, although the Founders did not agree on the specific subjects to which the treaty power ought to extend, by implication they intended the power to be limited by other parts of the Constitution.<sup>51</sup> Among the limitations was that the treaty power could not extend to "the rights reserved to the states; for surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way."<sup>52</sup>

During the nineteenth century, the Supreme Court's decisions concerning the treaty power did very little to define the limits of such power; they simply confirmed that treaties trumped state laws and constitutions, even in matters typically regulated by the states.<sup>53</sup> This rule is evident from the text of the Supremacy Clause.<sup>54</sup> But the Court did not say whether the national government may use the treaty power to supersede the rights of states as sovereign entities within the federal system. The Court did not directly address the scope of the treaty power, nor did it definitively say whether the Tenth Amendment or the sovereignty of the states limits that power.<sup>55</sup>

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<sup>47</sup> See Bradley, *supra* note 24, at 413.

<sup>48</sup> *The Debates in the Convention of the Commonwealth of Virginia*, reprinted in 3 ELLIOT'S DEBATES, 469, 504 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott 2d ed. 1888) [hereinafter *Virginia Debates*].

<sup>49</sup> *Id.* at 507.

<sup>50</sup> See Thomas Jefferson, *A Manual of Parliamentary Practice: For the Use of the Senate of the United States*, reprinted in JEFFERSON'S PARLIAMENTARY WRITINGS 420, 421 (Wilber S. Howell ed., 1938).

<sup>51</sup> *Id.* at 420.

<sup>52</sup> *Id.* at 421.

<sup>53</sup> See, e.g., *Hauenstein v. Lynham*, 100 U.S. 483 (1879) (holding that a treaty granting aliens rights to inheritance takes precedence over an inconsistent state law limiting inheritance by aliens).

<sup>54</sup> See U.S. CONST. art. VI, 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; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

<sup>55</sup> Bradley, *supra* note 24, at 418-19. Bradley also notes that none of the treaties challenged on states' rights grounds actually sought to regulate the relationship between states and their own citizens, but only "the treatment of aliens, in return for similar treatment of U.S. citizens residing abroad." *Id.* at 420. But see Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127, 1130 (1999) (arguing that the Court paid lip service to states' rights while, in practice, federalism placed "few meaningful limits on the treaty power").

The Court did suggest, however, that such limitations existed, even as it continued to uphold exercises of the treaty power. For example, the Court noted that the treaty power could not be used to change the character of a state's government or cede its territory to another state.<sup>56</sup> The Court also observed that uses of the treaty power must be consistent "with the nature of our government and the relation between the States and the United States" and the distribution of powers between them.<sup>57</sup>

With the Lochner Era came an opportunity for the Court to address the scope of the treaty power.<sup>58</sup> In 1913, Congress passed a statute regulating the hunting of migratory birds.<sup>59</sup> States sued to protect what they viewed as their own property, and two federal district courts held that the statute exceeded the scope of Congress's power under the Commerce Clause.<sup>60</sup> Since a majority of the current Supreme Court also took a narrow view of the Commerce Clause,<sup>61</sup> the Justice Department felt certain an appeal would be fruitless.<sup>62</sup> Instead of appealing the lower court decisions, the Wilson administration hit on the idea of reintroducing the statute in the form of a treaty with Canada.<sup>63</sup> The administration successfully negotiated the treaty, which the Senate ratified and Congress implemented.<sup>64</sup>

In *Missouri v. Holland*, described as "perhaps the most famous and most discussed case in the constitutional law of foreign affairs,"<sup>65</sup> the Su-

<sup>56</sup> *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) ("It would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.").

<sup>57</sup> *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 243 (1872) (noting that the treaty power may extend to all objects "not inconsistent with the nature of our government and the relation between the States and the United States"); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840) (observing that the treaty power covered all subjects "which are consistent with the nature of our institutions, and the distribution of powers between the general and state governments").

<sup>58</sup> In this Comment, I use "Lochner Era" to refer to the tenures of Chief Justices Fuller, White, and Taft—from approximately 1910 to 1930—during which period the Supreme Court narrowly construed the commerce power and struck down numerous federal statutes as exceeding Congress's Article I powers. See DANIEL A. FARBER ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 18 (2d ed. 1998). However, the Lochner Era acquired its name from an earlier case, *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a New York law limiting the working hours of bakers), which typified the court's well-known intolerance for all state laws regulating industry during this period. See FARBER, *supra*, at 18.

<sup>59</sup> 37 Stat. 847, 848 (1913).

<sup>60</sup> See *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915); *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914).

<sup>61</sup> See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

<sup>62</sup> See HENKIN, *supra* note 24, at 190.

<sup>63</sup> *Id.*

<sup>64</sup> The treaty was negotiated with Great Britain, then responsible for Canada's foreign relations. See *Convention for the Protection of Migratory Birds*, Aug. 16, 1916, U.S.-Gr. Brit., 39 Stat. 1702; Bradley, *supra* note 24, at 423 n.188. Congress implemented it in ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. § 703 (1994)).

<sup>65</sup> HENKIN, *supra* note 24, at 190.

preme Court upheld the Migratory Bird Treaty.<sup>66</sup> Justice Holmes, in an opinion noted for its eloquence, rejected Missouri's argument that the treaty power was limited by federalism to the same degree as the commerce power: "It is obvious 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>67</sup> It was enough for Holmes that the Treaty did not "contravene any prohibitory words" in the Constitution.<sup>68</sup> The implied rights of states did not stand in the way; no "invisible radiation of the Tenth Amendment" limited the scope of the treaty power.<sup>69</sup>

Holmes's opinion proceeds from the premise that the Treaty Clause provides a separate delegation of power to the president and the Senate independent of the Constitution's delegations to Congress.<sup>70</sup> As such, the treaty power has independent scope. However, Holmes did not sketch out the limits of this scope. He only wrote vaguely that, "we do not mean to imply that there are no qualifications to the treaty-making power."<sup>71</sup>

In any event, Holmes's opinion has been almost universally interpreted as protecting the treaty power from federalism-based attacks.<sup>72</sup> That Holmes considered the treaty power a unique creature can be gleaned from the diction of the opinion as well. Particularly striking is Holmes's employment of Darwinian metaphors: he likened the Constitution to an organism—"the development of which could not have been foreseen completely by the most gifted of its begetters."<sup>73</sup> In deciding which powers were reserved by the Tenth Amendment, Holmes wrote, "we must consider what this country has become."<sup>74</sup> This evolutive vision of federal power contrasts sharply with most *Lochner* Era jurisprudence.<sup>75</sup> Even a stubborn and backward-looking Supreme Court was willing to acknowledge that more

<sup>66</sup> See *Missouri v. Holland*, 252 U.S. 416, 416 (1920). This case technically dealt with the implementing legislation, not the treaty itself, but "if the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." *Id.* at 432.

<sup>67</sup> *Id.* at 433.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 433-34.

<sup>70</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-5, at 227 (2d ed. 1988). The idea that the treaty power is independent of other delegations of power to the national government is further discussed and criticized in subpart IV.A *infra*.

<sup>71</sup> *Missouri*, 252 U.S. at 433.

<sup>72</sup> See HENKIN, *supra* note 24, at 190-91; TRIBE, *supra* note 70, at 227; Healy, *supra* note 24, at 1731.

<sup>73</sup> *Missouri*, 252 U.S. at 433.

<sup>74</sup> *Id.* at 434.

<sup>75</sup> See FARBER, *supra* note 58, at 18 ("[The *Lochner* Era] was a rather dreary [period] in the Court's history, dominated as it was by Justices nostalgic for the Jeffersonian America of small farmers and craftsmen." But Holmes, in contrast to most of his colleagues, defended the rights of "states and the federal government to experiment with novel forms of market regulation."). What is especially noteworthy about *Missouri* is that Holmes was able to persuade his colleagues to support a broader role for the national government where the treaty power was concerned.

flexibility is required when interpreting foreign affairs provisions of the Constitution than when interpreting domestic ones.<sup>76</sup> While some scholars have concluded that the treaty power had always been broader than Congress's Article I powers,<sup>77</sup> Holmes's description in *Missouri* of a changing Constitution seems inconsistent with this view. As the nation evolves, Holmes's opinion declared, so evolves the treaty power.

Since *Missouri v. Holland*, the Supreme Court has provided some clues as to the limits of the treaty power. From *Reid v. Colvert*, a 1957 decision concerning the trial of the wives of two U.S. servicemen on military bases, most scholars have concluded that the specific provisions of the Constitution that place explicit limitations on federal power also limit the treaty power.<sup>78</sup> Other "remnants" of state sovereignty in the face of the treaty power include states' rights not to have their territory ceded to a foreign country and the guarantee of a republican form of government.<sup>79</sup> Even so, the Supreme Court has never held a treaty provision to be unconstitutional.<sup>80</sup>

The *Missouri* decision caused such concern that its critics made a serious attempt during the 1950s to override it with a constitutional amendment.<sup>81</sup> Proponents of the "Bricker Amendment" feared that U.S. ratification of several proposed international human rights treaties could be used to enact civil rights legislation that would circumvent the ordinary legislative process and supplant state laws.<sup>82</sup> The Bricker Amendment would have subjected treaties to the same limitations as any other piece of legislation.<sup>83</sup>

The Bricker Amendment failed, and the controversy surrounding it and *Missouri v. Holland* faded,<sup>84</sup> in part because the supporters of the amendment managed to persuade the Eisenhower administration not to become a party to the human rights treaties.<sup>85</sup> More significantly, by this time the Supreme Court was recognizing increasingly expansive domestic federal

<sup>76</sup> Here I imitate Laurence Tribe's observation about the separation of powers. See TRIBE, *supra* note 70, at 211 ("The Constitution's separation of powers and its arrangement of checks and balances are less precise [in matters of foreign affairs] than a survey of the text might suggest.").

<sup>77</sup> See, e.g., Cleveland, *supra* note 55, at 1129-30 (arguing that the Supreme Court had imposed fewer federalism limits on the treaty power from the beginning); Golove, *supra* note 24, at 1079-80 (arguing that *Missouri* did not descend "like a bolt of lightning out of a clear blue sky").

<sup>78</sup> See *Reid v. Colvert*, 354 U.S. 1 (1957) (holding that a defendant's right to trial by jury under the Sixth Amendment cannot be abrogated by the terms of a treaty); see also HENKIN, *supra* note 24, at 185.

<sup>79</sup> See HENKIN, *supra* note 24, at 193.

<sup>80</sup> *Id.*

<sup>81</sup> Senator Bricker of Ohio and Frank Holman of the American Bar Association mobilized the effort. See Bradley, *supra* note 24, at 426-27.

<sup>82</sup> See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 348-49 (1995).

<sup>83</sup> The amendment 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." S. REP. NO. 83-412, at 1 (1953).

<sup>84</sup> Bradley, *supra* note 24, at 427.

<sup>85</sup> See *id.* at 428.

power.<sup>86</sup> As Congress's Article I powers increased, a broad treaty power no longer seemed exceptional.<sup>87</sup> The New Deal jurisprudence rendered *Missouri* largely academic until the 1990s, when the Court revived federalism limitations on the commerce power with *Lopez*.

Developments in world affairs after the New Deal also diminished the importance of *Missouri*. During World War II, the Roosevelt administration was compelled to use international agreements that had the effect of treaties, but did not require the arduous treaty-approval process. Subpart B considers these international agreements.

