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## Does Federalism Constrain the Treaty Power?

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## ARTICLES

### DOES FEDERALISM CONSTRAIN THE TREATY POWER?

*Edward T. Swaine\**

*The Supreme Court's revival of federalism casts doubt on the previously unimpeachable power of the national government to bind its states by treaty, suggesting potential subject-matter, anti-commandeering, and sovereign immunity limits that could impair U.S. obligations under vital trade and human rights treaties.*

*Existing scholarship treats these principles separately and considers them in originalist or other terms, without definitive result. This Article takes a different approach. By assessing all of the doctrines with equal care, but not at daunting length, it permits insight into the common issues involved in determining whether they should be extended to the treaty power. It also demonstrates that international law and constitutional law are not estranged on these questions. Not only does international law require federal states to interpret their constitutions so as to permit adhering to treaties, but the new federalism doctrines show a sensitivity toward preserving adequate means to pursue national and international ends like the treaty power, especially where those means turn on state consent.*

*Finally, the Article develops a treaty-compact device as an innovative tool for dissolving federalism's constraints. Taking advantage of parallel doctrinal developments that liberate state and national authority relating to foreign and interstate compacts, it demonstrates that combining the use of compacts with treaties offers solutions on each of the new federalism's fronts. The answer, then, is that federalism does not constrain the treaty power, when the Constitution is read as an organic whole and interpreted in a fashion in keeping both with international law and the new federalism itself.*

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\* Assistant Professor, The Wharton School, University of Pennsylvania. I received valuable comments from participants during presentations at the University of Chicago Law School, the University of Pennsylvania Law School, Temple Law School, and the annual meeting of the American Academy of Legal Studies in Business. I would also like to thank Curt Bradley and Jill Hasday for comments on the draft paper. Errors remain my own.

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## INTRODUCTION

Federalism is the vampire of U.S. foreign relations law: officially deceased or moribund at best, but in reality surprisingly resilient and prone to recover at unsettling intervals. Linked with a dark period in our constitutional prehistory, foreign relations federalism was supposedly given a lasting burial by the Constitution's nationalization of foreign affairs authority; in foreign relations, the orthodox position held, states<sup>1</sup> simply ceased to exist.<sup>2</sup> Nonetheless, rumors of their twilight existence persist.

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1. While international lawyers use the term "states" to refer to sovereign nation-states, this confuses discussion of foreign relations federalism. I generally use the term "nations" to describe the principal subjects of international law and "subnational governments" to describe their constituent governments, reserving "federal government" and "states" to indicate the U.S. exemplars of each—with "states" being understood to include local governments, too, unless specifically distinguished. For similar reasons, though international lawyers sometimes refer to national or subnational law as "municipal," I will use the term "domestic," or "national" or "subnational" where greater specificity is needed.

2. See, e.g., Louis Henkin, *Foreign Affairs and the United States Constitution* 150 (2d ed. 1996) [hereinafter Henkin, *Foreign Affairs*] ("At the end of the twentieth century as at the end of the eighteenth, as regards U.S. foreign relations, the states 'do not exist.'"); Quincy Wright, *The Control of American Foreign Relations* 75 (1922) [hereinafter Wright,

With lingering memories of previous scares,<sup>3</sup> frightened law professors have begun to huddle together in symposia to discuss a rash of recent sightings—especially in the form of state-conducted foreign relations, obstacles to compliance with international agreements, and special exemptions in treaties and implementing statutes.<sup>4</sup>

The orthodoxy's fallback, however, has been that any state role is not *real* federalism, since it could be exterminated whenever the federal government so chose. To be sure, the states' emerging prominence suggests that sunlight alone will not suffice. Likewise, it is hard to be confident in "dormant" constitutional doctrines requiring judicial enforcement, since the Supreme Court prudently wishes to avoid sticking its neck out—as evidenced most recently in *Crosby v. National Foreign Trade Council*, in which it deliberately avoided resolving constitutional objections to Massachusetts's legislation regarding Burma.<sup>5</sup> But the Van Helsings of the or-

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Control] ("We may conclude that state exercises of power in the field of foreign relations have been so restricted that such powers hardly exist at all."); Edward S. Corwin, *The Doctrine of Judicial Review* 169 (1914) ("In a word, what powers the States possess is a matter of the utmost indifference in determining the scope of the treaty-making power of the United States. Or to put it otherwise, the United States has exactly the same range of powers in making treaties that it would have if the States did not exist."). For further examples, see Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 *Duke L.J.* 1127, 1129 n.1 (2000) [hereinafter Swaine, *Negotiating Federalism*].

3. The episode most keenly recalled nowadays concerns the so-called Bricker Amendment campaign of the 1950s. Reacting to several proposed human rights treaties, Senator Bricker led a campaign for a constitutional amendment designed to make it more difficult to make and enforce treaties that might have an impact on U.S. domestic affairs. One clause proposed by the American Bar Association, for example, would have provided that "[a] treaty shall become effective as internal law in the United States only through legislation by Congress which it could enact under its delegated powers in the absence of treaty." *Proceedings of the House of Delegates: Mid-Year Meeting, February 25–26, 1952*, 38 *A.B.A. J.* 425, 435 (1952). The principal effect of that clause would have been to subject treaties to the same constitutional limits constraining congressional legislation, thereby substantially overturning the Supreme Court's holding in *Missouri v. Holland*, 252 *U.S.* 416 (1920). That particular clause was eventually rejected, and the Bricker Amendment as a whole narrowly defeated. For discussion of the various versions of the Amendment and their fates, see Loch K. Johnson, *The Making of International Agreements* 85–110 (1984); Duane Tananbaum, *The Bricker Amendment Controversy: A Test of Eisenhower's Political Leadership* 36–48, appxs. A–M (1988). The supposed revival of Brickerism has been described in supernatural terms, albeit having nothing to do with vampires. Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 *Am. J. Int'l L.* 341 (1995) [hereinafter Henkin, *The Ghost of Senator Bricker*]; see also *infra* text accompanying notes 350–351 (noting additional controversies).

4. See, e.g., Symposium: *Foreign Affairs Law at the End of the Century*, 70 *U. Colo. L. Rev.* 1089 (1999); Symposium: *Federal Courts and Foreign Affairs*, 42 *Va. J. Int'l L.* 365 (2002); Symposium: *New Voices on the New Federalism*, 46 *Vill. L. Rev.* 907 (2001).

5. 530 *U.S.* 363, 372–86 (2000) (finding Massachusetts law restricting state purchasing from companies doing business in Burma preempted by federal statute, and refraining from resolving other constitutional objections); see also *Barclays Bank PLC v. Franchise Tax Bd.*, 512 *U.S.* 298, 324 (1994) (upholding, against dormant Foreign Commerce Clause challenge, California method for assessing state corporate franchise taxes on

thodox story, if you will, have always been the national political branches, with their stake being the treaty power. Whatever the limits on federal statutes, *Missouri v. Holland* indicated that the treaty power was not limited by constitutional federalism to the same extent, giving the national government nearly unfettered authority to oust the states from foreign and domestic matters alike.<sup>6</sup>

This authority is now challenged. To the extent that the United States wishes to implement treaties requiring state legislation or enforcement by state officials—as might be entailed by the Vienna Convention on Consular Relations,<sup>7</sup> or the requirement in the draft protocol to the Torture Convention requiring that prisons provide access to foreign monitors<sup>8</sup>—the anticommandeering principle, which bars the federal government from directing state legislatures or state political officials, suggests that it may not.<sup>9</sup> Similarly, if a foreign government wishes to sue

multinationals, in part on ground that Congress had failed to act preemptively). Compare *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 751–53 (9th Cir. 2001) (distinguishing *Zschernig v. Miller*, 389 U.S. 429 (1968), in holding that California’s Holocaust Victim Insurance Relief Act did not intrude on exclusive federal foreign affairs power), with *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 66–71 (1st Cir. 1999) (holding that Massachusetts law violated exclusive federal foreign affairs power and dormant Foreign Commerce Clause), and *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1168 (N.D. Cal. 2001) (holding that California law establishing cause of action for individuals forced into labor by the Axis powers violated exclusive federal foreign affairs power), *aff’d sub nom. Deutsch v. Turner*, 317 F.3d 1005 (9th Cir. 2003) (holding that California law violated foreign affairs power “because it intrudes on the federal government’s exclusive power to make and resolve war, including the procedure for resolving war claims”). As I have argued elsewhere, one can read the Court’s strained interpretation of the federal statutory scheme in *Crosby*, together with its dicta, as reflecting a constitutional judgment concerning the foreign affairs power, but the message is at best obscure. See generally Edward T. Swaine, *Crosby as Foreign Relations Law*, 41 Va. J. Int’l L. 481 (2001) [hereinafter Swaine, *Crosby*].

A number of commentators have argued that the Court’s reluctance to advance any concrete form of dormant foreign relations preemption is well founded. See, e.g., Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1622–23 (1997) (summarizing argument that doctrine is modern in origin, lacks any continuing functional justification, and arrogates federal authority to the judiciary); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. Colo. L. Rev. 1223, 1226 (1999) [hereinafter Spiro, *Foreign Relations Federalism*] (concluding that, in light of new participation by states in global affairs, “there is no justification for the courts to enforce a default rule protecting federal exclusivity in the face of contrary state-level preferences”). But see Swaine, *Negotiating Federalism*, *supra* note 2, at 1246–54 (arguing for limited judicial protection of President’s power to negotiate with foreign powers).

6. See 252 U.S. at 433. For further discussion, see *infra* Part I.A.

7. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1)(b), 21 U.S.T. 77, 101.

8. According to news reports, the United States unsuccessfully opposed these terms on the grounds of states’ rights, though the precise nature of its objections was unclear. See Barbara Crossette, *U.S. Fails in Effort to Block Vote on U.N. Convention on Torture*, N.Y. Times, July 25, 2002, at A7.

9. See *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that the federal government may not compel a state to enact or administer a federal program); *Printz v.*

the states for treaty breaches—to secure damages, because a state appropriated a foreign copyrighted work in violation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs),<sup>10</sup> or to prevent a state from executing a foreign national<sup>11</sup>—the ever-expanding penumbra of Eleventh Amendment immunity may block the suit,<sup>12</sup> and may equally prevent Congress from abrogating that immunity.<sup>13</sup> The revitalized limits to the Commerce Clause even call into question the subjects-matter that the treaty power can reach.<sup>14</sup>

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United States, 521 U.S. 898, 935 (1997) (holding that the federal government may not compel state non-judicial officers to execute federal law).

10. Professors Berman, Reese, and Young provide the delightful example in which the State of Texas appropriates a jingle for jingoistic purposes. See Mitchell N. Berman et al., *State Accountability for Violations of Intellectual Property Rights: How to “Fix” Florida Prepaid (and How Not to)*, 79 *Tex. L. Rev.* 1037, 1039 (2001). See generally Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Annex 1C, 33 *I.L.M.* 1197 (1994) [hereinafter TRIPs] (Agreement on Trade-Related Aspects of Intellectual Property Rights).

11. *Breard v. Greene*, 523 U.S. 371, 377 (1998) (per curiam) (denying motion for leave to file original complaint, and petition for certiorari, in part on ground that Paraguayan government’s claim based on violation of Vienna Convention on Consular Relations might be barred by Eleventh Amendment).

12. See, e.g., *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1868 (2002) (holding that state sovereign immunity bars the Federal Maritime Commission from adjudicating a private complaint against a state); *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) (holding that a tribe’s action to enjoin state officials from continuing to exercise jurisdiction over lands claimed by the tribe was “functional equivalent of a quiet title action” against the state, and thus ineligible for *Ex parte Young* exception to Eleventh Amendment sovereign immunity); *id.* at 270–80 (Kennedy, J., joined by Rehnquist, C.J.) (characterizing *Ex parte Young* doctrine as dependent either on the absence of a state forum or on interpretation of federal law, and urging case-by-case balancing and accommodation of state interests in maintaining immunity); *Seminole Tribe v. Florida*, 517 U.S. 44, 73–76 (1996) (holding *Ex parte Young* inapplicable where Congress had established a detailed remedial scheme, and otherwise permissible prospective relief would exceed scheme’s limitations).

13. See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636, 647 (1999) (holding that Congress lacked the authority under Article I in the Patent and Plant Variety Protection Remedy Clarification Act to abrogate state sovereign immunity, and had not established an adequate basis for abrogation under the Fourteenth Amendment); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (holding that because false advertising claims do not relate to a constitutionally recognized property right, relevant provisions of the Trademark Remedy Clarification Act abrogating state sovereign immunity could not be sustained as an exercise of congressional authority under the Fourteenth Amendment).

14. *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (holding that Congress lacked the authority under the Commerce Clause to prohibit possession of firearms near schools). Compare Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 *Mich. L. Rev.* 390, 394–95 (1998) [hereinafter Bradley, *Treaty Power I*] (arguing that “nationalist view” of the treaty power violates principles of federalism), and Curtis A. Bradley, *The Treaty Power and American Federalism*, Part II, 99 *Mich. L. Rev.* 98, 99–105 (1998) [hereinafter Bradley, *Treaty Power II*] (same), with David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 *Mich. L. Rev.* 1075, 1079–81 (2000) [hereinafter Golove, *Treaty-Making and the Nation*] (arguing, largely from an historical perspective, that “nationalist” view is

Should any of this come to pass, the new federalism<sup>15</sup> will have placed the United States in violation of its treaty obligations, which is plainly a serious problem. But even *perceived* constitutional limitations matter. The recent *LaGrand* judgment by the International Court of Justice, which held in part that omissions by the state of Arizona had put the United States in breach of the Vienna Convention, was one of the few occasions on which the United States has been authoritatively judged to have violated international law, and perhaps the first in which the United States took the position that it lacked the legal authority to have done differently.<sup>16</sup> Perceived limits may also divert U.S. bargaining power, or

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correct), and Thomas Healy, Note, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 Colum. L. Rev. 1726, 1728 (1998) (arguing, like Golove, that “the treaty power should not be subjected to federalism-based limitations”).

15. I intend this simply as shorthand for recent Supreme Court decisions, and do not attempt to evaluate their real doctrinal novelty. For like usage, see, e.g., David J. Barron, *A Localist Critique of the New Federalism*, 51 Duke L.J. 377 (2001) (adverting to the Supreme Court’s “new federalism”); Richard E. Levy, *Federalism: The Next Generation*, 33 Loy. L.A. L. Rev. 1629 (2000) (same); Keith E. Whittington, *Taking What They Give Us: Explaining the Court’s Federalism Offensive*, 51 Duke L.J. 477 (2001) (same); cf. Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. Chi. L. Rev. 429, 430 & n.6 (2002) (noting and citing contrary views among scholars as to whether recent federalism decisions are revolutionary). But I discount predictions that it has already been eclipsed. See, e.g., Linda Greenhouse, *Will the Court Reassert National Authority?*, N.Y. Times, Sept. 30, 2001, at D14 (asserting that “[t]he Supreme Court’s federalism revolution has been overtaken by events”).

16. *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (on file with the *Columbia Law Review*); see Counter-Memorial of the United States of America (F.R.G. v. U.S.), 2000 I.C.J. Pleadings (*LaGrand Case*) ¶¶ 121–126 (Mar. 27), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (on file with the *Columbia Law Review*) (alluding to constitutional restrictions on U.S. federal authority).

Still more recently, Mexico brought an action against the United States alleging that ten U.S. states hold at least fifty-four Mexican nationals on death row notwithstanding proceedings violating the same Convention provisions, which required, *inter alia*, that those authorities have notified the detainees of their right to contact the Mexican consulate. Application Instituting Proceedings Submitted by the Government of the United Mexican States at 1 ¶ 1, *Case Concerning the Vienna Convention on Consular Relations (Mex. v. U.S.)* (Jan. 9, 2003), at [http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus\\_iapplication\\_20030109.PDF](http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iapplication_20030109.PDF) (on file with the *Columbia Law Review*). Over objections by the United States, the International Court of Justice granted preliminary relief with respect to three Mexican nationals, two held by the state of Texas and one by Oklahoma, who were in most imminent risk of execution. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, at [http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus\\_iorder\\_20030205.PDF](http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iorder_20030205.PDF) (Provisional Measures Order of Feb. 5, 2003) (on file with the *Columbia Law Review*) [hereinafter *Mexican Nationals Order*]. Texas officials indicated that it will not comply with the order, which they consider to go beyond the authority of the Court of Justice or the federal government to enforce, while Oklahoma has indicated that it will proceed with plans while evaluating whether to comply. Kris Axtman, *U.S. Death Penalty Creates International Snarl*, *Christian Science Monitor*, Feb. 24, 2003, at 2; Marcia Coyle, *A Death Penalty Duel: U.N. Court Orders U.S. to Stay Executions*, *Nat’l L.J.*, Feb. 17, 2003, at A1. Some have speculated that the United States lacks the ability to countermand them. See Julian Ku, *Choosing Between Constitutional*

otherwise leave Pareto optimal gains at the bargaining table,<sup>17</sup> by encouraging the United States flatly to oppose treaties (as with Convention on the Rights of the Child<sup>18</sup>), to seek treaty exemptions modifying the consequences for states (most notably, with a variety of human rights treaties,<sup>19</sup> as well as the Agreement on Government Procurement<sup>20</sup>), or to provide substantial concessions to the states in domestic implementation (as par-

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and International Law: Why the United States May Have Good Reason to Ignore the Recent World Court Order, Writ, Feb. 11, 2003, at [http://writ.news.findlaw.com/commentary/20030211\\_ku.html](http://writ.news.findlaw.com/commentary/20030211_ku.html) (on file with the *Columbia Law Review*); see also *infra* note 221 and accompanying text (discussing U.S. and Mexican submissions).

17. These gains may be appropriate either by foreign treaty partners or by the United States. For elaboration, see *infra* text accompanying notes 279–281.

18. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); see also Peter J. Spiro, The States and International Human Rights, 66 *Fordham L. Rev.* 567, 575 & nn.25–26 (1997) [hereinafter Spiro, The States and International Human Rights] (citing authorities relating to states' rights objections). Only Somalia and the United States have failed to ratify the Convention, though many signatories have sharply limited the terms of their commitments through reservations. See William A. Schabas, Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child, 3 *Wm. & Mary J. Women & L.* 79, 79–80 (1997).

19. These may take the form of federal state clauses or reservations, understandings, and declarations. See *infra* text accompanying notes 154–158. For example, the United States attached a federalism understanding in finally agreeing to be bound by the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); S. Exec. Doc. No. 95-2, at 23 (1978); see U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 *Cong. Rec.* S4783–84 (daily ed. Apr. 2, 1992) (providing that “the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments”). The Clinton Administration also proposed such an understanding with respect to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981). While the Senate Foreign Relations Committee favorably reported on CEDAW and the Bush Administration initially indicated its support, its approval continues to be held up on sovereignty grounds. Sean Salai, Review to “Delay” Women’s Treaty, *Wash. Times*, July 26, 2002, at A12; S. Exec. Rep. No. 103-38, at 51 (1994) (“[T]he United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the State and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary take appropriate measures to ensure the fulfillment of this Convention.”); Ann Elizabeth Mayer, Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?, 23 *Hastings Const. L.Q.* 727, 729–30 (1996); Judith Resnik, Categorical Federalism: Jurisdiction, Gender, and the Globe, 111 *Yale L.J.* 619, 665–66 (2001). The United States was not, it should be stressed, alone in considering ratification acceptable only if it were accompanied by substantial reservations. See Resnik, *supra*, at 677–78; Schabas, *supra* note 18, at 79.

20. Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4, at 17–43, reprinted in *Uruguay Round of Multilateral Trade Negotiations: Legal Instruments Embodying the Results of*

ticularly evident in trade matters like the Uruguay Round Agreements Act<sup>21</sup>). Other implications are less direct. Some argue, for example, that the new federalism requires reassessing the validity of congressional-executive agreements,<sup>22</sup> or intimate that the United States is obliged to reject any international agreement that is inconsistent with its federal system.<sup>23</sup> Perceived limits to the treaty power may also influence domestic concerns about surrendering autonomy to international institutions<sup>24</sup>—though

the Uruguay Round vol. 31, at 25,679–705 (1994) [hereinafter Agreement on Government Procurement]. For further discussion, see *infra* note 72 and accompanying text.