### B. Alternatives to the Treaty Power

In the years after *Missouri v. Holland* legitimized a uniquely broad scope for the treaty power, another significant change further weakened the states' influence in treaty making. Increasingly, the federal government bypassed the textually mandated constitutional process for ratifying treaties—negotiation by the president with approval by two-thirds of the Senate—and instead adopted congressional-executive agreements, which require only a simple majority vote in each house and the signature of the president.<sup>88</sup> This subpart discusses the increasing use of these agreements. It concludes that widespread circumvention of the treaty clause further diminishes state involvement in the treaty approval process and undermines the argument that the process provides political protection for the states.

The rise of the congressional-executive agreement resulted indirectly from the Senate's failure to approve the Treaty of Versailles in 1919.<sup>89</sup> From the time of the Founding until the 1930s, most scholars and officials thought the Senate possessed exclusive power to approve lasting international agreements.<sup>90</sup> President Monroe felt it necessary to seek two-thirds Senate approval when he completed an agreement with Britain to demilitarize the Great Lakes after the War of 1812.<sup>91</sup> Even though later presidents conducted stop-gap executive agreements and military arrangements with other nations, foreign governments understood that they would have to insist on a treaty if they wished to bind the United States government beyond the length of any particular administration.<sup>92</sup>

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<sup>86</sup> See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257-58 (1964); *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942); *United States v. Darby*, 312 U.S. 100, 113-17 (1941); see also Ackerman & Golove, *supra* note 31, at 857 (making a similar point).

<sup>87</sup> *TRIBE*, *supra* note 70, at 227 ("The Supreme Court . . . has so broadened the scope of Congress' constitutionally enumerated powers as to provide ample basis for most imaginable legislative enactments quite apart from the treaty power.").

<sup>88</sup> See RESTATEMENT (THIRD), *supra* note 24, § 303 cmt. c.

<sup>89</sup> Ackerman & Golove, *supra* note 31, at 802.

<sup>90</sup> See *id.* at 808.

<sup>91</sup> See *id.* at 816-17.

<sup>92</sup> See *id.* at 816, 823-24.

However, when the Senate failed to approve the Treaty of Versailles despite the support of a majority of Senators, criticism of the difficult constitutional treaty approval process grew.<sup>93</sup> By the time World War II broke out, the Senate's rejection of the League of Nations "became a symbol of isolationist irresponsibility."<sup>94</sup> Momentum began to build for a constitutional amendment to strip the Senate of its treaty-making prerogative.<sup>95</sup> In 1945, the House approved such an amendment, but President Roosevelt declined to pursue it in the Senate because he did not want to risk losing Republican support on other issues.<sup>96</sup> Nonetheless, scholars Bruce Ackerman and David Golove argue that World War II marked the same kind of turning point in foreign affairs that the New Deal represented in domestic affairs.<sup>97</sup> Rather than change the Constitution, Roosevelt simply chose to ignore it. In the midst of total war, states' rights seemed quaint, and it seemed paramount that the president should be able to make agreements quickly, without mounting the kind of intensive political effort often required to muster a two-thirds majority in the Senate.<sup>98</sup>

Although treaties are by no means obsolete, and the Senate still occasionally refuses to ratify them, to the great consternation of the president and vice-president, the vast majority of international agreements since World War II have not been approved by the Article II method.<sup>99</sup> Many of the most recent, far-reaching international accords, such as the North American Free Trade Agreement (NAFTA) and GATT, were approved by congressional-executive agreement.<sup>100</sup> Significantly, observers believe that if the president had offered NAFTA as a treaty instead of as ordinary legislation, its opponents probably could have mustered the thirty-four Senate votes needed to defeat it.<sup>101</sup>

However, Congress has acquiesced to this alternative procedure, and arguments that congressional-executive agreements are unconstitutional have made little headway.<sup>102</sup> The Supreme Court has not definitively ruled

<sup>93</sup> See *id.* at 861.

<sup>94</sup> *Id.*

<sup>95</sup> By May of 1944, polls showed that 60% of the American public was in favor of such an amendment. See *id.* at 863.

<sup>96</sup> 91 CONG. REC. 4,367 (1945); Ackerman & Golove, *supra* note 31, at 866.

<sup>97</sup> Ackerman & Golove, *supra* note 31, at 866-70.

<sup>98</sup> See *id.* at 870.

<sup>99</sup> See BARRY E. CARTER & PHILIP R. TRIMBLE, INTERNATIONAL LAW 204 (2d ed. 1995). In 1999, the Senate rejected the Comprehensive Nuclear Test Ban Treaty, which President Clinton had signed in 1996. The treaty failed to muster even a simple majority. See Senator Jon Kyl, *Maintaining "Peace Through Strength": A Rejection of the Comprehensive Test Ban Treaty*, 37 HARV. J. ON LEGIS. 325, 325 (2000).

<sup>100</sup> See Ackerman & Golove, *supra* note 31, at 801.

<sup>101</sup> See *id.* No fewer than twenty-one state delegations cast a majority vote against the agreement, and five other delegations were divided. See 139 CONG. REC. 29,722 (1993).

<sup>102</sup> Since Franklin Roosevelt's administration, the Senate has made scattered attempts to reassert its constitutional privilege and has on occasion insisted that international agreements ought to take the form of Article II treaties. These efforts have been almost uniformly rebuffed or ignored. See Ackerman &

on their scope or limits.<sup>103</sup> Most scholars insist, however, that they have the same scope and force as treaties approved in the textually mandated fashion.<sup>104</sup>

If this is true, then federalism concerns limit neither congressional-executive agreements *nor* treaties. This conclusion should trouble proponents of federalism because the practice of congressional-executive agreements circumvents the special protection afforded the states through the two-thirds majority Senate approval requirement. Moreover, all justifications for the uniqueness of the treaty power that rely on the Constitution's text would simply be irrelevant. It would not matter that the treaty power is found in Article II of the Constitution rather than in Article I. Instead, the justification for ignoring federalism concerns would have to rest on claims that the legislation in question is of "international concern." Yet, the distinction between domestic and international affairs has become virtually impossible to define because many current treaties and agreements govern matters traditionally thought to be domestic. This development is discussed in subpart C.

### C. *The Decline of the Subject-Matter Limitation*

*Missouri v. Holland* undermined state sovereignty limitations on the treaty power. The other significant textual limitation on the treaty power—the subject-matter limitation—has been eroded as well. The enumerated powers of the national government are limited by the very fact of their enumeration.<sup>105</sup> For example, Congress cannot use the Commerce Clause to regulate matters that do not affect interstate commerce.<sup>106</sup> Similarly, the national government seemingly cannot use the treaty power to regulate matters of domestic concern. James Madison assured the Virginia Ratifying Convention that the object of every treaty is "the regulation of intercourse with foreign nations, and is external."<sup>107</sup>

It appears, however, that modern developments have proven Madison wrong. In recent years, the subject matter of treaties and other international

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Golove, *supra* note 31, at 900-04. One of the most prominent academic critics of congressional-executive agreements is Professor Laurence Tribe, who expressed doubts to the president and the Senate about the constitutionality of the legislation implementing the GATT agreement that established the WTO. See, e.g., *GATT Implementing Legislation: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong. 285 (1994) (prepared statement of Laurence Tribe, Professor, Harvard Law School). For an interesting debate about the constitutionality of congressional-executive agreements, compare Ackerman & Golove, *supra* note 31, with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

<sup>103</sup> See Bradley, *supra* note 24, at 398.

<sup>104</sup> See HENKIN, *supra* note 24, at 217, 229; Ackerman & Golove, *supra* note 31, at 805; Bradley, *supra* note 24, at 398.

<sup>105</sup> This inherent limitation on national powers is sometimes referred to as "distributive federalism." See *infra* subpart III.C.

<sup>106</sup> See *United States v. Lopez*, 514 U.S. 549, 567 (1995).

<sup>107</sup> *Virginia Debates*, *supra* note 48, at 513.

agreements has expanded to encompass nearly every part of what used to be considered the exclusive domain of state law. This subpart argues that a "foreign-affairs-only" subject-matter limitation is implicit in the Constitution's grant of the treaty power to the federal government because the Framers conceived of treaties as laws governing only foreign relations. Even so, the national government has increasingly ignored this limitation. This subpart explores ways that the treaty power will conflict directly with federalism concerns in the future, concluding that the argument for treaty power exceptions resting on a distinction between domestic and international affairs is no longer tenable.

Some scholars have concluded that the Framers intended the treaty power to be flexible enough to govern virtually any subject matter.<sup>108</sup> As Hamilton and others argued during the ratification debates, they could not predict in 1789 every future contingency that could one day require a treaty.<sup>109</sup> However, the Framers scarcely could have imagined treaties such as the GATT, which function as international legislation binding on much of the world, or today's human rights treaties, which seek to regulate a broad range of matters traditionally governed by state law.<sup>110</sup> The Framers believed there existed a sharp distinction between domestic and foreign affairs.<sup>111</sup> Alexander Hamilton—not known to sympathize with states' rights—believed that treaties were "not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign."<sup>112</sup> There is evidence that this assumption was valid until recently.<sup>113</sup> As late as the 1950s, opponents of the Bricker Amendment argued that the subject-matter limitation on treaties made the amendment unnecessary.<sup>114</sup>

Today, however, most scholars support the view that the treaty power has no subject-matter limitation.<sup>115</sup> In any event, the United States has al-

<sup>108</sup> See, e.g., Golove, *supra* note 24, at 1132.

<sup>109</sup> See Golove, *supra* note 24, at 1145; *Virginia Debates*, *supra* note 48, at 363, 505.

<sup>110</sup> See *infra* notes 124-42 and accompanying text.

<sup>111</sup> Bradley, *supra* note 24, at 411. Zachariah Chafee notes that "the vital distinction between foreign affairs and domestic matters was taken for granted throughout [the drafting of the Constitution]." Zachariah Chafee, Jr., *Amending the Constitution to Cripple Treaties*, 12 LA. L. REV. 345, 368 (1952).

<sup>112</sup> THE FEDERALIST NO. 75, at 450-51 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>113</sup> When Chief Justice Charles Evans Hughes suggested in a speech to the American Society of International Law that the treaty power might be limited to matters of international concern and not matters "which normally and appropriately were within the local jurisdiction of the states," his remarks were "accepted as authority." See HENKIN, *supra* note 24, at 471 n.87. *But see* Golove, *supra* note 24, at 1290 n.728 (arguing that Hughes's remarks were misconstrued).

<sup>114</sup> See Bradley, *supra* note 24, at 430.

<sup>115</sup> See RESTATEMENT (THIRD), *supra* note 24, § 302 cmt. c.; Ackerman & Golove, *supra* note 31, at 843-44; Damrosch, *supra* note 24, at 530. The *Second Restatement*, in contrast, provided that the treaty power was limited to matters of "international concern" and not matters of a "purely internal nature." See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 117(1)(a), § 117 cmt. b (1965). Curtis Bradley criticized what he saw as an effort to bootstrap the lack of a subject-matter limitation into widespread acceptance. Its most prominent supporters, such as Louis

ready approved or may yet approve treaties and agreements that regulate subjects one thinks of as exclusively local or even personal, from education to family life.