21. See Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, § 102(b)(1)(C), 108 Stat. 4809, 4816–17 (1994) (codified as amended at 19 U.S.C. § 3512(b)(1)(C) (2000)); see also North American Free Trade Agreement (NAFTA) Implementation Act, Pub. L. No. 103-182, § 102(b)(1)–(3), 107 Stat. 2057, 2062–63 (1993) (codified as amended at 19 U.S.C. § 3312(b)(1)–(3) (2000)), Dec. 17, 1992, 32 I.L.M. 605, 676 (1993). For further discussion, see *infra* note 71 and accompanying text.

22. It is generally accepted that the federal government can subscribe to an international agreement either by treaty or by congressional-executive agreement, which substitutes a bicameral majority for consent by two-thirds of the Senate. See Restatement (Third) of Foreign Relations § 303(2) cmt. e (1987) [hereinafter Restatement (Third)]; Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 *Tex. L. Rev.* 961, 965 & n.8 (2001) [hereinafter Spiro, *Constitutional Method*] (noting breadth of consensus); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 *Geo. Wash. L. Rev.* 527, 560 (1999) (concluding that constitutionality of congressional-executive agreements is “settled”); see also, e.g., *Made in the USA Found. v. United States*, 56 F. Supp. 2d 1226, 1319–23 (N.D. Ala. 1999) (holding that the United States constitutionally subscribed to NAFTA through legislative means, and was not required to employ procedures under Treaty Clause), vacated and dismissed as political question, 242 F.3d 1300 (11th Cir. 2001), cert. denied, 534 U.S. 1039 (2001). There is a recurring dispute, however, as to whether the two methods are completely interchangeable. For the latest recurrence, compare Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 *Harv. L. Rev.* 1221, 1249–78 (1995) [hereinafter Tribe, *Taking Text and Structure Seriously*] (stressing reservations about interchangeability), with Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 *Harv. L. Rev.* 799, 924–25 (1995) (celebrating interchangeability as consistent with modern Constitution). Cf. Golove, *Treaty-Making and the Nation*, *supra* note 14, at 1307 n.789 (qualifying interchangeability as contingent on a broad construction of Congressional lawmaking authority). Professor Yoo recently cited the new federalism decisions as an additional basis for reconsidering interchangeability: as he argued, “If such statutes can take the place of treaties, and if treaties are not subject to the regular federalism limitations that apply to laws, then interchangeability exempts congressional-executive agreements from the limitations imposed by Article I, Section 8 and the Tenth Amendment,” thus creating an untenable loophole within the legislative power. John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 *Mich. L. Rev.* 757, 820 (2001).

23. See Peter J. Spiro, *The New Sovereignists*, *Foreign Aff.*, Nov.–Dec. 2000, at 9, 13 (reporting, without endorsing, position).

24. Cf. John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 *Colum. J. Transnat'l L.* 157, 170–88 (1997) (noting, and rebutting, sovereignty complaints); Samuel C. Straight, Note, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 *Duke L.J.* 216, 250–54 (1995) (same); Charles Tiefer, *Free Trade Agreements and the New Federalism*, 7 *Minn. J. Global Trade* 45, 46–47 (1998)

whether such limits help defuse concerns, or give them legitimacy, is as yet unclear.

The merits of the new federalism doctrines are thus highly significant, and getting deserved attention—but they also deserve to be considered together.<sup>25</sup> Rather than scrutinizing one or more of the issues in terms of originalism or some other mode of constitutional critique,<sup>26</sup> or undertaking a normative account of foreign relations federalism,<sup>27</sup> this Article instead addresses an overarching, doctrinal question: do these new federalism doctrines (really) constrain the treaty power?<sup>28</sup>

(describing emergence of new federalism paradigm in which states influence international negotiations, and national political branches limit themselves to “‘weak’ preemption” of state law); Julie Long, Note, Ratcheting Up Federalism: A Supremacy Clause Analysis of NAFTA and the Uruguay Round Agreements, 80 *Minn. L. Rev.* 231, 261–65 (1995) (advocating balancing test for evaluating state laws potentially conflicting with trade agreements, weighing disruption to federal system against state’s legitimate policy pursuits).

25. To be clear, though, I consider only the most immediately pertinent doctrines. For a broader approach, see generally Fallon, *supra* note 15 (examining federalism in Rehnquist Court decisions across a much broader spectrum).

26. See, e.g., Robert Anderson IV, “Ascertained in a Different Way”: The Treaty Power at the Crossroads of Contract, Compact, and Constitution, 69 *Geo. Wash. L. Rev.* 189, 190, 203 (2001) (adopting originalist inquiry into relationship between the treaty power and federalism). To completely realize a more theoretical approach would require, I suppose, specifying and defending a method of constitutional analysis, or at least a willingness to endure criticism from each and every other method. See, e.g., Bradley, *Treaty Power I*, *supra* note 14, at 394, 409–17 (replying to mammoth originalist critique by, *inter alia*, disclaiming any pretense to having made an originalist argument). This is a daunting task, and may be of limited value if the relevant federalism doctrines are examined in isolation from one another. See Edward T. Swaine, *The Undersea World of Foreign Relations Federalism*, 2 *Chi. J. Int’l L.* 337, 341–43 (2001) [hereinafter Swaine, *Undersea World*].

27. See, e.g., Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 *U. Pa. L. Rev.* 245, 249–54 (2001) (articulating an approach to federalism “premised on dialogue and intergovernmental relations as a way to negotiate, rather than avoid, conflict and indeterminacy”); Resnik, *supra* note 19, at 621–25 (proposing a theory of “multi-faceted” federalism); cf. Ann Althouse, *Why Talking About “States’ Rights” Cannot Avoid the Need for Normative Federalism Analysis: A Response to Professors Baker and Young*, 51 *Duke L.J.* 363, 370–76 (2001) (arguing that “[q]uestions about the normative value of federalism are unavoidable”). See generally Swaine, *Undersea World*, *supra* note 26, at 343–47 (describing need for such inquiries). The doctrinal questions I do address are not, of course, norm-free; evaluating whether an existing doctrine should be considered robust, or how easily it may be extended to resolve new questions, clearly involves many of the same kinds of judgments.

28. Constitutional doctrine here means the Constitution as authoritatively construed by the Supreme Court, including any steps it might plausibly take to reconcile inconsistencies in that doctrine or to apply it to new facts. While I note the relationship between this doctrine and the negotiating positions taken by the United States on federalism-related questions, see *infra* text accompanying notes 157–159, I otherwise simply assume that doctrine acts to constrain both judicial and political institutions. But see, e.g., Frank B. Cross, *Realism About Federalism*, 74 *N.Y.U. L. Rev.* 1304, 1304–05 (1999) (concluding that “federalism does not now and will never have authentic legal significance as a principled constraint on the power of national government,” and

Focusing on what the law actually provides, but across the spectrum of relevant principles, permits important insights. First, as demonstrated in Part I, there is a substantial risk that subject-matter limitations, the anticommandeering principle, and state sovereign immunity may all be applied to the exercise of the treaty power. While *Missouri v. Holland* may survive for the foreseeable future, it will likely be read narrowly. Partly in consequence, it is more likely than not that the Supreme Court would be inclined to restrict the federal government's ability under the treaty power to commandeering state legislatures and state officials, and to waive state immunity from suits based on treaty violations, to a degree similar to that already effected in the domestic context. While Congress and the President may favor protecting the states in any event, and the states may engage in self-help by undertaking independent foreign relations initiatives, neither mechanism eclipses the potential significance of judicially imposed limits on national power.

Second, while considering the new federalism doctrines together shows their potential impact, the Court's cases also show a sensitivity toward accommodating the United States' ability to promote its interests through international law. Part II shows that international law and constitutional law are not entirely estranged on the question of how to reconcile federalism with international obligations. While international law professes agnosticism as to how national governments order their political relations, so long as the national government remains responsible, it is also best read as imposing a duty on nations to interpret constitutional law so as to avoid, where possible, defeasance of their treaty responsibilities. The new federalism cases, analogously, suggest that state sovereignty is most likely to be indulged when alternative means of securing the national interest may be identified—particularly when those alternative means are sensitive to state consent. The final section of Part II concludes, though, that applying these interpretive approaches to the treaty power at first yields an equivocal result: the alternatives previously acknowledged in the domestic context may well be insufficient in the treaty context, but the case is not so clear as to warrant truncating the new federalism on that basis alone.

Part III then revives and reconceives an alternative that has lain fallow since *Missouri v. Holland*: compacts with foreign nations (or "foreign compacts," for short). The Compact Clause,<sup>29</sup> I submit, *must* be read through the prism of constitutional doctrine: to do otherwise not only produces a textualist or historical understanding of interstate and foreign compacts at odds with the Supreme Court's, but also overlooks an offset-

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describing the anticommandeering doctrine as a "[r]elatively weak bright-line doctrine[ ] . . . [that] probably represent[s] the apogee of states' rights").

29. U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power."). But see *id.* art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation.").

ting corrective for the compromises suggested by the Court's new federalism doctrines. While foreign compacts are most commonly envisaged as a device for promoting state autonomy in foreign relations, or at best as a vehicle for harnessing states as an alternative to unified federal representation, they may also be employed in tandem with treaties as a vehicle for overcoming constitutional inhibitions on both the federal government and the states.

By this reckoning, the United States could, in theory, enter into a treaty with a foreign nation while consenting to a foreign compact involving the several states on the same terms—and encourage the states to participate, for example, by denying nonparticipating state governments the benefits of the treaty or by refusing to espouse their claims. As I explain, foreign compacts offer a doctrinally coherent means of resolving subject-matter, anticcommandeering, and state sovereign immunity limits on the treaty power, at least where the Constitution is interpreted with favor toward facilitating full participation in international agreements. The benefit of such a device, even if rarely employed, is to liberate substantially the United States from fears that the treaty power is constrained by federalism, and to permit it—and its negotiating partners—a fuller understanding of the nation's foreign relations potential.

#### I. THE TREATY POWER AND THE NEW FEDERALISM

No treaty has ever been struck down on federalism grounds,<sup>30</sup> and there is little case law even addressing the relationship between federalism and the treaty power. Yet virtually every principle of U.S. foreign relations law helps define the relationship between international agreements and state authority. The rise of congressional-executive agreements, for example, not only raises separation of powers issues, but also diminishes the residual space available to the states (by permitting agreements to be fashioned when a treaty may not have been feasible), and further impairs the increasingly marginal role of the Senate as a guardian of state interests.<sup>31</sup> The U.S. doctrine of non-self-execution similarly

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30. Indeed, Justice Chase once opined that “[i]f the court possess a power to declare treaties *void*, I shall never exercise it, but in a very clear case indeed.” *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1796) (Chase, J.) (emphasis added).

31. That said, the potential import of Senate involvement is far from clear. The Senate has, to be sure, continued to play an obstructionist role in the treaty process—including as to matters of concern to the states—withstanding the Seventeenth Amendment. See Golove, *Treaty-Making and the Nation*, *supra* note 14, at 1294–99; Healy, *supra* note 14, at 1753–55; cf. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *Colum. L. Rev.* 215, 224 n.33 (2000) (arguing that “contrary to popular belief, the power of state legislators to select Senators had lost most of its significance for federalism long before adoption of the 17th Amendment in 1913”). But obstructionism, or antimajoritarianism, has no necessary connection with any genuine commitment to federalism. See *id.* at 224–25 (distinguishing between protecting state interests and protecting state institutions). And if obstructionism is what is being measured, it is unclear why the protection offered by a simple majority of the Senate, as

sounds in the separation of powers,<sup>32</sup> but indirectly *increases* the potential authority of all domestic institutions—including the states—by indicating that treaties may lack preemptive force until implemented by domestic legislation.<sup>33</sup>

But these and other familiar doctrines of foreign relations law have recently been augmented by domestic federalism cases that threaten to cross over to foreign affairs. Because their scopes are controversial, it is worth sketching their parameters before situating them at the intersection of more general constitutional and international principles. As I explain below, if we put to one side the role played by the accepted and potential alternative means of regulating state activities—considered in Parts II and III, respectively—it seems most likely that the Court would apply the new federalism in a fashion that constrains the treaty power.

appropriate to congressional-executive agreements, is insufficient to protect state interests, while the supermajority appropriate to treaties would be sufficient—even putting aside procedural requirements that reduce the distance between the two. See Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treaty-making*, 8 *Temp. Int'l & Comp. L.J.* 257, 311 (1994).

32. The basic principle is derived from English dualism, which obviously had separation of powers rather than federalism in mind. In the U.S. context, John Yoo's recent argument that non-self-execution is constitutionally obligatory is limited to horizontal issues of federal authority, and he expressly concedes that either treaties or implementing legislation are wholly satisfactory means of imposing federal obligations on the states. John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 *Colum. L. Rev.* 2218, 2251–52 (1999) [hereinafter Yoo, *Treaties and Public Lawmaking*].

33. Cf. John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 *Am. J. Int'l L.* 310, 323–27 (1992) (describing functional arguments, most relating to legislative authority, for disfavoring direct application). To the extent that the non-self-execution doctrine concerns the Supremacy Clause, of course, it pertains directly to the federal government's authority relative to the states. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.) (concluding that, save where state parties agreed that a treaty would not be self-executing, the Supremacy Clause required that a treaty “be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision”), overruled in part, *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88–89 (1833) (modifying *Foster*, on its facts, where subsequently unearthed Spanish version of treaty suggested that it was self-executing); see also *infra* note 263 and accompanying text (discussing *Foster*). But the insistence in *Foster v. Neilson* on a strong presumption in favor of self-execution has arguably eroded, making reliance on the Supremacy Clause more attenuated. Compare, e.g., Henkin, *The Ghost of Senator Bricker*, *supra* note 3, at 346–47 (arguing for self-execution based, in part, on Supremacy Clause), and Carlos Manuel Vázquez, *Laughing at Treaties*, 99 *Colum. L. Rev.* 2154, 2157–58 (1999) [hereinafter Vázquez, *Laughing at Treaties*] (suggesting the Supremacy Clause, as interpreted by the Supreme Court, indicates a “default rule” of self-execution), with Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 *U. Pa. L. Rev.* 399, 447–49 (2000) [hereinafter Bradley & Goldsmith, *Conditional Consent*] (arguing that the Supremacy Clause does not prohibit federal lawmakers from limiting the domestic application of treaties), and Yoo, *Treaties and Public Lawmaking*, *supra* note 32, at 2219–20 (arguing that the Constitution “allow[s] the three branches to defer execution of a treaty until the President and Congress can determine how best to implement the nation's treaty obligations”).

A. *Applying the New Federalism*

1. *Substantive Limits: Revisiting Missouri v. Holland.* — For some time, the most certain proposition of U.S. foreign relations law has been that there are no subject-matter limits to the U.S. treaty power. *Missouri v. Holland* involved a state’s challenge to a treaty with Great Britain regulating the hunting of migratory birds in the United States and Canada—a matter that Congress had previously tried to regulate within U.S. borders by statute, only to find federal prosecutions enjoined as unconstitutional.<sup>34</sup> Dismissing the state’s property interest in migratory fowl<sup>35</sup>—and stressing, in contrast, the significance of the national interest involved, the need for international cooperation, and the infeasibility of relying on state self-regulation<sup>36</sup>—Justice Holmes rejected any view that “some invisible radiation from the general terms of the Tenth Amendment” could constrain the treaty power and its implementation by federal statute.<sup>37</sup>

This holding has never since been limited.<sup>38</sup> But history suggests that it may be vulnerable whenever it proves relevant. The Bricker Amendment movement of the 1950s, which would have effectively overturned *Holland*, was averted in no small part due to executive branch promises that the United States would not seek approval of any hot-button human rights accords,<sup>39</sup> and was later mooted as domestic authority expanded to close the gap with the treaty power.<sup>40</sup> The Supreme Court’s recent renewal of limits on national legislative authority has revived criticism of *Holland*. The cornerstone was *United States v. Lopez*, which invalidated the Gun-Free School Zones Act on the ground that Congress had

34. 252 U.S. 416, 432 (1920); see Act of March 4, 1913, ch. 145, 37 Stat. 828, 847 (1913); *United States v. McCullagh*, 221 F. 288, 292–96 (D. Kan. 1915) (rejecting argument that statute was warranted as an exercise of congressional authority to promote the general welfare, or to regulate interstate commerce); *United States v. Shauver*, 214 F. 154, 160 (E.D. Ark. 1914) (rejecting argument that statute was warranted as an exercise of congressional authority to “make all needful regulations respecting [its property]” (citing U.S. Const. art. IV, § 3, cl. 2)). The Supreme Court reserved judgment as to whether either of the purely statutory cases had been correctly decided. See *Holland*, 252 U.S. at 433.

35. See *Holland*, 252 U.S. at 434.

36. *Id.* at 435.

37. *Id.* at 433–34; see also *infra* note 104 (discussing *Holland*’s separate delegation argument).

38. See, e.g., *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (“The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations, and . . . any conflicting law of the State must yield.”); *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (“The treaty-making power of the United States is not limited by any express provision of the Constitution, and . . . [it] extend[s] to all proper subjects of negotiation between our government and other nations.”). As noted below, the idea that the treaty power may be limited by other constitutional principles, such as individual liberties, is indicated in *Holland* itself. See *infra* text accompanying note 107.

39. See Tananbaum, *supra* note 3, at 89, 199; see also *supra* note 3 (describing Bricker Amendment controversy).

40. See Henkin, *supra* note 2, at 192–93.

exceeded the Commerce Clause.<sup>41</sup> While *Lopez* has not yet exceeded the average life span of the federalism doctrines,<sup>42</sup> neither has it been abandoned. After *City of Boerne v. Flores*,<sup>43</sup> the Court combined its restrictive approaches to congressional authority under the Commerce Clause and the Fourteenth Amendment in *United States v. Morrison*.<sup>44</sup> It recently expressed qualms about construing the Commerce Clause to include activities at issue in *Holland*,<sup>45</sup> thereby unsettling contentions that *Holland*'s outcome was secure irrespective of the treaty power.<sup>46</sup> More important, the Court's apparent conviction that the enumeration of federal powers must leave the states with *some* authority beyond the federal reach is inconsistent with *Holland*—which did, after all, indicate that such a limit was “invisible”—and suggests that the Court might be inclined to cabin the treaty power.<sup>47</sup>

41. 514 U.S. 549, 551 (1995).

42. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530–31 (1985) (overruling *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), which itself overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968)).

43. 521 U.S. 507, 511 (1997) (holding that Religious Freedom Restoration Act RFRA exceeded Congress's remedial powers under Fourteenth Amendment).

44. 529 U.S. 598, 627 (2000) (holding that the Violence Against Women Act exceeded Congress's powers under the Commerce Clause and under the Fourteenth Amendment).

45. See *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 173–74 (2001) (concluding that Corps of Engineers lacked authority under Clean Water Act to adopt Migratory Bird Rule in light of “significant constitutional questions” that would be raised by construing Act to encompass implicated intrastate activities).

46. *Missouri v. Holland* itself did not resolve whether the statute in question would in fact have exceeded Congress's domestic authority, and some have suggested it did not, even under then-prevailing standards. See Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 *Yale L.J.* 229, 351 n.464 (1990) (“The eternal puzzle of *Missouri v. Holland* is, of course, why Holmes went out of his way to intimate that treaty power is not limited by the Constitution's ordinary rules of federalism. Holmes could have demurely placed controls on migratory birds within regulation of interstate and foreign commerce, and then decided only that treaty power extends at least as far as Congress's enumerated legislative powers.”). But see Golove, *Treaty-Making and the Nation*, *supra* note 14, at 1255–56 (describing serious doubts among advocates for migratory bird regulation concerning Commerce Clause authority).

47. *Morrison*, 529 U.S. at 617–18 (“The Constitution requires a distinction between what is truly national and what is truly local.”); *Lopez*, 514 U.S. at 567–68 (resisting conclusion that “the Constitution's enumeration of powers does not presuppose something not enumerated . . . and that there never will be a distinction between what is truly national and what is truly local” (citations omitted)); see also *Morrison*, 529 U.S. at 607 (“Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. ‘The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.’” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.))). Because this approach eschews any definition of “local” matters—preferring instead to suppose that some must be maintained, and that establishing limits on federal authority permits that—it would, I presume, require the intermediate step of addressing any claims that the treaty power is distinctive in character.