Rapidly increasing globalization driven by advances in technology has many salutary effects. Those who feel they are unable to get satisfaction from government at the national level can seek assistance from the international community. When considering recent genocides in Rwanda and Bosnia, for example, few persons would doubt that human rights is a matter of international concern and, therefore, appropriate subject matter for a treaty. As the *Restatement* asserts, "how a state treats individual human beings, including its own citizens, in respect of human rights, is not the state's own business alone."<sup>116</sup>

However, the extension of treaty making to traditionally domestic areas of law will be difficult to stop now that it has begun. Public choice theorists have found that the same forces driving a strong national government are also driving trends toward the internationalization of lawmaking. Powerful interest groups unable to have their way in Congress will seek to achieve results during treaty negotiations or through treaty-enforcement mechanisms.<sup>117</sup> Nowhere is this more apparent than in the area of commerce. Trade works best with low barriers.<sup>118</sup> Therefore, economic interests will seek regulation (or deregulation) at the international level.<sup>119</sup> American companies frustrated by federal environmental and labor regulations would much rather see rules governing their business promulgated by an entity such as the WTO.<sup>120</sup> Two scholars, Hannes L. Schloemann and Stefan Ohloff, have already noted that this trend has accelerated during the short time the WTO has been in existence. In a 1999 article, they observed:

The emergence of the WTO and the experience of the past four years, in particular the overwhelming acceptance and use of the dispute settlement mechanism, have pushed the multilateral trade system to develop into a proto-supranational structure . . . [that] has been charged with more and more tasks and responsibilities beyond its original scope, both by political decisions (new

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Henkin, argued for the change during the writing of the Third Restatement and then cited to the Third Restatement as though it were black letter law. See Bradley, *supra* note 24, at 432-33.

<sup>116</sup> RESTATEMENT (THIRD), *supra* note 24, at pt. VII, introductory note, at 144.

<sup>117</sup> See Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1445 (1994).

<sup>118</sup> See Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1401-07 (1994).

<sup>119</sup> See *id.* at 1446.

<sup>120</sup> During the Seattle protests, labor and environmental leaders demanded that President Clinton negotiate basic standards for the WTO, such as the prohibition of child labor, and a process that would enable nations to retaliate against other nations that violated these standards. When the president proposed that the Seattle negotiators take up these topics, the talks collapsed. See Egan, *supra* note 1, at A1.

separate agreements) and by external pressure (the popularity of the dispute settlement mechanism).<sup>121</sup>

As corporations gain access to external sources of rules such as the WTO, they will grow increasingly impatient with states' laws.

It should come as no surprise, then, that conflicts between international standards and state laws will be felt the soonest in the area of commerce. Every state has some form of "blue sky laws" that seek to protect consumers against securities fraud.<sup>122</sup> But the state securities laws are all over the map, ranging from regulations that call for a "hands-off" approach to strict requirements that authorize officials to judge transactions on their merits.<sup>123</sup> The insurance industry, even more than the securities industry, has traditionally been regulated almost exclusively by the states. Yet the most recent GATT agreement, the Uruguay Round that authorized the WTO, contains standards governing banking, securities, and insurance.<sup>124</sup> The Twenty-First Amendment grants states the power to regulate the sale of alcoholic beverages.<sup>125</sup> Nonetheless, even before the WTO was formed, a GATT panel ruled that various liquor taxes and regulations of some forty-one U.S. states violated the provisions of the GATT, and that the Twenty-First Amendment was no barrier.<sup>126</sup> The U.S. government then took steps to have the laws changed.<sup>127</sup> The "Technical Barriers to Trade" portion of the Uruguay GATT imposes "mandatory measures that regulate products, as well as their packaging and the process of production."<sup>128</sup> The theory is that, in the absence of overt tariffs, nations will try to impose de facto tariffs via strict regulation.<sup>129</sup> One commentator properly observed that "[a]t issue in the [treaty] ratification process . . . is nothing less than federal arrogation of traditional state competence in the law governing private, and in particular, commercial, relations."<sup>130</sup>

<sup>121</sup> Schloemann & Ohloff, *supra* note 7, at 425 n.1. This article discusses potential substantive limitations on the WTO enforcement mechanism, particularly the tendency for nations to use national security as an ironclad excuse for imposing trade barriers. *See id.* at 425-26.

<sup>122</sup> Friedman, *supra* note 117, at 1449.

<sup>123</sup> *See* Brian J. Fahrney, Comment, *State Blue Sky Laws: A Stronger Case for Federal Pre-Emption Due to Increasing Internationalization of Securities Markets*, 86 NW. U. L. REV. 753, 759-60 (1992).

<sup>124</sup> *See* Friedman, *supra* note 117, at 1451-53.

<sup>125</sup> *See* U.S. CONST. amend. XXI.

<sup>126</sup> *See* Friedman, *supra* note 117, at 1462; GATT Panel Report, *United States—Measures Affecting Alcoholic and Malt Beverages* (1992), reprinted in 4 WORLD TRADE MATERIALS NO. 5, at 25 (Sept. 1992).

<sup>127</sup> *See* Friedman, *supra* note 117, at 1462.

<sup>128</sup> *Id.* at 1455.

<sup>129</sup> *See id.*

<sup>130</sup> Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 690 (1998). The U.S. laws implementing GATT and NAFTA both respect federalism concerns to a certain extent. They both contain provisions for a federal-state consultation process and allow only the national government to challenge a state's law in violation of the trade agreement. *See* 19 U.S.C. § 3312 (1994) (NAFTA); 19 U.S.C. § 3512 (1994) (GATT). After all, the WTO can only punish nations, not states.

Few may pause to consider the potential impact even of human rights treaties on local laws in the United States. There are a number of treaties that grant rights that individuals can assert against their own governments, in areas such as racial and gender equality, criminal procedure and punishment, and religious freedom. In many cases, international human rights standards are higher than those provided by the laws of American states.<sup>131</sup> Therein lies the potential for still more conflict.

Two scholars have suggested, for instance, that human rights treaties to which the United States is a party require states such as California to restore affirmative action in government and education.<sup>132</sup> The Convention on the Rights of the Child,<sup>133</sup> which the United States has signed but not ratified, contains a number of provisions that grant rights to education, privacy, and even a certain standard of living.<sup>134</sup> Similarly awaiting ratification is the Convention on the Elimination of All Forms of Discrimination Against Women,<sup>135</sup> which governs family relations, education, marriage, and even "sports and recreational activities."<sup>136</sup> Some provisions of these treaties will inevitably clash with family law in the states; at the very least, legislation implementing these treaties would greatly expand the scope of federal power into the entire range of local concerns.<sup>137</sup> While most Americans agree with these treaties' goals, they may not agree that matters such as family life and education should be regulated by international agreement.

As Justice Rehnquist reminded us when the Court declared a federal criminal statute unconstitutional in *Lopez*, "[u]nder our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'"<sup>138</sup> A number of treaties that regulate punishment of crimes may supersede state laws. The implementing legislation for the Genocide Conven-

However, the thrust of this subpart (and this Comment) is that the national government may use the treaties and international agreements to circumvent federalism concerns.

<sup>131</sup> See Peter J. Spiro, *The States and International Human Rights Accords*, 66 *FORDHAM L. REV.* 567, 567 (1997) ("The human rights movement is now turning its attention to conditions in the United States, and it is increasingly finding instances in which such practices fall short of international standards."); Nadine Strossen, *United States Ratification of the International Bill of Rights: A Fitting Celebration of the Bicentennial of the U.S. Bill of Rights*, 24 *U. TOL. L. REV.* 203, 204 (1992).

<sup>132</sup> See Conne de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 *U. CIN. L. REV.* 423 (1997); Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 *MICH. J. INT'L L.* 659, 674 (1997); see also Bradley, *supra* note 24, at 403 n.69.

<sup>133</sup> Nov. 20, 1989, 28 *I.L.M.* 1448.

<sup>134</sup> Bradley, *supra* note 24, at 403 n.61.

<sup>135</sup> Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, S. EXEC. DOC. NO. 103-38, 1249 *U.N.T.S.* 13 (entered into force Sept. 3, 1981).

<sup>136</sup> Bradley, *supra* note 24, at 403.

<sup>137</sup> See *id.* at 402-03. Family law is still considered a matter almost exclusively for state regulation. See, e.g., *Hisquierdo v. Hisquierdo*, 439 *U.S.* 572, 581 (1979) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not the laws of the United States." (quoting *In re Burns*, 136 *U.S.* 586, 593-94 (1890))).

<sup>138</sup> *United States v. Lopez*, 514 *U.S.* 549, 561 n.3 (1995) (quoting *Brecht v. Abrahamson*, 507 *U.S.* 619, 635 (1993)).

tion, which was used to prosecute war criminals in Bosnia and is probably supported by most Americans, makes it a federal crime to kill or cause serious bodily harm in the United States "with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such."<sup>139</sup> The Second Circuit has determined that the provision applies to private conduct committed in this country.<sup>140</sup> Treaties such as the Genocide Convention will open up vast new areas of criminal law for regulation by the national government irrespective of federalism limitations.

In the area of crime and punishment, the United States is perhaps most out-of-step with major industrialized countries in its use of the death penalty.<sup>141</sup> The Supreme Court has upheld state-sanctioned executions provided they comport with the Eighth Amendment, and the national government probably could not prohibit the death penalty under its Article I powers. Nonetheless, scholars have proposed that the government could avoid federalism concerns by interpreting the International Covenant on Civil and Criminal Rights to require the abolition of the death penalty.<sup>142</sup>

As conflicts emerge between state prerogatives and international standards in treaties and other agreements, the temptation of the federal government to resolve disputes in favor of the international consensus will be strong. Free trade drives the stock market, and free trade depends upon uniformity. As Professor Barry Friedman concluded, "[g]lobalizing pressures . . . are likely to lead to increased calls to eliminate or further modify independent state regulatory authority."<sup>143</sup>

The treaty power has grown far beyond what the Framers envisioned. If the majority of scholars are correct and *Missouri v. Holland* remains good law, then the states possess virtually no protections against an exercise of the treaty power by the federal government. Therefore, the treaty power has perhaps become what the opponents of the Constitution and strong federal power feared most—an all-purpose vehicle for imposing the will of the national government upon the states. Under such conditions, judicial enforcement of constitutional federalism constraints against exercises of the treaty power will be crucial to the preservation of the federal system.

<sup>139</sup> 18 U.S.C. § 1091(a) (1994).

<sup>140</sup> See *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995) (stating that the statute applies to private conduct "if the crime is committed within the United States or by a U.S. national").

<sup>141</sup> Nations and international organizations frequently criticize the United States for its continued use of the death penalty. See, e.g., Elizabeth Olson, *U.N. Report Criticizes U.S. for "Racist" Use of Death Penalty*, N.Y. TIMES, Apr. 7, 1998, at A17 (describing some of this criticism); David Stout, *The Nation: Do as We Say, Not as We Do; U.S. Executions Draw Scorn from Abroad*, N.Y. TIMES, Apr. 26, 1998, § 4, at 4 (same).

<sup>142</sup> See Posner & Spiro, *supra* note 29, at 1213 n.24.

<sup>143</sup> Friedman, *supra* note 117, at 1448.

## III. THE REVIVAL OF FEDERALISM

In 1789, when the Constitution was written, the word "State" principally meant an independent nation or country.<sup>144</sup> The Articles of Confederation had created an alliance of independent entities, the closest modern analogy to which might be the United Nations.<sup>145</sup> Of course, upon ratifying the Constitution and joining the Union, the states agreed to cede a portion of their sovereignty to the national government.<sup>146</sup> It has been the role of the courts to determine what amount of sovereignty the states forfeited.