The new federalism decisions also invite fresh scrutiny of the treaty power by encouraging its creative use to circumvent federalism restrictions (not incidentally, just as happened in *Holland* itself).<sup>48</sup> Professor Neuman has argued, for example, that the Religious Freedom Restoration Act, struck down in *City of Boerne*, might be reenacted as an implementation of extant treaties.<sup>49</sup> Others have taken the view that the Violence Against Women Act, struck down in *Morrison*, could be defended as an exercise of the treaty power.<sup>50</sup> And the Southern District of New York intimated in dictum that congressional implementation of the Berne Convention and the Universal Copyright Convention through the Berne Convention Implementation Act of 1988<sup>51</sup> might have permitted U.S. enforcement of foreign copyrights unable to satisfy the originality standard imposed by the Copyright Clause.<sup>52</sup> Because such arguments rely on an apparent inconsistency between *Holland* and the new federalism, they arguably increase its vulnerability to being reinterpreted, narrowed, or overruled.<sup>53</sup>

If it comes to that, the alternatives to *Holland* have changed very little over the years. Few continue to advocate requiring an “external” or “international” object for a valid treaty,<sup>54</sup> but some argue that a treaty must

48. Bradley, Treaty Power I, *supra* note 14, at 409; Bradley, Treaty Power II, *supra* note 14, at 99–100.

49. Gerald L. Neuman, The Global Dimension of RFRA, 14 Const. Comment. 33, 46 (1997) [hereinafter Neuman, Global Dimension].

50. Brief of Amici Curiae on Behalf of International Law Scholars and Human Rights Experts for Petitioners at 3–17, *United States v. Morrison*, 529 U.S. 598 (2000) (No. 99-0029). The Court did not address the argument.

51. Pub. L. No. 100-568, 102 Stat. 2853 (1988).

52. *Bridgeman Art Library v. Corel Corp.*, 36 F. Supp. 2d 191, 195 (S.D.N.Y. 1999). The court concluded, however, that the Berne Convention Implementation Act only extended the protection afforded by the Copyright Act, thus mooting the issue. *Id.*

53. See, e.g., Bradley, Treaty Power II, *supra* note 14, at 112 n.80 (citing authorities querying whether *Holland* is likely to be rethought or overruled); Healy, *supra* note 14, at 1726 (posing question, in title, as to whether *Holland* remains good law). Of course, it might also be argued that the availability of the treaty power had the effect of diminishing the constraints on the Court in announcing the federalism limits on domestic authority. But that seems less plausible, given the relative prevalence of domestic issues.

54. See, e.g., *United States v. Lue*, 134 F.3d 79, 83–84 (2d Cir. 1998) (endorsing criticism of dichotomy between domestic and international matters, but still finding Hostage Taking Convention valid because it addresses “a matter of central concern among nations”); see also Henkin, Foreign Affairs, *supra* note 2, at 196–98 (describing position as having been “authoritatively abandoned”); Bradley, Treaty Power I, *supra* note 14, at 451–52; Bradley, Treaty Power II, *supra* note 14, at 107; Golove, Treaty-Making and the Nation, *supra* note 14, at 1289 (noting that “international concern” test has been “widely rejected”); Note, Restructuring the Modern Treaty Power, 114 Harv. L. Rev. 2478, 2498 (2001) (concluding that limiting treaties and congressional-executive agreements to “traditionally international subjects” is outmoded). But see *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (describing treaty power as “broad enough to cover all subjects that properly pertain to our foreign relations”); *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (noting that the treaty power “extend[s] to all proper subjects of negotiation between our government and other nations”); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890)

be bona fide and not intended solely to circumvent the Constitution<sup>55</sup>—an approach that might have merited a different result in *Holland* itself, given the dispute’s background. Professor Golove suggests that treaties must “advance[ ] the national interests of the United States in its relations with other nations,”<sup>56</sup> echoing Justice Holmes’s emphasis on the need for national action in *Missouri v. Holland* itself. But it is difficult to imagine any modern court adopting that as a justiciable test, let alone invalidating an international commitment on that ground.<sup>57</sup>

Finally, in the leading work advocating federalism constraints, Professor Bradley proposes that the treaty power should be construed so as to afford no additional federal authority beyond the power to bind the United States internationally—meaning that the domestic effects of a treaty (or its statutory implementation) would be encumbered by the

(proposing, in dictum, that treaties must concern questions that are “properly the subject of negotiation with a foreign country”); Healy, *supra* note 14, at 1732 & nn.45–50, 1750 & n.192 (noting, and tentatively endorsing, limitation). Compare 1 Laurence H. Tribe, *American Constitutional Law* § 4-4, at 646 (3d ed. 2000), [hereinafter Tribe, *Constitutional Law* (3d ed.)] (“Even though global interdependence now reaches across an ever broadening spectrum of issues, this limit on the subject matter of treaties remains a meaningful restriction.”), with Laurence H. Tribe, *American Constitutional Law* § 4-5, at 227–28 (2d ed. 1988) (“The Supreme Court, in dictum, has embraced Jefferson’s view as a constitutional limitation: a treaty must deal with questions ‘properly the subject of negotiation with a foreign country.’ With global interdependence reaching across an ever broadening spectrum of issues, however, this seems unlikely to prove a serious limitation.” (citations omitted)).

55. See, e.g., 1 Tribe, *Constitutional Law* (3d ed.), *supra* note 54, § 4-4, at 646–47 n.16 (“It is generally accepted that the Treaty Clause procedure is legitimate only for international agreements related genuinely, and not just pretextually, to foreign relations.” (citations omitted)); see also Henkin, *Foreign Affairs*, *supra* note 2, at 185; Healy, *supra* note 14, at 1732 & n.51, 1750 & n.191. Such a limitation reflects the spirit of the Necessary and Proper Clause. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (“[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.”).

56. See Golove, *Treaty-Making and the Nation*, *supra* note 14, at 1090 n.41; see also *id.* at 1090 (“[T]he President and Senate can make treaties on any subject appropriate for negotiation and agreement among states.”); *id.* at 1281 (“Were the President and Senate to make a treaty on a subject inappropriate for negotiation and agreement, and thus beyond the scope of the treaty power, the treaty would be invalid under the Tenth Amendment.”); *id.* at 1287 (“[T]he treaty power extends to all proper subjects of negotiation and agreement between states. To put the point more precisely . . . the object of the treaty power is to enable the federal government to protect and advance the national interests by obtaining binding promises from other states regarding their conduct. To be within the scope of the treaty power, therefore, the purpose of a treaty must be to advance those interests—that is, our foreign policy interests.”); *id.* at 1291 n.730 (describing as “the most plausible test” one inquiring whether “a treaty is valid if its purpose is to advance the interests of the United States in its relations with other nations”).

57. See Bradley, *Treaty Power II*, *supra* note 14, at 105–09. Bradley describes Golove as “essentially conced[ing]” that courts would not, under Supreme Court precedent, second-guess the assessment of the national interest by the national political branches. *Id.* at 107 & n.55.

same federalism limitations burdening invocations of the Commerce Clause and the Fourteenth Amendment.<sup>58</sup> Such a proposal faces substantial procedural obstacles. For one, it would require overturning *Missouri v. Holland* at least in part.<sup>59</sup> While the Supreme Court is increasingly solicitous of state sovereignty,<sup>60</sup> and resentful of attempts to circumvent federalism restrictions,<sup>61</sup> stare decisis remains no small hurdle.<sup>62</sup> It might also be some time before an appropriate case arises. Even putting aside issues like standing, there remain few circumstances in which the contemporary subject-matter limitations on Congress would restrict potential subjects for international negotiation,<sup>63</sup> and certainly fewer in which the national government would be inclined to so encroach.<sup>64</sup>

Should the occasion arise, however, these same circumstances may tempt the Court to depart from *Holland*. Though it was the statute, rather than the treaty, that was being challenged in that case,<sup>65</sup> Justice Holmes essentially supposed that Congress's domestic authority had to be coextensive with the federal government's international authority.<sup>66</sup> Sub-

58. Bradley, Treaty Power I, supra note 14, at 456–61; Bradley, Treaty Power II, supra note 14, at 100–01.

59. See Bradley, Treaty Power I, supra note 14, at 458–59 (conceding that “a principal disadvantage of this proposal is that it might require overruling at least some portion of the *Holland* decision. The Court in *Holland* was unclear about many things, but one thing it did make clear is that the treaty power is not subject to the same federalism restrictions as Congress's lawmaking powers”).

60. See Bradley, Treaty Power II, supra note 14, at 111–18.

61. See infra note 141 and accompanying text (noting, and quoting, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)).

62. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 854–69 (1992) (emphasizing importance of stare decisis in declining invitation to overturn *Roe v. Wade*). *Casey* was an extraordinary case, with an exceptionally strong (apparent) reliance on stare decisis, but it is not alone in requiring a “special justification” for overturning precedent even in constitutional matters. See, e.g., *Harris v. United States*, 122 S. Ct. 2406, 2414 (2002).

63. Bradley, Treaty Power I, supra note 14, at 458–61. The sole example cited by Bradley concerns the hypothetical resuscitation of RFRAs advocated by Professor Neuman, and he is uncertain even in that case. See *id.* at 460–61. It seems clear, in any event, that treaties concerning all manner of commercial matters would survive. Matthew Schaefer, Twenty-First Century Trade Negotiations, the US Constitution, and the Elimination of US State-Level Protectionism, 2 J. Int'l Econ. L. 71, 88 (1999) (concluding that “the outer limits on the federal government's commerce power imposed by the Court in *Lopez* will have no impact on the acceptance and implementation of trade agreements with anti-protectionism obligations binding upon the states”).

64. See supra note 19 and accompanying text (discussing federalism-oriented reservations, understandings, and declarations); *infra* text accompanying note 155–158. (same); cf. Henkin, Foreign Affairs, supra note 2, at 193 n.\*\* (suggesting that “Senator Bricker lost the constitutional battle but perhaps not his political war,” given conservative U.S. treaty practices thereafter); Bradley, Treaty Power I, supra note 14, at 426–29 (noting that Bricker Amendment controversy was resolved in part because the federal government exercised self-restraint in imposing burdens on states).

65. *Missouri v. Holland*, 252 U.S. 416, 431 (1920).