Two terms are useful when discussing the judicial role in enforcing federalism. The structure of the Constitution provides protection to the states from the reach of federal power in two ways that are in certain cases "mirrors of each other."<sup>147</sup> On the one hand, the fact that the Constitution grants Congress *enumerated* powers acts as a substantive limit on each power.<sup>148</sup> If the powers of the federal government were limitless, there would have been no need in the Constitution to spell out each power. This concept is called "distributive federalism."<sup>149</sup> On the other hand, the Constitution, and the Tenth and Eleventh Amendments in particular, reserve a special immunity to the states, by virtue of their status as sovereign entities, from the otherwise legitimate exercise of federal power.<sup>150</sup> This special protection is called "sovereignty federalism."<sup>151</sup>

The Lochner Era was marked by the Supreme Court's strict enforcement of distributive federalism. In a series of cases, the Court struck down a number of New Deal statutes that exceeded Congress's power to legislate under

<sup>144</sup> Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 830 (1999).

<sup>145</sup> SHAPIRO, *supra* note 12, at 58; see also Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 469 n.37 (1994) (noting that the Declaration of Independence referred to the "free and independent states" and that the Treaty of Peace with Great Britain recognized the legal independence of individual states). The Articles of Confederation guaranteed that "[e]ach State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress assembled." ARTICLES OF CONFEDERATION art. II. However, there is no analogous phrase referring to state sovereignty in the Constitution. See SHAPIRO, *supra* note 12, at 58-59.

<sup>146</sup> See Richard A. Epstein, *The Federalist Papers: From Practical Politics to High Principle*, 16 HARV. J.L. & PUB. POL'Y 13, 20 (1993).

<sup>147</sup> *New York v. United States*, 505 U.S. 144 (1992) (striking down as unconstitutional an attempt by Congress to force the state of New York to adopt by statute a hazardous waste agreement or take ownership of its own waste).

<sup>148</sup> See *id.* at 156.

<sup>149</sup> Martin S. Flaherty, *Are We to Be One Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1282 (1999).

<sup>150</sup> See U.S. CONST. amend. X ("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."); *New York*, 505 U.S. at 155.

<sup>151</sup> See Flaherty, *supra* note 149, at 1283.

the Commerce and Necessary and Proper Clauses.<sup>152</sup> But the Lochner Era came to an abrupt end after Roosevelt's court-packing scheme triggered a "switch in time" that fundamentally changed the Supreme Court's direction, paving the way for a reign of virtually unlimited federal power vis-à-vis the states.<sup>153</sup> For nearly sixty years, the Court did not strike down a single federal statute for exceeding Congress's power under the Commerce Clause.<sup>154</sup>

During this time, the Court once briefly attempted to rehabilitate the Tenth Amendment in *National League of Cities v. Usery*.<sup>155</sup> The Court held that the federal government could not regulate the wages and hours of state employees under the Fair Labor Standards Act.<sup>156</sup> *National League of Cities* was overruled nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>157</sup> but then-Justice Rehnquist, in a brief dissent, wrote that he felt confident the minority view of stronger state sovereignty would eventually prevail again.<sup>158</sup>

Only seven years later, it began to look as though Rehnquist might be vindicated. In *New York v. United States*, the Court again considered the scope of state sovereignty—this time in the context of a dispute about the storage of toxic waste.<sup>159</sup> The Court held that Congress could not force the state of New York into a choice between either adopting federal guidelines or taking title of the waste and thereby becoming liable for any damages resulting from improper storage.<sup>160</sup>

*New York v. United States* began a revival of federalism, the strength and importance of which did not become fully clear until 1999. The Court, usually by a 5-4 margin, recognized a number of state protections from federal overreaching.<sup>161</sup> Whether the Court held the protection to be grounded

<sup>152</sup> The Court struck down numerous federal statutes regulating industry. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down portions of the National Industrial Recovery Act that permitted the President to approve a code regulating the poultry industry).

<sup>153</sup> See LOUISE WEINBERG, *FEDERAL COURTS* 217 (1994) ("The power of the nation is virtually plenary under the Commerce Clause and the Necessary and Proper Clause.").

<sup>154</sup> It bears repeating that, until *United States v. Lopez*, 514 U.S. 549 (1995), the last time the Court had struck down a federal statute for exceeding the commerce power was in 1936. See *Carter v. Carter Coal*, 298 U.S. 238 (1935) (holding that a statute regulating coal industry labor practices governed mining and production, not commerce).

<sup>155</sup> 426 U.S. 833 (1976).

<sup>156</sup> *Id.*

<sup>157</sup> 469 U.S. 528 (1985).

<sup>158</sup> See *id.* at 579-80 (Rehnquist, J., dissenting).

<sup>159</sup> 505 U.S. 144 (1992).

<sup>160</sup> *Id.* at 176.

<sup>161</sup> See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (placing limits on Congress's power to enact civil rights legislation under § 5 of the Fourteenth Amendment); *Printz v. United States*, 521 U.S. 898 (1997) (declaring invalid a statute commandeering state executive officials); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that the Indian Commerce Clause does not give Congress the power to override states' Eleventh Amendment immunity from suit in federal court); *United States v. Lopez*, 514 U.S. 549 (1995).

in limitations on the commerce power, Section Five of the Fourteenth Amendment, or the Tenth or Eleventh Amendments, it is now clear that the cases together are more than the sum of their parts. In the 1999 *Alden v. Maine*<sup>162</sup> decision, the Court recognized a concern for state sovereignty and states' rights grounded in the structure of the Constitution itself.<sup>163</sup> The language of *Alden*, bolstered by the other recent decisions, provides the framework the Court could build upon to overrule *Missouri v. Holland* and impose federalism limits on exercises of the treaty power and congressional-executive agreements.

This Part examines the Court's recent federalism jurisprudence and explores some of the ramifications of the treaty power. Subpart A looks at what has emerged as the most powerful tool for judicial enforcement of federalism—state sovereign immunity. It concludes that state sovereign immunity is the most promising vehicle for the Supreme Court's efforts to impose federalism limits on exercises of the treaty power and congressional-executive agreements. Subpart B examines another aspect of state sovereignty protection the Court has addressed during the current revival of federalism—the rule against commandeering of state legislatures and executive officials. Finally, subpart C discusses the Court's effort to revive distributive federalism limits and concludes that this principle is unlikely to be useful in reining in potential abuses of the treaty power.

#### A. State Sovereign Immunity

The federalism protection possessing the greatest potential for conflicts with the treaty power is states' sovereign immunity from lawsuits. Through a series of decisions, occasionally overruling prior decisions, the Court has developed sovereign immunity into a narrow, but nearly impenetrable, fortress of state power against federal incursions. This subpart explores the recent cases strengthening sovereign immunity and argues that it is the most effective means the judiciary can use to limit imprudent exercises of the treaty power that encroach on state prerogatives.

The Eleventh Amendment explicitly provides the states immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."<sup>164</sup> However, the Supreme Court has long recognized that the amendment means more than its text suggests. First, the Court interpreted the Eleventh Amendment to prohibit lawsuits by a citizen against his own state in federal court without the express authorization of Congress.<sup>165</sup> In 1993, the Su-

<sup>162</sup> 527 U.S. 706 (1999).

<sup>163</sup> See *id.* at 2268 ("Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States.").

<sup>164</sup> U.S. CONST. amend. XI.

<sup>165</sup> See *Hans v. Louisiana*, 134 U.S. 1 (1890).

preme Court overruled a prior decision and removed the possibility that Congress could abrogate a state's immunity from lawsuits in federal courts, even by a specific exercise of the commerce power.<sup>166</sup> Finally, in 1999, the Court filled in the last gap in the wall of state sovereign immunity. Congress could not, the Court held, force a state to be sued in its own courts for violation of federal statutes enacted under the Commerce Clause<sup>167</sup> or for infringement of patents and trademarks.<sup>168</sup> The Court also limited the circumstances under which Congress could subject states to such lawsuits under Section Five of the Fourteenth Amendment.<sup>169</sup>

But much more important for the revival of federalism were the Court's reasoning and language. In *Alden v. Maine*, the most thorough of the 1999 opinions, the Court confirmed that state sovereign immunity was rooted not in the Eleventh Amendment, but in the system of dual sovereignty provided by the structure of the Constitution itself.<sup>170</sup> Significantly, the case dealt with the same federal statute—the Fair Labor Standards Act (FLSA)<sup>171</sup>—that twenty-three years earlier, the Court had proclaimed could not apply to state government workers in the short-lived *National League of Cities v. Usery* decision.<sup>172</sup>

In *Alden*, a group of state probation officers sued Maine in its own courts, alleging violations of the overtime provisions of the FLSA.<sup>173</sup> The Court held that the provision of the FLSA subjecting states to lawsuits in their own courts was an unconstitutional exercise of Congress's powers under Article I.<sup>174</sup>

Writing for the majority, Justice Kennedy explained that the Eleventh Amendment was added merely to make explicit a principle the Founders had assumed from the beginning, and “Congress acted not to change but to restore the original constitutional design.”<sup>175</sup> Therefore, “no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard-of when the Constitution was adopted.”<sup>176</sup> Suits against an entity in its own courts were forbidden under

<sup>166</sup> See *Seminole Tribe*, 517 U.S. at 44.

<sup>167</sup> See *Alden*, 527 U.S. at 712.

<sup>168</sup> See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (involving patent infringement); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (involving trademark infringement).

<sup>169</sup> See, e.g., *Coll. Sav. Bank*, 527 U.S. at 672 (stating that the object of such legislation must be “the remediation of or prevention of constitutional violations”).

<sup>170</sup> 527 U.S. at 728.

<sup>171</sup> Fair Labor Standards Act of 1938, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-216(b), 203(x) (1994 and supp. IV)).

<sup>172</sup> 426 U.S. 833 (1976).

<sup>173</sup> 527 U.S. at 711-12.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 722.

<sup>176</sup> *Id.* at 727 (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)).

the sovereign immunity assumed by the Crown under English Law and by the states themselves when the Constitution was ratified.<sup>177</sup>

Beyond recognizing the sovereign immunities observed at the time of the Founding, however, the Court insisted that the principles of federalism embedded in the Constitution required that the dignity of the states be protected.<sup>178</sup> Justice Kennedy wrote that,

[a]lthough the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation. . . .

. . . .

. . . When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations.<sup>179</sup>

When the other federalism decisions of recent years are taken together and viewed in light of this language, it becomes clear that the Court intended to do much more than salvage an iota of state dignity from the wreckage left by untrammelled federal power. Rather, it desired to restore an appropriate balance to the federal-state relationship.

At least one wrinkle remains. As subpart IV.A of this Comment discusses in more detail, the proponents of the treaty power exception assert that foreign affairs are peculiarly the province of the national government, and thus the treaty power falls outside the ordinary relationship established by the Constitution between the states and the federal government. Under this theory, the treaty power is, like the Fourteenth Amendment Section Five power, a unique power of the national government that exists outside the federal system and is accordingly immune from federalism limitations.

However, this assertion is dubious. For one thing, the treaty power, as part of the original Constitution, is logically part of that Constitution's framework and therefore subject to the same limitations as other parts.<sup>180</sup> No textual evidence suggests otherwise. In contrast, the Fourteenth Amendment was designed by its framers specifically to alter, in certain circumstances the federal-state balance of power.<sup>181</sup> Yet, the Supreme Court's revival of federalism has not spared the Fourteenth Amendment enforcement power.