66. *Id.* at 432 (“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.”); see *id.* (“[T]he question raised is the general one whether the treaty and

sequent cases have applied that reasoning without much elaboration,<sup>67</sup> occasionally requiring only an extraordinarily loose connection between a statute and the treaty from which it derived constitutional authority.<sup>68</sup>

But the Supreme Court has become less indulgent in reading the Necessary and Proper Clause,<sup>69</sup> and recent U.S. practices may persuade it to look more skeptically at the equivalence of a treaty and its legislative implementation. The General Agreement on Tariffs and Trade of 1947 never received legislative approval, leaving its preemptive effect unclear, but somehow it worked.<sup>70</sup> Congress did take specific steps to implement the Uruguay Round Agreements and NAFTA, but in each case pointedly impaired the effectiveness of the agreement for the states' sake;<sup>71</sup> in

statute are void as an interference with the rights reserved to the States.”); *id.* at 433–34 (observing that the “only question is whether [the treaty] is forbidden by some invisible radiation from the general terms of the Tenth Amendment”).

67. *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998) (“If the Hostage Taking Convention is a valid exercise of the Executive’s treaty power, there is little room to dispute that the legislation passed to effectuate the treaty is valid under the Necessary and Proper Clause.”); accord *United States v. Ferreira*, 275 F.3d 1020, 1027–28 (11th Cir. 2001) (upholding Hostage Taking Act as a necessary and proper use of congressional authority to implement the Hostage Taking Convention).

68. See, e.g., *United States v. Eramdjian*, 155 F. Supp. 914, 920 (S.D. Cal. 1957) (noting, after citing *Missouri v. Holland*, that “[a]lthough no mention is made of marihuana in the treaties, marihuana is definitely related to the drug problem and the evils that flow from the use of drugs. A statute which has its impact on both the drugs named in the treaty and on marihuana, related as it is to the drug addiction problem, would seem to us a valid statute to implement a valid treaty”). In the case of the Hostage Taking Act, on the other hand, “the wording of the Act track[ed] precisely the language of the Convention.” *Ferreira*, 275 F.3d at 1027.

69. See *infra* notes 300–306 and accompanying text (noting divergent sentiments in *New York* and *Printz*).

70. The United States assented in the form of an executive agreement, or, at most, via executive action implementing delegated authority. See David W. Leebron, Implementation of the Uruguay Round Results in the United States, *in* *Implementing the Uruguay Round* 175, 187–88 (John H. Jackson & Alan O. Sykes eds., 1997). Yet some judicial decisions attributed preemptive effect nonetheless. See *Straight*, *supra* note 24, at 241 (citing case law).

71. NAFTA provided substantial protections to the states, see 19 U.S.C. §§ 3312(b)(1)(A)–(B) (2000); H.R. Rep. No. 103-361, pt. 1, at 18 (1993), which the Uruguay Round Agreements Act (URAA) emulated and extended. See Leebron, *supra* note 70, at 193, 202, 207–08; cf. Judith H. Bello & Alan F. Holmer, The Post-Uruguay Round Future of Section 301, 25 L. & Pol’y Int’l Bus. 1297, 1299–1300 (1994) (noting common practice of adding provisions to fast-track legislation that are unnecessary to implement underlying trade agreements). While the Agreements themselves asserted national responsibility for subnational compliance and imposed responsibility for certain obligations directly on subnational governments, the URAA and the accompanying Statement of Administrative Action protected state interests by, among other things, establishing extraordinary procedural barriers to the invalidation of conflicting state laws. See Uruguay Round Agreements Act of 1994, 19 U.S.C. §§ 3512(b)(2) & (c)(1)–(2) (barring anyone other than the United States from challenging U.S. or state action or inaction based on its consistency with the Uruguay Round Agreements); Uruguay Round Agreements Act: Statement of Administrative Action, Sept. 27, 1994, reprinted in *Message from the President of the United States Transmitting the Uruguay Round Trade*

other matters, like the Agreement on Government Procurement, the United States more forthrightly negotiated internationally and domestically for purely voluntary subscription by American states.<sup>72</sup> Given the discrepancies between U.S. international obligations and binding domestic law—and the conspicuous strategy of accepting national responsibility while pursuing constructive political engagement of state governments in implementation—the Supreme Court may no longer assume an inviolable link between the ability to exercise the treaty power and the authority to legislate preemptively. Self-executing treaties might, in other words, have binding effect domestically (contra Professor Bradley), but any im-

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Agreements, Texts of Agreement Implementing Bill, Statements of Administrative Action and Required Supporting Statements, H.R. Doc. No. 103-316 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4327–28 [hereinafter Statement of Administrative Action]. As Professor Leebron observes, while these preclusion provisions technically apply only to claims that a state has violated one of the Uruguay Round Agreements, not to claimed violations of the URAA, the legislation itself provides for few obligations that might be deemed binding on the states. Leebron, *supra* note 70, at 226–31. The URAA additionally establishes a federal state consultation process not only to improve state compliance, but also to require that the U.S. Trade Representative take state positions into account, and further tries to maximize state involvement with the dispute resolution proceedings that directly or indirectly affect state interests. See 19 U.S.C. § 3512(b)(1); Statement of Administrative Action, *supra*, 1994 U.S.C.C.A.N. at 4050–54; see also Leebron, *supra* note 70, at 228, 231.

Such procedural protections are in addition, of course, to the simple exemption of states from international trade obligations. See, e.g., H.R. Rep. No. 103-361, *supra*, at 18 (“NAFTA obligations generally apply to State and local, as well as Federal, laws and regulations, with significant exceptions, particularly with respect to standards, government procurement, investment, and trade in services.”); Schaefer, *Twenty-First Century Trade Negotiations*, *supra* note 63, at 77 (noting state-level exemptions to national treatment obligations in the General Agreement on Trade in Services (GATS)).

72. NAFTA contemplated that subnational governments would at some future point commit themselves on a “voluntary” and “reciprocal” basis to nondiscriminatory government procurement. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., art. 1024(3), 32 I.L.M. 612, 622 (1993) (entered into force Jan. 1, 1994) [hereinafter NAFTA]. Parallel negotiations involving the Agreement on Government Procurement arrived at much the same arrangement, according to which nations would enlist their subnational governments to subscribe voluntarily—to the extent desired—to nondiscriminatory procurement relative to other signatory nations. The United States managed to obtain the agreement of some thirty-seven states, accounting for a high proportion of subnational procurement, but subject to individual exemptions. Agreement on Government Procurement, *supra* note 20; see Christopher McCrudden, *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of ‘Selective Purchasing’ Laws Under the WTO Government Procurement Agreement*, 2 *J. Int’l Econ. L.* 3, 24–27 (1999) (describing negotiations and resulting commitments); Matthew Schaefer, *Searching for Pareto Gains in the Relationship Between Free Trade and Federalism: Revisiting the NAFTA, Eyeing the FTAA*, 23 *Can.-U.S. L.J.* 441, 472–73 (1997) [hereinafter Schaefer, *Searching for Pareto Gains*] (same); Tiefer, *supra* note 24, at 60–62 (same). Canada regarded the sum of U.S. commitments as insufficient, and has refused to extend reciprocal provincial commitments until the U.S. offer is improved. Schaefer, *Searching for Pareto Gains*, *supra*, at 473; Schaefer, *Twenty-First Century Trade Negotiations*, *supra* note 63, at 78.

plementing or ancillary lawmaking by the national government would have to survive the test applied to ordinary legislation.<sup>73</sup>

The Court may, in any event, be able to humble *Holland* without overturning it. It might adopt the presumption, for example, that neither treaties nor their domestic implementation were intended to exceed the federal government's legislative authority. Recent decisions have been conflicting, evasive, or simply obscure as to the statutory presumptions appropriate to foreign affairs questions,<sup>74</sup> most recently signaling that the presumption against preemption would not be "mechanically" applied in the treaty context.<sup>75</sup> But a presumption that treaties ought not be construed in excess of otherwise applicable limits on the national government's power is more finely calibrated, and has precedent.<sup>76</sup> In the alternative, the Court might begin evaluating whether objected-to provisions of implementing legislation were necessary to fulfill international obligations.<sup>77</sup> Though scarcely radical, either approach

73. By self-executing, I here mean only in the sense that the treaty is by design self-sufficient, so that it requires no implementing legislation. See generally Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 *Am. J. Int'l L.* 695 (1995) (discussing various meanings of self-execution).

74. See Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 *Sup. Ct. Rev.* 175, 176–78 (noting confusion, and arguing for elimination of any presumption). For a critical evaluation, see Swaine, *Undersea World*, *supra* note 26, at 348–51.

75. *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 175 (1999) (explaining, in response to invocation of rule that preemption of state law is disfavored, that "[o]ur home-centered preemption analysis . . . should not be applied, mechanically, in construing our international obligations"). The *El Al* majority did not, however, expressly reject the notion of a presumption against treaty preemption. But see *id.* at 181 (Stevens, J., dissenting) ("I firmly believe that a treaty, like an Act of Congress, should not be construed to preempt state law unless its intent to do so is clear." (citations omitted)). Still more recent decisions have avoided even that level of determinacy. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000) ("We leave for another day a consideration in this context of a presumption against preemption.").

76. Wright, *Control*, *supra* note 2, at 91 (noting that "sometimes the treaty has been subjected to a strained interpretation to save the State's power" (citing *Compagnie Francaise v. State Bd. of Health*, 186 U.S. 380 (1902))); *id.* ("With respect to statutes relating to the control of natural resources and state-supported services, the attitude of the courts has been cautious, with a decided tendency in recent cases to compromise by adopting interpretations of the treaty favorable to the state power."); Arthur K. Kuhn, *The Treaty-Making Power and the Reserved Sovereignty of the States*, 7 *Colum. L. Rev.* 172, 181 & n.2 (1907) ("The power of the courts to 'interpret' treaty provisions so as to make them consistent with the police or reserved powers of a State has been exercised on [several] occasions." (citing *Prevost v. Greneaux*, 60 U.S. (19 How.) 1 (1856); *Cantini v. Tillman*, 54 F. 969 (D. S.C. 1893); *People v. Dibble*, 16 N.Y. 203 (1857), *aff'd*, 62 U.S. (21 How.) 366 (1858))).