Section Five of the Fourteenth Amendment provides that Congress has the power to enforce its provisions "by appropriate legislation."<sup>182</sup> Congress's power under Section Five has been subject to seemingly conflicting

<sup>177</sup> *Id.* at 715-16.

<sup>178</sup> *Id.* at 748-49.

<sup>179</sup> *Id.* at 748, 758.

<sup>180</sup> See discussion *infra* subpart IV.A.

<sup>181</sup> See *Alden*, 527 U.S. at 756.

<sup>182</sup> U.S. CONST. amend. XIV, § 5.

interpretations by the Court. On one hand, the Court has described the power as a broad, positive legislative grant by which Congress may intrude into the "legislative spheres of autonomy previously reserved to the states."<sup>183</sup> While demarcating the limits of Congress's commerce power in *Alden v. Maine*, the Court noted that the Section Five power was broader than the commerce power because, by enacting the Fourteenth Amendment, the people "required the States to surrender a portion of their sovereignty that had been preserved to them by the original Constitution."<sup>184</sup> In other words, when Congress acts pursuant to its power to enforce the Fourteenth Amendment, federalism concerns are muted and the interests of the national government "are paramount."<sup>185</sup> Therefore, the Court observed that even though Congress could not abrogate the states' sovereign immunity from lawsuit through its commerce power, it could do so under its Section Five enforcement power.<sup>186</sup>

To illustrate the breadth of the Section Five power, the Court has acknowledged that Congress may enjoin the states from activity that does not itself violate the provisions of the Fourteenth Amendment.<sup>187</sup> In *Katzenbach v. Morgan*, the Court upheld as proper Section Five legislation a statute preventing New York from imposing literacy tests for voting, despite the fact that the Court had earlier upheld the use of such tests.<sup>188</sup> According to the *Morgan* court, Congress may "determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference."<sup>189</sup> *Morgan* led some scholars to ask whether the Section Five power was broad enough to entitle Congress even to overrule the Supreme Court.<sup>190</sup>

And yet, what the Court granted Congress with one hand, it has in recent years taken away with the other. As part of the Court's revival of federalism during the last decade, the Court imposed limits on all national powers, eventually including even the Section Five power. In *City of Boerne*,<sup>191</sup> the Court considered the constitutionality of the RFRA.<sup>192</sup> In an opinion by Justice Kennedy, the Court asserted that Congress did not have

<sup>183</sup> *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 445 (1976)).

<sup>184</sup> 527 U.S. at 756.

<sup>185</sup> *Id.*

<sup>186</sup> *See id.*

<sup>187</sup> *See City of Boerne*, 521 U.S. at 518 (discussing the constitutionality of federal bans on voting literacy tests).

<sup>188</sup> 384 U.S. 641, 646-47 (1966).

<sup>189</sup> *Id.* at 651.

<sup>190</sup> *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 216 (1997).

<sup>191</sup> 521 U.S. 507 (1997).

<sup>192</sup> 42 U.S.C. §§ 2000bb-2000bb-4 (1994). The statute prohibited federal or state regulations that substantially burdened the exercise of religion without a compelling government interest, and then only if the least restrictive means were used.

the power to declare the substance of the Fourteenth Amendment or to determine what constitutes a constitutional violation.<sup>193</sup> In order to prevent Congress from adopting improper “substantive” legislation, the Court must independently confirm that the legislation in question has “congruence and proportionality” to a particular constitutional violation.<sup>194</sup>

Applying its new congruence and proportionality test, the Court then determined that although the RFRA sought sweepingly to enforce the Constitution’s protection of a right—First Amendment freedom of religion—it did not do so by reference to any actual or potential violation of First Amendment rights. Congress’s factual basis for the RFRA, the legislative record, only contained examples of laws of general applicability that incidentally burdened religion.<sup>195</sup> Therefore, in enacting the RFRA, Congress did not act pursuant to its “remedial or preventive power.”<sup>196</sup> In addition, the Court observed, the reach and scope of RFRA—it applied throughout the nation and had no time limit—far exceeded the scope of the problem it sought to address.<sup>197</sup>

After *City of Boerne*, the Court continued to limit congressional exercises of the Section Five power. In fact, it did so even as it declared that power to be immune from other federalism concerns.<sup>198</sup> When it announced its decision in *Alden*, the Court handed down two other significant decisions that served to hinder Congress’s use of the Fourteenth Amendment to overcome sovereign immunity. Both cases involved the State of Florida’s effort to initiate a pre-paid college tuition program.<sup>199</sup>

College Savings Bank was a New Jersey chartered bank that, in 1987, began marketing and selling certificates of deposit designed to finance the costs of college education.<sup>200</sup> The company held a patent on the particular method it used to administer the certificates. A year later, Florida Prepaid Postsecondary Education Expense Board, an arm of the Florida state government, launched a similar program allegedly using the same administrative methods as College Savings Bank.<sup>201</sup> College Savings Bank brought suit against the State of Florida for patent infringement under the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act).<sup>202</sup>

<sup>193</sup> *City of Boerne*, 521 U.S. at 518.

<sup>194</sup> *Id.* at 520.

<sup>195</sup> *Id.* at 531.

<sup>196</sup> *Id.* at 532.

<sup>197</sup> *Id.* at 534-35.

<sup>198</sup> *See Alden*, 527 U.S. at 756 (observing that Congress may, in some situations pursuant to its § 5 power, subject states to suits in their own courts) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1996)).

<sup>199</sup> *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 671 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 631 (1999).

<sup>200</sup> *Coll. Sav. Bank*, 527 U.S. at 670-71.

<sup>201</sup> *Id.* at 671.

<sup>202</sup> 35 U.S.C. §§ 279(h), 296(a) (1994). This statute was a clarification of existing patent law designed to enable the enforcement of patent law against state governments. *See Fla. Prepaid*, 527 U.S. at 670.

It also alleged false representations in commerce under the Lanham Act,<sup>203</sup> claiming that the State of Florida had misrepresented its program in marketing publications. The Court announced its decision on the first claim in *Florida Prepaid*; it disposed of the second claim in *College Savings Bank*.

In *Florida Prepaid*, the Court held that Florida was immune from lawsuit for patent infringement and struck down as unconstitutional the statute that enabled States to be sued for patent infringement.<sup>204</sup> The Court's decision, written by Chief Justice Rehnquist, built upon the Court's earlier decision in *City of Boerne* and held that in order to exercise its Fourteenth Amendment power to subject states to lawsuit, Congress must identify "with reference to historical experience" a "widespread and persisting deprivation of constitutional rights."<sup>205</sup> Although patent infringement by the state technically was a "taking" in violation of the Due Process Clause, Congress had identified no historical pattern of infringement and had failed to consider remedies available in state courts.

In *College Savings Bank*, however, the Court found no constitutional violation at all.<sup>206</sup> Florida did not violate due process by engaging in alleged false advertising because, as the Court held, there is no recognized "right to be secure in one's business interests."<sup>207</sup> Significantly, the Court also held that Florida did not waive its sovereign immunity when it engaged in the business of marketing and selling its college loan program.<sup>208</sup>

In 2000, the Court made clear that the new limitations on Congress's Fourteenth Amendment enforcement power applied with equal force in the arena of individual rights. In *Kimel v. Florida Board of Regents*, the Court struck down the portion of the Age Discrimination in Employment Act (ADEA) that subjected the states to lawsuits for age discrimination.<sup>209</sup> The Court had never recognized the elderly as a suspect class, and therefore it held that Congress could not claim the ADEA addressed a constitutional violation.<sup>210</sup> As *Kimel* and *Florida Prepaid* suggest, in most situations Congress lacks the power to subject states to lawsuits against their will. Even the Fourteenth Amendment creates no exception.

These cases strongly indicate that the Court intends to strengthen state prerogatives while weakening federal ones. However, Congress could attempt to circumvent the Court's recent state sovereignty decisions through its use of the treaty power. For example, Congress could pass legislation

<sup>203</sup> 15 U.S.C. § 1125(a) (1994). In order to make the Lanham Act applicable to state governments, Congress passed the Trademark Remedy Clarification Act, 106 Stat. 3567 (1992).

<sup>204</sup> 527 U.S. at 630.

<sup>205</sup> *Id.* at 640, 645.

<sup>206</sup> 527 U.S. at 675.

<sup>207</sup> *Id.* at 672.

<sup>208</sup> *Id.* at 687.

<sup>209</sup> 120 S. Ct. 631 (2000); Age Discrimination in Employment Act, 29 U.S.C. § 626(b) (1967).

<sup>210</sup> See *Kimel*, 120 S. Ct. at 645-46.

making the provisions of a treaty protecting intellectual property enforceable against states in state and federal court, thus getting around *Florida Prepaid*. Several treaties, including NAFTA and the GATT, have provisions regulating intellectual property.<sup>211</sup> Scholars have argued that these treaties, in light of *Missouri v. Holland*, could be used to expand federal power to regulate intellectual property.<sup>212</sup> This power could presumably permit Congress to subject states to lawsuits against their will. Finally, Congress could use existing human rights treaties to enact legislation subjecting states to lawsuits for violations of labor or environmental laws, thus circumventing the protection provided by *Seminole Tribe* and *Alden*. Likewise, as one scholar suggested, Congress could attempt to get around *City of Boerne* by passing implementing legislation for an existing treaty, such as the ICCPR.<sup>213</sup>

However, Justice Kennedy's opinion hints that such tactics would fail. In *Alden*, he noted that the Framers of the Eleventh Amendment rejected a proposal to include an exception for the treaty power.<sup>214</sup> Thus, the implication is that an exception to state sovereign immunity for the treaty power does not comport with the design of the Constitution. And, to the extent that *Missouri* suggests such an exception, the Court will likely overrule it.

### B. The Rule Against Commandeering

As part of its revival of sovereignty federalism, the Supreme Court bolstered state sovereignty in another way—by refusing to allow Congress to commandeer state officials and legislatures.<sup>215</sup> This subpart explores the Court's recent decisions supporting the anti-commandeering principle, but ultimately finds that principle to be of limited utility in addressing the scope of the treaty power.

In *New York v. United States*, the Court first began seriously to revive the concept of state sovereignty in the context of a dispute about the storage of toxic waste.<sup>216</sup> The Court held that Congress could not force the state of New York to choose between either adopting federal guidelines or taking title to the waste and thereby becoming liable for any damages resulting

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<sup>211</sup> See generally Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 546-49 (1997).

<sup>212</sup> See, e.g., Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 422 n.302 (1997).

<sup>213</sup> See International Covenant on Civil and Political Rights, Dec. 19, 1966, S. EXEC. DOC. E. 95-2 (1978), 999 U.N.T.S. 171; Neuman, *supra* note 28, at 49-53.

<sup>214</sup> 527 U.S. at 721 ("All attempts to weaken the Amendment were defeated. . . . [Congress] refused as well to make an exception for 'cases arising under treaties made under the authority of the United States.'" (quoting 4 ANNALS OF CONGRESS 25, 30, 477, 499 (1794))).

<sup>215</sup> See *Printz v. United States*, 521 U.S. 898 (1997) (declaring invalid a statute commandeering state executive officials); *New York v. United States*, 505 U.S. 144 (1992).

<sup>216</sup> 505 U.S. at 144.

from improper storage.<sup>217</sup> The Court concluded that Congress does not have the power to commandeer state governments.<sup>218</sup> However, it is not easy to tell from Justice O'Connor's opinion whether this limitation on federal power derives from the nature of the Commerce Clause or from the Tenth Amendment and state sovereignty inherent in the constitutional structure. Justice O'Connor remarked that the Tenth Amendment is essentially a tautology in that it reserves to the states (and the people) only that which the other sections of the Constitution have not granted to the federal government.<sup>219</sup> This is another way of saying that the limits on the powers of the federal government are to be discovered by close examination of the enumerated powers themselves. Justice O'Connor then did just that—she proceeded to examine whether the provision of the statute fell within the scope of the commerce power. Ultimately, she found the provision to be “inconsistent with the federal structure of our government.”<sup>220</sup>

However, Justice O'Connor also noted that there exists a symmetry between the powers reserved by the states and those granted to the federal government—one begins where the other ends. And the fact remains that the provision commandeering the state legislature was offensive to the Constitution precisely because it regulated states as states. As Professor Martin S. Flaherty points out, “the analysis [in *New York v. United States*] ultimately turned on a trait that only states can possess, an attribute that by any other name would still amount to sovereignty.”<sup>221</sup> The Court's decision was not what it appeared to be; in fact, it was essentially a Tenth Amendment analysis dressed up as a Commerce Clause analysis.

State sovereignty came to the forefront in *Printz v. United States*.<sup>222</sup> The Supreme Court, in an opinion written by Justice Scalia, struck down a portion of the Brady Act that required local chief law enforcement officers to conduct background checks on potential purchasers of firearms.<sup>223</sup> In reaching its conclusion, the Court examined historical understandings and practices at the time of the Founding, the structure of the Constitution, and the Court's own jurisprudence.<sup>224</sup>

Rather than merely looking at the limits of the commerce power—as Justice O'Connor's *New York* opinion had done—Justice Scalia's opinion in *Printz* broadened the inquiry to address the scope of all federal power. A look at the historical practice at the time of the Framers, Justice Scalia as-

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<sup>217</sup> *Id.* at 176.

<sup>218</sup> *Id.* at 175-76.

<sup>219</sup> *Id.* at 157.

<sup>220</sup> *Id.* at 177.

<sup>221</sup> Flaherty, *supra* note 149, at 1285.

<sup>222</sup> 521 U.S. 898 (1997).

<sup>223</sup> *Id.* at 902-03.

<sup>224</sup> *See id.* at 904-18 (examining historical practice); *id.* at 918-25 (examining constitutional structure); *id.* at 925-33 (examining Supreme Court jurisprudence).

serted, revealed no evidence that the Congress could command state executives to carry out federal regulations.<sup>225</sup> In fact, there was “some indication of precisely the opposite assumption.”<sup>226</sup> Next, the Court looked at the structure of the Constitution itself and found implicit in that structure the “residuary and inviolable sovereignty” of the states.<sup>227</sup> State sovereignty could not be abrogated, even by an act that might otherwise be permissible under the Commerce Clause and the Necessary and Proper Clause.<sup>228</sup> Justice Scalia wrote that “[w]hen a ‘Law . . . for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier . . . it is not a ‘Law . . . proper for carrying into Execution the Commerce Clause.’”<sup>229</sup> With these words, Justice Scalia seemed to go beyond Justice O’Connor’s prior explanation for the source of the rule against commandeering.

The *Printz* Court made clear that the Tenth Amendment created a zone of sovereignty protecting the states. Thus, the Court appeared to transform the amendment, once a “truism,” into an independent source of state power against the federal government. Since *Printz* applied not just to the commerce power, but all federal power, it seems likely that the Court would apply the same restrictions to the treaty power. Indeed, scholars have explored a potential conflict between the rule against commandeering and at least one treaty, the Vienna Convention.<sup>230</sup> A provision of the Convention, inconsistent with the holding of *Printz*, requires police officers who arrest a foreign national to allow him to consult with his homeland’s consulate or embassy.<sup>231</sup> The Supreme Court has already refused to overturn the death sentence of Angel Breard, a citizen of Paraguay, even though the police who arrested him clearly failed to carry out the Vienna Convention provision.<sup>232</sup> This does not resolve the issue, however, as the Court refused to

<sup>225</sup> See *id.* at 905-08.

<sup>226</sup> *Id.* at 909-10 (noting that the First Congress asked for state assistance in detaining federal prisoners, but did not compel the states’ cooperation).

<sup>227</sup> *Id.* at 919 (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

<sup>228</sup> *Id.* at 923-24.

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

<sup>230</sup> See Neuman, *supra* note 28, at 52 (arguing that the holding of *Printz* would not apply to exercises of the treaty power); Tribe, *supra* note 102, at 1260 (arguing that the holding of *New York* would not apply to exercises of the treaty power); cf. Carlos Manuel Vazquez, Breard, *Printz*, and the Treaty Power, 70 U. COLO. L. REV. 1317 (1999) (arguing that a narrow interpretation of *Printz* and *New York* makes exempting the treaty power from their holdings unnecessary). But see James A. Deeken, Note, *A New Miranda for Foreign Nationals? The Impact of Federalism on International Treaties that Place Affirmative Obligations on State Governments in the Wake of Printz v. United States*, 31 VAND. J. TRANSNAT’L L. 997 (1998) (arguing that the Vienna Convention cannot create new “rights,” and therefore, the exclusionary rule cannot be applied to exclude evidence obtained in violation of the treaty).

<sup>231</sup> See Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

<sup>232</sup> See *Breard v. Greene*, 523 U.S. 371, 373 (1998) (per curiam); see generally Vazquez, *supra* note 230.

hear the case for other reasons and did need to reach the anti-commandeering question.<sup>233</sup>

The holdings of *New York* and *Printz* prohibited only a particular exercise of federal power—the rare and often clumsy efforts of Congress to commandeer state legislatures and executives. Congress has other means by which it can obtain the same ends.<sup>234</sup> The states must therefore look to stronger protections that do not depend on the limits of the national power, but rather have their source in powers reserved to the states. The Eleventh Amendment jurisprudence that culminated in *Alden* and the other recent decisions provides that protection.

### C. A Revival of Distributive Federalism Under the Commerce Clause

In *United States v. Lopez*, the Supreme Court finally imposed limits on Congress's enumerated powers and revived distributive federalism.<sup>235</sup> Congress passed the Gun-Free School Zones Act in 1990, making possession of a firearm in a school zone a federal crime.<sup>236</sup> The Supreme Court held that the statute exceeded Congress's power to legislate under the Commerce Clause.<sup>237</sup> In support of its decision, the majority returned to a basic definition of "interstate commerce."<sup>238</sup> A matter that was essentially local, such as schools, could not be "interstate." A matter essentially non-commercial, such as the possession of firearms, could not be "commerce." To uphold the statute, Rehnquist reasoned, would make the text of the Commerce Clause meaningless because "[it] would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated . . . and that there will never be a distinction between what is truly national and what is truly local . . . . This we are unwilling to do."<sup>239</sup>

For the next five years, many scholars wondered if the *Lopez* Court merely meant to slap Congress on the wrist.<sup>240</sup> After all, Chief Justice Rehnquist's opinion noted that Congress had provided no express findings regarding the effects of gun possession in school zones on interstate com-

<sup>233</sup> See *Breard*, 523 U.S. at 375-76.

<sup>234</sup> Congress could, for example, threaten to withhold federal funds if the state refused to execute the federal regulation. See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (holding constitutional Congress's indirect encouragement of states through the threat of withholding federal funds, even where direct action upon the states would be unconstitutional). Also, the line between commandeering of state legislatures and the mere preemption of state statutes by federal statutes can be a fuzzy one. See *New York v. United States*, 505 U.S. 144 (1992).

<sup>235</sup> 514 U.S. 549 (1995).

<sup>236</sup> 18 U.S.C. § 922(q) (1994).

<sup>237</sup> *Lopez*, 514 U.S. at 567.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 567-68.

<sup>240</sup> See, e.g., Philip F. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695, 697 (1996) (arguing that *Lopez* may be defended as a technique "to encourage appropriate congressional procedures and considerations").

merce.<sup>241</sup> Perhaps that was the problem. However, in 2000, *Lopez* doubters acquired new faith when the Court decided *United States v. Morrison*.<sup>242</sup> That case concerned a provision of the Violence Against Women Act that created federal criminal and civil remedies for acts of violence “motivated by gender,” even when the perpetrator of the act did not cross state lines.<sup>243</sup> Unlike the statute in *Lopez*, VAWA’s legislative history contained numerous findings regarding the serious aggregate effects of gender-motivated violence on interstate commerce.<sup>244</sup> The Court held the provision unconstitutional anyway. Chief Justice Rehnquist, again writing for the Court, explained that Congressional findings of fact were not, by themselves, “sufficient to sustain the constitutionality of Commerce Clause legislation.”<sup>245</sup> The connection between gender-motivated violence against women and interstate commerce was simply too attenuated. If such legislation were upheld, Chief Justice Rehnquist reasoned, Congress could easily regulate not only murder, but marriage, divorce, and childrearing as well, since these activities had an undoubtedly significant aggregate effect on interstate commerce.<sup>246</sup>

One can reconstruct the distributive federalism thesis that animates *Lopez* and *Morrison* in the context of another seemingly plenary grant to the federal government—the treaty power. The Court could draw a distinction between what is domestic and what is international, just as *Lopez* drew a distinction between what was local and what was national. If the President and the Senate may make treaties that govern matters of traditional state concern, such as violence against women, schools, or the possession of firearms in local communities, then the enumeration of the treaty power in the Constitution would be meaningless. A treaty that mimics the state police power is not a treaty at all and, therefore, cannot be constitutional.

However, there 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.<sup>247</sup> Second, distinctions like the one Chief Justice Rehnquist drew in *Lopez* are even more difficult to apply to treaties.

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<sup>241</sup> See *id.* at 562.

<sup>242</sup> 120 S. Ct. 1740 (2000).

<sup>243</sup> 42 U.S.C. § 13981(b) (1994).

<sup>244</sup> See *Morrison*, 120 S. Ct. at 1752.

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

<sup>246</sup> *Id.* at 1753.

<sup>247</sup> 299 U.S. 304, 318 (1936) (“[T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the constitution, would have vested in the federal government as necessary concomitants of nationality.”). This argument is dealt with in subpart IV.B *infra*.