77. I assume, for these purposes, that any such review would be conducted in accord with a rational basis standard. However, others suggest that a rational basis standard would not be sufficient. See, e.g., Virginia H. Johnson, Note, *Application of the Rational Basis Test to Treaty-Implementing Legislation: The Need for a More Stringent Standard of Review*, 23 *Cardozo L. Rev.* 347, 355–56, 376–91 (2001) (arguing that rational basis review of treaty power violates tenets of federalism, and urging stricter approach).

might have produced a different result in *Holland* itself, without necessarily overturning the basic principle it espoused.<sup>78</sup>

Equally significant, the shadow *Holland* casts over other federalism doctrines may also be shortened. Justice Holmes's opinion has long been cited by commentators in the cause of what is now being described as foreign affairs "exceptionalism," the notion that constitutional restrictions on the federal government have reduced, or nonexistent, purchase when it conducts international relations.<sup>79</sup> The decision's continuing relevance is illustrated by its invocation, not without reservation, as a basis for distinguishing commandeering<sup>80</sup> and state sovereign immunity<sup>81</sup> analyses in the treaty context. But if international obligations are typically accommodated within the U.S. political system, rather than imposed upon it, there seems to be less basis for employing *Holland* as a shield against other principles of the new federalism, such as the new prohibition against commandeering.

2. *Procedural Limits: Anticommandeering.* — The anticommandeering principle first revealed by *New York v. United States* prohibits the federal government from directing state legislatures to enact regulatory programs.<sup>82</sup> According to *Printz v. United States*, the federal government is equally powerless to compel state and local officials to enforce federal law, though it remains capable of requiring them to obey it.<sup>83</sup> Although

78. Cf. Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 Va. J. Int'l L. 713, 722–23 (2002) [hereinafter Vázquez, *Treaties*] ("The treaty merely required the parties to 'propose' legislation to their legislatures. When a treaty does not require the enactment of legislation, but merely encourages it, it may be defensible to hold that the relevant legislation must be proposed to the *state* legislatures unless it would fall within the federal government's legislative jurisdiction in the absence of a treaty." (citations omitted)).

79. See, e.g., Curtis A. Bradley, *Breard*, Our Dualist Constitution, and the Internationalist Conception, 51 Stan. L. Rev. 529, 555–61 (1999) (describing invocation of *Holland* by recent commentators); Bradley, *Treaty Power I*, supra note 14, at 393–94, 461 (citing *Holland* as basis for "conventional wisdom" that Tenth Amendment does not impede federal government's ability to make international agreements).

80. See Janet R. Carter, Note, *Commandeering Under the Treaty Power*, 76 N.Y.U. L. Rev. 598, 598–99, 602–06 (2001) (considering *Holland* a partial, but incomplete, basis for distinguishing commandeering analysis in the treaty context). For further discussion, see *infra* text accompanying notes 103–108.

81. See Vázquez, *Treaties and the Eleventh Amendment*, supra note 78, at 719 ("The best doctrinal case for exempting exercises of the Treaty Power from state sovereign immunity relies on a reading of *Missouri v. Holland* as establishing that federalism-based constitutional limits do not apply to the Treaty Power."). But see Robert Knowles, Note, *Starbucks and the New Federalism: The Court's Answer to Globalization*, 95 Nw. U. L. Rev. 735, 757 (2001) ("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.").

82. 505 U.S. 144, 161–66 (1992).

83. 521 U.S. 898, 935 (1997).

the *New York* and *Printz* holdings were explained somewhat differently,<sup>84</sup> and perhaps with differing degrees of persuasiveness,<sup>85</sup> they establish in tandem that the federal government may not commandeer the states to participate in national governance.<sup>86</sup>

It is still unclear whether the anticommandeering principle applies to domestic affairs outside the Commerce Clause,<sup>87</sup> so it is unsurprising that its application to the treaty power is also unresolved.<sup>88</sup> Nothing in

84. *Printz*, in particular, relied on the view that congressional directives to state officials compromised the unitary executive. *Id.* at 922–23. For a critical evaluation, see Evan H. Caminker, *Printz*, State Sovereignty, and the Limits of Formalism, 1997 Sup. Ct. Rev. 199, 223–33 [hereinafter Caminker, *Printz*] (arguing that “unprecedented argument” of *Printz* “illustrates the . . . pitfalls of interpretive formalism” in declaring that delegation of administrative responsibilities to state officials precluded President from performing his duty to supervise federal law); see also Evan Caminker, The Unitary Executive and State Administration of Federal Law, 45 U. Kan. L. Rev. 1075, 1076 n.6 (suggesting grounds for distinguishing *New York* in the then-undecided *Printz* case) (1997).

85. See Vicki C. Jackson, Federalism and the Uses and Limits of Law: *Printz* and Principle?, 111 Harv. L. Rev. 2180, 2199 (1998) [hereinafter Jackson, *Federalism*] (asserting that scholarship “is quite divided on whether there is a basis for concluding that the Constitution prohibits commandeering of state legislatures, but is more in agreement that Founding history can better be read to contemplate federal commandeering of state executive officials than to prohibit it”); see also, e.g., Saikrishna Bangalore Prakash, Field Office Federalism, 79 Va. L. Rev. 1957, 2012–13 (1993) (arguing that, according to original understanding, Congress lacked the authority to commandeer state legislatures, but could compel state executives to enforce federal policy).

86. See, e.g., 1 Tribe, *Constitutional Law* (3d ed.), *supra* note 54, at 647–48.

87. Some commentators take the view that it should not, particularly when Congress’s powers under the Reconstruction Amendments are at issue. See, e.g., Matthew D. Adler, State Sovereignty and the Anti-Commandeering Cases, 574 *Annals Am. Acad. Pol. & Soc. Sci.* 158, 164–65 (2001) (assuming that anticommandeering principle is limited to exercise of Article I authority); Matthew D. Adler & Seth F. Kreimer, The New Etiquette of Federalism: *New York*, *Printz*, and *Yeskey*, 1998 Sup. Ct. Rev. 71, 119–33 (distinguishing Reconstruction Amendments).

88. Compare Henkin, *Foreign Affairs*, *supra* note 2, at 467 n.75 (observing, subsequent to the *New York* decision but prior to *Printz*, that “[p]resumably, the United States could not command state legislatures, or ‘coopt’ state officials by treaty, say a human rights convention that required state legislatures, as distinguished from Congress, to enact state procedures or provide state remedies, or an agreement that required state officials to participate in international peace-keeping operations”), 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, 1026–38 (1998) (indicating uncertainty as to whether *Printz* would bar various means of enforcing the Vienna Convention on Consular Relations, but assuming *Printz* would apply in treaty context), and Knowles, *supra* note 81, at 763–66 (concluding that the Court would likely extend *New York* and *Printz* to the treaty context, but that commandeering is a relatively incidental means of exercising national power), with Martin S. Flaherty, Are We to Be a Nation? Federal Power vs. “States’ Rights” in Foreign Affairs, 70 *U. Colo. L. Rev.* 1277, 1279–80 (1999) (concluding that anticommandeering principle, though superficially applicable to treaty obligations, should not apply), Healy, *supra* note 14, at 1746–50 (same), Neuman, *Global Dimension*, *supra* note 49, at 52 (suggesting that *New York* may not be applicable to the treaty power), Gerald L. Neuman, The Nationalization of Civil Liberties, Revisited, 99 *Colum. L. Rev.* 1630, 1650–55 (1999) (suggesting that *Printz* may not be applicable to the treaty power), and A.

*New York* or *Printz* suggested that the principle was purely domestic: although *New York* focused on congressional authority under the Commerce Clause, both decisions could equally be read as espousing the narrow reading of enumerated federal authority, without regard to its domestic or foreign character.<sup>89</sup> And none of the exemptions yet suggested—for statutes applicable in equal measure to private parties and state officials,<sup>90</sup> noncoercive statutes (such as those imposing conditions on federal funds,<sup>91</sup> or allowing states to choose between accepting federal standards or preemption<sup>92</sup>), or (implicitly) statutes imposing duties to refrain rather than affirmative duties<sup>93</sup>—would categorically exclude treaties.<sup>94</sup>

Finally, to the extent relevant, the historical evidence for differentiating treaties is not compelling. If *New York* is correct that dissatisfaction with forcing the national government to rely on state legislatures led not only to giving it the ability to legislate directly with respect to individuals, but also made that the *exclusive* means by which the national government could act,<sup>95</sup> it is unclear why that (dubious) reasoning would not hold as well for treaties—which had surely suffered from the same infirmities under the Articles of Confederation.<sup>96</sup> Similarly, putting to one side stat-

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Mark Weisburd, *International Courts and American Courts*, 21 Mich. J. Int'l L. 877, 920–24 (2000) (concluding that *Printz*, at least, should not apply to the treaty power). To illustrate the uncertainty, compare 1 Tribe, *Constitutional Law* (3d ed.), supra note 54, at 647–48 (“[A]lthough *Missouri v. Holland* establishes that a treaty may enlarge the substantive reach of congressional legislation, it appears that a treaty cannot give Congress authority to circumvent the structural limitations on such legislation—such as the ban on federal commandeering of state sovereignty recognized in *Printz v. United States* and *New York v. United States*.”), with Tribe, *Taking Text and Structure Seriously*, supra note 22, at 1260 (asserting that the anticommandeering principle is “not applicable, of course, to the treaty power”).

89. Compare Healy, supra note 14, at 1736–37 (suggesting that *New York*'s emphasis on the affirmative grant of authority to Congress under the Commerce Clause, rather than the Tenth Amendment, would suggest that its holding does not apply to the treaty power), with Flaherty, supra note 88, at 1285 (concurring that *New York* literally turned on the distribution of authority to Congress, but “in reality sounded in sovereignty rather than distribution for the simple reason that ‘a power to commandeer states’ . . . can *only* affect states”).

90. See infra text accompanying notes 293–295.

91. See infra text accompanying notes 296–297.

92. See infra text accompanying note 298.

93. For the clearest articulation of this point, see Adler & Kreimer, supra note 87, at 89–95.

94. But see infra text accompanying notes 292–316 (describing relative difficulty of accommodating anticommandeering rule in treaty context).