After all, globalization means worldwide integration at every level, from the economic and political to the cultural and personal. In the age of satellites, the Internet, and porous borders, it seems nearly impossible to separate domestic from international concerns.<sup>248</sup> As Professor Laurence Tribe observed, “[w]ith global interdependence reaching across an ever broadening spectrum of issues,” a requirement that treaties only deal with matters of international concern is “unlikely to prove a serious limitation.”<sup>249</sup>

Despite these difficulties, the Court could still choose to demarcate the boundaries of the treaty power. Ironically, a recent decision limiting state prerogatives hints that the Court could treat the treaty power as just another enumerated power. In *Crosby v. National Foreign Trade Council*, the Court considered a Massachusetts law barring state entities from purchasing goods or services from companies doing business with Burma.<sup>250</sup> After Japan and the European Union challenged the law before the WTO as inconsistent with U.S. obligations under its agreement on government procurement, Congress passed its own set of sanctions against Burma.<sup>251</sup> Justice Souter’s opinion for the Court held that Congress’s sanctions preempted the state sanctions and did not need to reach constitutional issues.<sup>252</sup> However, the First Circuit had held that the Massachusetts law violated both the dormant Foreign Commerce Clause and a more general “dormant foreign affairs power.”<sup>253</sup> The First Circuit relied on an earlier case, *Zschernig v. Miller*, in which the Supreme Court held unconstitutional state probate statutes restricting inheritance rights of persons living in Communist countries, even though no federal statute governed the issue.<sup>254</sup> Justice Souter’s opinion in *Crosby* suggests that the Court is sympathetic to the argument that the Massachusetts law, even absent preemptive federal law, would interfere with the president’s power to direct foreign policy and the national government’s commitments to the WTO.<sup>255</sup>

*Crosby*, and the lower court’s decision in particular, supports the proposition that the treaty power may function like the commerce power. Just as the dormant commerce clause defines the scope of Congress’s commerce clause power by reinforcing its basis in interstate commerce, the dormant foreign affairs power may also define and limit the treaty power by forbidding the states to conduct foreign economic policy. Admittedly,

<sup>248</sup> Bradley, *supra* note 24, at 451.

<sup>249</sup> TRIBE, *supra* note 70, at 228.

<sup>250</sup> 120 S. Ct. 2288, 2291-92 (2000); Peter J. Spiro, *U.S. Supreme Court Knocks Down State Burma Law*, ASIL INSIGHT (June 2000), available at <http://www.asil.org/insigh46.htm>.

<sup>251</sup> See Spiro, *supra* note 250; *Crosby*, 120 S. Ct. at 2291-92.

<sup>252</sup> *Crosby*, 120 S. Ct. at 2294.

<sup>253</sup> See *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 58 n.14 (1st Cir. 1999).

<sup>254</sup> 389 U.S. 429 (1968); Spiro, *supra* note 250.

<sup>255</sup> 120 S. Ct. at 2298-99 (“We need not get into any general consideration of limits of state action affecting foreign affairs to realize that the President’s maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy . . .”).

however, these arguments will remain speculative until the Court fleshes out the dormant foreign affairs doctrine. Again, it is in the area of state sovereign immunity that the Supreme Court has established the firmest barrier against incursions by the national government.

#### IV. A CRITIQUE OF TREATY POWER EXCEPTION

The idea that the treaty power ought not be limited by states' rights rests largely on the premise that foreign affairs are *sui generis*, or uniquely the province of the national government. This premise yields two basic arguments for maintaining the treaty power exception. The first, addressed in subpart A, is the argument that, with respect to foreign affairs, the nation "speaks with one voice." That is, history and necessity both dictate that our system of dual sovereignty simply does not exist outside of purely domestic affairs. The second argument, addressed in subpart B, reassures proponents of federalism that the states still have a voice in foreign affairs through the political process, making judicial enforcement of federalism protections unnecessary. This Part examines these arguments and finds them unconvincing, particularly in light of recent changes in the treaty-making process.

##### A. The "One Nation" Argument

Proponents of the treaty power exception to federalism concerns argue that the treaty power is uniquely the province of the federal government. This subpart examines this argument and rejects it as inconsistent with the text and structure of the Constitution.

The scholar Louis Henkin has declared that "[a]s regards U.S. foreign relations, the states 'do not exist.'"<sup>256</sup> He means that the dual sovereignty established by the structure of the Constitution does not apply where the treaty power is concerned. The states never had "international sovereignty," Henkin asserts and, even if they did, they gave it up when they ratified the Constitution.<sup>257</sup> The Constitution appears to prohibit the states from conducting foreign affairs or acting as international agents. States cannot make treaties, coin money, or impose duties or tariffs without the consent of Congress.<sup>258</sup>

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<sup>256</sup> HENKIN, *supra* note 24, at 150.

<sup>257</sup> *Id.* at 19. It is not clear whether the states actually individually possessed "external sovereignty" after they declared independence from Great Britain. Those arguing against external sovereignty point out that no colony declared itself independent of Britain until authorized to do so by the Continental Congress. See SHAPIRO, *supra* note 12, at 15. Proponents respond that the Continental Congress was not a political entity, but something more like a "council of states." *Id.* at 58. Besides, they argue, even the Articles of Confederation guaranteed the sovereignty of the states. See *id.*; ARTICLES OF CONFEDERATION AND PERPETUAL UNION art. 2. Yet, the assumption that the States never had external sovereignty is crucial to the reasoning of *Curtiss-Wright*. See *infra* notes 259-63 and accompanying text.

<sup>258</sup> See U.S. CONST. art. I, § 10.

Even granting that some foreign affairs activities are off-limits to the states, it still requires a leap to reach the conclusion that the federal government possesses immunity from all federalism limitations when acting pursuant to the Treaty Clause. A much-criticized 1936 Supreme Court decision, *United States v. Curtiss-Wright Export Corp.*,<sup>259</sup> made that theoretical leap possible. The case is in some respects the separation of powers analog to *Missouri v. Holland*, but it contains an "essay" by Justice Sutherland that has implications for federalism as well.

In *Curtiss-Wright*, Congress had passed a joint resolution giving the president the power to apply a criminal prohibition on the sale of arms in the United States to countries engaged in a war in South America. The plaintiff protested that the agreement was an unconstitutional delegation of legislative authority to the president. In order to respond to what was, at the time, a valid legal argument,<sup>260</sup> Justice Sutherland drew a sharp distinction between the national government's power over foreign affairs and its power over domestic affairs. Justice Sutherland wrote that "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."<sup>261</sup> Sutherland reasoned that the foreign affairs powers of the national government, in contrast, exist outside the constitutional framework of power delegations: "[S]ince the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source."<sup>262</sup>

Justice Sutherland's national sovereignty explanation for the uniqueness of the national government's foreign relations powers has been subjected to "withering criticism."<sup>263</sup> Indeed, it hardly follows that because the power to make treaties and otherwise conduct foreign relations is inherent in national sovereignty, a treaty impinging on the rights of the states as sovereigns would be permissible. The Constitution expressly delegates the

<sup>259</sup> 299 U.S. 304, 315-16 (1936).

<sup>260</sup> The Lochner Era court of *Curtiss-Wright* had just struck down New Deal statutes as unconstitutional delegations of power from Congress to the president. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-42 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421-30 (1934).

<sup>261</sup> *Curtiss-Wright*, 299 U.S. at 315-16.

<sup>262</sup> *Id.* at 316.

<sup>263</sup> Bradley, *supra* note 24, at 438. For criticism of the *Curtiss-Wright* decision, see Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barre or Curtiss-Wright?*, 13 *YALE J. INT'L L.* 5 (1988); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 *YALE L.J.* 467 (1946); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 *YALE L.J.* 1 (1973). The reasoning of *Curtiss-Wright* was largely rejected by Justice Robert Jackson, who called it "dictum" in his famous concurrence in the "Steel Seizure" case. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 n.2 (1952) (declaring a presidential order authorizing seizure of the steel industry unconstitutional despite claims by the president that the order was necessary for national defense) (Jackson, J., concurring).

treaty power to the national government, just as it delegates the power to regulate commerce. Logically, then, foreign affairs powers should be subject to the Constitution's structural limitations. That the states may never have enjoyed those powers themselves is immaterial. Moreover, the exclusivity argument is further weakened when one considers that the Constitution does permit states to enter into some kinds of international agreements.<sup>264</sup>

In general, proponents of special federalism immunity for the treaty power and the foreign relations power also stress the practical side of the "one nation" argument: the need for the United States to speak with one voice in international negotiations. States' rights cannot be allowed to limit the scope of the treaty power because, as Professor Neuman argues, "[r]equiring the unanimous agreement of . . . all the states for ratification of any treaty that includes a provision addressing 'local' concerns would greatly hamper American participation in international treaty regimes."<sup>265</sup>

It is true that effective bargaining may often require a single national representative with the power to make binding commitments. Presidents developed the "fast-track" process for precisely this reason.<sup>266</sup> Likewise, the Supreme Court has emphasized the need for exclusive federal control of foreign relations.<sup>267</sup> However, examination of the Treaty Clause itself belies the notion that the Framers believed states should not participate in the making of treaties. Recall that the Framers originally planned to hold the Senate—then the states' rights body—solely responsible for negotiating and approving treaties.<sup>268</sup> Admittedly, the Framers changed the plan to give the primary negotiating role to the president because of concerns raised by Madison that the treaty-maker should represent the interests of the entire nation.<sup>269</sup> However, the plan still contemplated an active advising role for the Senate, and any treaty that survived the process would have to command support from two-thirds of the "states' representatives," the United States senators.

Advocates of treaty power exceptionalism will argue that times have changed. That, however, is precisely the point. Treaties now govern a wide

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<sup>264</sup> See U.S. CONST. art. I, § 10, cl. 3 (allowing states to enter into "Agreement[s] or Compact[s]" with foreign nations with congressional consent); see generally Raymond S. Rodgers, *The Capacity of States of the Union to Conclude International Agreements: The Background and Some Recent Developments*, 61 AM. J. INT'L L. 1021 (1967).

<sup>265</sup> Neuman, *supra* note 28, at 48.

<sup>266</sup> Fast-track legislation allows the president to conclude trade agreements subject only to limited debate and an up-or-down vote in Congress. See generally Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143 (1992).

<sup>267</sup> See, e.g., *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976) ("[T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments. . . ."); *Zschernig v. Miller*, 389 U.S. 429, 436 (1968) (describing "foreign affairs and international relations" as "matters which the Constitution entrusts solely to the Federal Government"); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.").

<sup>268</sup> See *supra* subpart II.A.

<sup>269</sup> See Madison Convention Notes, *supra* note 38, at 392.

range of matters formerly considered to be domestic in nature.<sup>270</sup> When the subject of the typical treaty was, for example, the resolution of armed conflict in Asia, the need for a strong executive authority was apparent. Now that a treaty is much more likely to govern, for instance, religious freedom, a singular role for the President can be troubling. As Curtis Bradley observed, “[i]t is not at all obvious . . . that it is necessary or desirable that the country speak through the Executive with respect to the regulation of religious freedom.”<sup>271</sup> The states’ traditional role in the treaty-making process seems more appropriate and necessary than ever before.

### B. *The Political Process Argument*

Proponents of a treaty power exception also argue that no substantive federalism restrictions are necessary because the interests of the states are properly represented in the political process.<sup>272</sup> This subpart examines this argument and rejects it on the ground that subsequent practices have undermined all of the traditional state protections afforded through the political process. In addition, even were such protections in place, the federal government would have a natural tendency to aggrandize itself at the expense of the states.

Proponents of the treaty power exception point out that the states already have a built-in voice in the process that produces treaties. After all, each state is equally represented in the Senate, and the two-thirds majority requirement ensures the consideration of states’ interests.<sup>273</sup> Critics have made similar arguments against federalism constraints on national power in general. Herbert Wechsler first asserted such a theory in the 1950s, and Jesse Choper subsequently developed it further.<sup>274</sup> Justice Blackman and four other Justices adopted the theory in *Garcia*, the decision that overruled *National League of Cities* and permitted the application of federal wage and hour regulations to state government employees.<sup>275</sup>

However, in *Alden*, the Supreme Court appeared finally to reject accountability as the sole federalism protection. Under Justice Kennedy’s theory of dual sovereignty, the judicial branch simply cannot leave the states to rely only on their representatives in the national government for protection. State governments have separate accountability to those they represent: “By ‘split[ting] the atom of sovereignty,’ the founders estab-

<sup>270</sup> See *supra* subpart II.C.

<sup>271</sup> Bradley, *supra* note 24, at 446.

<sup>272</sup> See, e.g., HENKIN, *supra* note 24, at 443-44 n.4.

<sup>273</sup> See *id.*

<sup>274</sup> See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977).

<sup>275</sup> 469 U.S. 528, 551 n.11 (1985).

lished 'two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'"<sup>276</sup> Senators are members of the national government and no longer have direct accountability to the governments of the states they represent. As scholars have noted, national representatives tend to aggrandize the national institution at the expense of state government.<sup>277</sup> Professor John Yoo observed that members of Congress have an interest in expanding the power of the federal government, even when it may not be politically expedient to do so.<sup>278</sup>

Moreover, the political process argument is particularly weak where treaties and international agreements are concerned. As Part I explained, the political federalism safeguards envisioned by the Framers for the treaty power simply no longer exist, or they have been substantially weakened. State legislators no longer elect senators. The Senate usually plays no role in the writing or negotiation of treaties. Moreover, the practice of making congressional-executive international agreements, rather than treaties, ignores even the Senate's traditional prerogative.

Finally, treaties and international agreements such as NAFTA and the GATT are huge documents, and they are even less amenable to clear understanding than the most complex federal statutes. They are more likely to contain vague or "aspirational" language that is subject to multiple interpretations.<sup>279</sup> It may not be entirely clear, either to the members of Congress or those whom they represent, what exactly they have approved.

The failure of the political process to enforce the values of federalism contributes to citizens' discontent with that process. Part V discusses the reasons why court-imposed federalism limitations will increase citizen participation in government and perhaps lessen voter frustration.

## V. FEDERALISM IN AN AGE OF GLOBALIZATION.

The potential clash between the Supreme Court's revival of federalism and the well-established doctrine of treaty power exceptionalism raises the question: Why is federalism worth protecting? Treaties are fast beginning to resemble international legislation binding on much of the world.<sup>280</sup> However, they are negotiated and written in relative obscurity far from the

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<sup>276</sup> *Alden v. Maine*, 527 U.S. 706, 751 (1999) (quoting *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999)).

<sup>277</sup> See John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 *IND. L. REV.* 27, 39 (1998) ("As members of the federal government, legislators would possess the driving interest to expand the power of the federal government, even perhaps if it did not benefit them in terms of political support. The founding generation feared that Congress would seek to grab more power from the states in order to enhance its own institutional power, prestige, and glory.").

<sup>278</sup> *Id.*

<sup>279</sup> See John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 *AM. J. INT'L L.* 310, 339 (1992).

<sup>280</sup> Bradley, *supra* note 24, at 396.

people who must live under their provisions.<sup>281</sup> Ironically, in an age of globalization, state and local matters grow in importance. As Professor Barry Friedman observed, the delegation of power to international organizations and agreements creates “a strong incentive to reinvigorate state and local government . . . in order to return control over other aspects of our lives to governments close to home.”<sup>282</sup> American federalism is a peculiar type of localism built into the Constitution.<sup>283</sup> The states are permanent fixtures in the constitutional framework. This Part argues that federalism provides the best available basis for restoring a sense of power to individual citizens who feel alienated from the decision-making process.

Increasing reliance on treaties and the executive enforcement of international agreements weakens chains of accountability and creates distance between citizens and the government. As Professor Cass Sunstein observed, “participation is difficult when the seat of government is far away.”<sup>284</sup> Federalism is valuable because it invests local government with more power, increasing government’s accountability to individual voters.

However, democracy is about more than just “one person, one vote.”<sup>285</sup> Professor Robert Bennett posited a model of democracy that seeks to explain why many do not vote and yet feel they participate in the democratic process. After all, the opportunities for the individual voter actually to affect the outcome of any particular election are statistically quite small.<sup>286</sup> Under a “conversational” model of democracy, however, citizens value above all the opportunity to influence the makers of public policy, not even through direct dialogue with officeholders, but because they participated in a public conversation that “genuinely entered into the process of give and take that eventuates in a decision.”<sup>287</sup>

By preserving the prerogatives of state government, federalism provides an opportunity for meaningful involvement in the political process itself.<sup>288</sup> Voters, for their part, feel that multiple layers of government provide greater opportunities to express their views and be listened to.<sup>289</sup> As Professor Bennett observed, voters feel the political process is personally meaningful to them even when their opportunities to affect policy out-

<sup>281</sup> *Id.* at 442.

<sup>282</sup> Friedman, *supra* note 117, at 1443.

<sup>283</sup> See *Alden v. Maine*, 527 U.S. 706, 751 (1999).

<sup>284</sup> Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1555-57 (1988).

<sup>285</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>286</sup> See Robert Bennett, *Democracy as Meaningful Conversation*, 14 *CONST. COMMENT.* 481, 487-88 (1997).

<sup>287</sup> *Id.* at 504.

<sup>288</sup> See Larry Kramer, *Understanding Federalism*, 47 *VAND. L. REV.* 1485, 1551-52 (1994) (noting that disenfranchised groups are likely to work in state government or get involved in state politics as a way of gaining power. Minorities are more likely to work in state government or be involved in state politics because it is the way in for most people.).

<sup>289</sup> See Erwin Chemerinsky, *The Values of Federalism*, 47 *FLA. L. REV.* 499, 538 (1995).

comes are small.<sup>290</sup> What is significant for most people is that they participated in the conversation.<sup>291</sup> By giving state government its proper respect, federalism increases the amount of attention citizens pay to state and local politics and fosters conversation about politics and public policy at the local level.<sup>292</sup> Giving respect to state government strengthens the sense of individual involvement among citizens.

One of the most difficult problems with the proliferation of treaties and international agreements is the danger of "one-size-fits-all" governance.<sup>293</sup> This trend, known somewhat euphemistically as "harmonization," seeks to eliminate difference in local laws in favor of worldwide uniformity.<sup>294</sup> In contrast, federalism encourages regulatory creativity, preserving an arena in which states can freely experiment, innovate, and copy one another's successes.<sup>295</sup> Indeed, there may not be one "right" approach to every policy problem. Even at a time where there is a Starbucks on every corner, state governments still offer their citizens different choices.<sup>296</sup> The result is greater freedom for the individual "consumer" of government, who can always move to a state more suited to her taste.

Critics of American federalism remind us that states historically have been more likely than the national government to exclude minority groups from the political process.<sup>297</sup> If localism is really the solution, critics argue, why not empower *local* governments, where minorities are likely to have more influence? The simplest answer is that states are the local entities recognized by the Constitution. We cannot start again with a clean slate, so

<sup>290</sup> See Bennett, *supra* note 286, at 504.

<sup>291</sup> See *id.*

<sup>292</sup> Perhaps more than any other recent federalism decision, Justice Kennedy's *Alden* opinion emphasizes respect: "Congress must accord States the esteem due to them as joint participants in a federal system." 527 U.S. at 758.

<sup>293</sup> One of the objections to the latest GATT agreement is that it would impose standards on various state regulatory powers such as banking, insurance, and local tax-breaks and incentives that have been used for policy experimentation. See Bradley, *supra* note 24, at 407-08; subpart II.C *supra*.

<sup>294</sup> See CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 79 (George A. Bermann et al. eds., 1992) (noting that "[h]armonization" or "approximation" denotes the process by which, through community legislation of some sort, the laws of the Member States on a given matter are brought more closely into line with one another, possibly though not necessarily even made uniform").

<sup>295</sup> Perhaps the most famous expression of this theory was a dissent by Justice Louis Brandeis in *New State Ice Co. v. Liebman*, 285 U.S. 262 (1932). "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.* at 311; see also Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1498 (1987) (book review) (arguing that having a large number of states will produce innovation).

<sup>296</sup> See Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1574 (1994).

<sup>297</sup> See THE FEDERALIST NO. 10, at 77-84 (James Madison) (Clinton Rossiter ed., 1961) (predicting this phenomenon); see also Steven Calabresi, Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403, 1404 n.4 (1982) ("This has been historically true and is just as true today.").

we ought to make the best of it.<sup>298</sup> But perhaps a false choice is being offered between, on the one hand, a variety of state governments with differentiated political cultures, each of which permits entrenched majorities to cling to power, and, on the other hand, a monolithic national government that respects minority rights but imposes a sameness that discourages involvement in politics. The national government can still take steps to protect minorities while preserving a significant degree of autonomy to the states.<sup>299</sup> Indeed, Professor Vicki Jackson argues that the permanence of state geographical boundaries promotes tolerance among racial, ethnic, and religious groups.<sup>300</sup> State lines do not usually correspond to race or religion. Maintaining the significance of state governments creates allegiances and civic identities that cut across divisive cultural and religious lines.<sup>301</sup>

It would be naive under any circumstances to rely on the political process to protect state sovereignty and promote respect of state government without intervention from the courts. This is particularly true where the treaty power is concerned. As argued in subpart IV.B, the political protections for the states envisioned by the Founders and built into the treaty approval process have been worn away. But the treaty negotiation and approval process is particularly troubling from the standpoint of a conversational model of democracy.<sup>302</sup> Not only is the treaty process "less representative than the normal federal legislative process,"<sup>303</sup> but it is far more opaque. The Executive conducts negotiations with little public disclosure or media attention, particularly since the advent of "fast-track" legislation.<sup>304</sup> It is no wonder, then, that a sense of frustration drew a veritable cross-section of society to protest at the WTO meeting in Seattle. Many felt unelected officials were making important decisions in secret. It is this aspect of the treaty power that is most destabilizing.

The Supreme Court's enforcement of federalism limitations upon treaties and other international agreements would not completely solve these problems. Nevertheless, it would force both the president and Congress to pay more attention to state concerns in the process of negotiation and ratification. States would be more likely to assert themselves in the treaty process, and this could in turn create a dialogue that would be useful to citizens.

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<sup>298</sup> See SHAPIRO, *supra* note 12, at 122-23.

<sup>299</sup> See Richard Briffault, "What About the 'Ism'?" *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1345-46 (1994) (arguing for federalism but noting that localism may call for federal intervention in some cases); Calabresi, *supra* note 297, at 1410-11 (arguing for a less stringent equal protection approach at the federal level and an absolute prohibition on discriminatory laws at the state level).

<sup>300</sup> Jackson, *supra* note 12, at 2221-22.

<sup>301</sup> *Id.*

<sup>302</sup> See generally Bennett, *supra* note 286.

<sup>303</sup> Bradley, *supra* note 24, at 442; see also Friedman, *supra* note 117, at 1475-59.

<sup>304</sup> See *supra* note 66 and accompanying text.

## VI. CONCLUSION

The forces of globalization will continue to put pressure on national governments to legislate through treaties and international agreements. The Court will interpret the constitutional status of this legislation in light of the Treaty Clause jurisprudence, even though formal treaties themselves are becoming more rare. If *Missouri v. Holland* remains good law, very little can prevent a torrent of international standards from wiping out state prerogatives.

The inevitable conflict between the uniqueness of the treaty power and the Court's revival of federalism should be resolved in favor of federalism. Since the incentives for the political branches at the federal level to protect states' rights are few, it will be up to the courts to enforce federalism limitations. The most recent Supreme Court decisions establish a firm grounding for federalism in the constitutional structure, leaving courts better equipped to protect states' rights.