95. See *New York v. United States*, 505 U.S. 144, 162–67 (1992) (citing judicial precedent and originalist materials).

96. Indeed, at the beginning of the 20th century, and even after *Missouri v. Holland*, some writers seem to have anticipated *New York*'s application in the treaty context. See Charles Pergler, *Judicial Interpretation of International Law in the United States* 167 (1928) (“If a treaty, standing alone and without the consent of Congress, cannot require the United States Government to expend money, it is equally clear that a treaty cannot

utes imposing notification requirements on state officers, which may or may not fall within the anticommandeering principle,<sup>97</sup> the evidence regarding the role of state officials in founding-era consular treaties—which required, among other things, that American officers arrest foreign seamen at the behest of foreign officials—is deeply ambiguous,<sup>98</sup> and successor treaties appear to have been understood in precisely the

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compel any affirmative action by a State, and, indeed, it has never been held, either by the Supreme Court of the United States, or any other court, that such an affirmative action could successfully be required. Certainly no State Government could be required, by treaty, to assume any obligation against its will.”); accord Albert H. Putney, *United States Constitutional History and Law* 157–58 (1908) (“[I]t has never been held, either by the Supreme Court of the United States, or any other court, that the United States, by treaty, could compel any affirmative action by a State.”). More commonly, it was implied. See, e.g., Wright, *Control*, supra note 2, at 130 (“Full power to enforce treaties and international law within the state could doubtless be conferred upon national officers and courts by act of Congress under the necessary and proper clause, but the legislation at present in force is not complete and state authorities alone must be relied on to meet certain international responsibilities.”).

Professor Vázquez, on the other hand, indicates that the use of non-self-executing treaties is inconsistent with *New York*, insofar as the anticommandeering principle suggests, in concert with the Supremacy Clause, that the federal government (by process of elimination) would be obligated by domestic law to adopt implementing legislation. See Carlos Manuel Vázquez, *Breard, Printz*, and the Treaty Power, 70 U. Colo. L. Rev. 1317, 1353–54 & n.124 (1999) [hereinafter Vázquez, *Breard*]. That may misread his argument, but if not, the implications are unclear. Assuming there were such an obligation—and that reading of the Supremacy Clause is open to dispute, see Yoo, *Treaties and Public Lawmaking*, supra note 32, at 2219–20, 2249–57—it is unclear why it would be inconsistent with the Framers’ expectations, instead of highlighting instances in which the United States violated its duty.

97. See *infra* text accompanying notes 314–319 (discussing reporting requirements).

98. The *Printz* decision relied on the absence of political precedent, see *Printz v. United States*, 521 U.S. 898, 905–18 (1997), but Professor Weisburd has indicated that “early treaties included topics that apparently required action by local executive officials.” Weisburd, supra note 88, at 903; see also Mark Tushnet, *Federalism and International Human Rights in the New Constitutional Order*, 47 Wayne L. Rev. 841, 866–67 (2001) [hereinafter Tushnet, *Federalism*] (relying on Weisburd). Since “the United States has been entering into treaties imposing duties on state officials since before Washington was inaugurated,” he argues, “[e]ither a practice extending over more than two centuries turns out to have been forbidden by the Constitution, or *Printz*’s absolute prohibition of federal imposition of duties on state officials cannot be applied in the treaty context without modification.” Weisburd, supra note 88, at 917, 920.

Though the historical case against *Printz* may yet be made, the example cited by Professor Weisburd is not convincing. The Consular Convention of 1788 with France, he argues, placed a duty upon each signatory “to arrest deserters from merchant vessels of the other party” upon being presented with proper proof, and “[s]ince there would have been no federal officials competent to effect such arrests in 1788, the officials upon whom these duties were imposed would necessarily have been state officials.” *Id.* at 903 & n.139 (citing Consular Convention, Nov. 14, 1788, U.S.-Fr., art. IX, 8 Stat. 106, 112, reprinted in 7 *Treaties and Other International Agreements of the United States of America, 1776–1949*, at 794 (Charles I. Bevans ed., 1971) [hereinafter Bevans]). And the Convention also, he further notes, “required that the consul be notified upon the release from confinement of any crew-members from such ships arrested for crimes,” and “[i]n 1788, most if not all such crew-members would have been arrested and confined by officers of the state

governments, not by federal officers.” *Id.* at 903 (citing Consular Convention, *supra*, art. XI, 8 Stat. at 112, 114).

The argument that the Convention would have involved commandeering of state officers is, as he recognizes, purely inferential, but it is a weaker inference than he acknowledges. Article IX permits foreign consuls or vice-consuls to “cause to be arrested” any deserting crew members by “address[ing] themselves to the courts, judges and officers competent,” and Weisburd emphasizes the function of “officials competent” (“officers competent” in the official, co-authoritative English text) in the directive that if sufficient proof were mustered “there shall be given all aid and assistance to the said Consuls and vice-Consuls for the search, seizure and arrest of the said deserters.” Consular Convention, *supra*, art. IX, 8 Stat. at 112; The Consular Convention of 1788, The Official English Text as Ratified, in 14 The Papers of Thomas Jefferson 171, 176 (Julian P. Boyd ed., 1958). One might argue that because the Continental Congress *could* have created the competent officials, the conflict is illusory. See Articles of Confederation art. IX, § 5 (authorizing the Continental Congress to “appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under [congressional] direction”); see also Prakash, *supra* note 85, at 1966 (relying on provision). One might also argue that, even if no one could really have been contemplating a national mechanism, *Printz* suggests (however unsatisfactorily) that the Convention would be read as more in the nature of a request to state officers than an obligation. See *Printz*, 521 U.S. at 910–11.

The best answer, though, is that the United States contemplated that applications for assistance could be made to existing admiralty courts and that judges would be the parties providing assistance. See Letter from Thomas Jefferson, Ambassador to France, to Count de Montmorin, Minister of Foreign Affairs (June 20, 1788), in 14 The Papers of Thomas Jefferson, *supra*, at 121, 122–23. This understanding of judicial capacity is consistent with the Second Congress’s implementing legislation, which transferred to the newly appointed district court judges responsibility “to give aid to the consuls and vice-consuls of the King of the French, in arresting and securing deserters from vessels of the French nation according to the tenor of [article IX].” An Act Concerning Consuls and Vice-Consuls, ch. 24, § 1, 1 Stat. 254, 254 (1792); e.g., *United States v. Lawrence*, 3 U.S. (3 Dall.) 42, 52–53 (1795) (refusing to issue writ of mandamus to compel district judge to issue arrest warrant, in case clearly predicated on judicial responsibility under treaty and implementing statute). Admiralty judges might be assisted by officers of the court, like marshals, which is also consistent with the view later taken by the Second Congress. See 1 Stat. 254, § 1 (providing that where any article entitled French consuls and vice-consuls “to the aid of the competent executive officers of the country, in the execution of any precept, the marshals of the United States and their deputies shall, within their respective districts, be the competent officers, and shall give their aid according to the tenor of the stipulations”). To be sure, admiralty courts were in practice state courts at the time the convention was negotiated, but this is irrelevant: not only was it widely understood that the new Constitution would authorize an expanded national admiralty regime, William R. Casto, The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates, 37 Am. J. Legal Hist. 117, 154 (1993), but the Constitution also (according to *Printz*) distinguished and permitted the commandeering of state judicial functions—such as, presumably, state admiralty courts and their officers. *Printz*, 521 U.S. at 905–07.

To truly succeed, in any event, Professor Weisburd’s argument needs to manage the difficult task of marrying a *post*-constitutional legal expectation that commandeering was illegitimate—since *Printz* does not assert that the Continental Congress was similarly conflicted, and *New York* (on which *Printz* depends in part) positively asserted that the Articles of Confederation were different—with *pre*-constitutional facts (specifically, the national government’s dependence on state personnel). It is difficult to do so based on the Convention of 1788, which seems to have been *sui generis*. The treaty was signed under the authority of the Continental Congress and the Articles of Confederation, on

same deferential fashion as had all international or domestic obligations trenching upon the states.<sup>99</sup>

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November 14, 1788—after ratification of the Constitution, but before the new government legally commenced. See Resolution of Congress, Sept. 13, 1788, *in* 2 Documentary History of the Constitution of the United States of America, 1786–1870, at 262, 262–64 (1894) (setting March 4, 1789, as time for commencing new proceedings). The terms at issue were similar in kind to those authorized by the Continental Congress for the pre-constitutional negotiation of the never-ratified Consular Convention of 1784. See 22 Journals of the Continental Congress, 1774–1789, at 52 (1904–1937 ed.) (Jan. 25, 1782) (providing, in article XII, that in order to facilitate the power of consuls and vice-consuls to arrest deserters, “all persons in authority shall assist them; and upon a simple requisition . . . shall cause to be kept in prison, at the disposal and cost of the consuls or vice consuls, the sailors and deserters so arrested, until an opportunity shall be presented of sending them out of the country”); see also *id.* at 51 (providing that, in relation to art. XI authority of consuls and vice-consuls to attend to shipwrecks, “no officers of the customs, of justice, of the police, or naval officer, shall interfere, but upon application made to them for their assistance, in which case they shall exert themselves in the most effectual manner”).

The Senate surely would have had the chance to internalize any new anticommandeering principle by the time it approved the Convention in mid-1789. See The Consular Convention of 1788, Editorial Note, *in* 14 The Papers of Thomas Jefferson, *supra*, at 66, 89 (narrating events). But in reviewing the treaty, the Senate was reassured by John Jay (somewhat inaccurately, in respects not strictly relevant here) both that the treaty had been negotiated consistent with diplomatic instructions *and* that the Continental Congress had committed itself to ratifying a convention completed on such terms, and it seems to have approved the Convention largely because it felt so obliged. *Id.*; see Swaine, Negotiating Federalism, *supra* note 2, at 1184–85 & n.207. Accordingly, it is highly problematic to regard the episode as reflecting any concerted deliberation over and approval of the power to commandeer.

If the post-constitutional implications were obscure, they were also limited in tenure. By the time the Convention was ratified, the Judiciary Act of 1789 had already been adopted, creating the district courts and their marshals. An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789). Moreover, as previously noted, the Convention was ultimately put “into full effect” by the Second Congress through specific implementing legislation. An Act Concerning Consuls and Vice-Consuls, ch. 24, 2nd Cong., 1 Stat. 254 (1789). If the latter act was contemplated when the Convention was signed and ratified, there would of course be no necessary or enduring expectation of state commandeering; even were it not, no lasting expectancy should have been forged by the Convention and its implementation, and one could even view the act as curing the constitutional problem later diagnosed by *Printz*.

99. The treaty with France of August 12, 1853, stated that local authorities shall not, on any pretext, interfere in . . . differences [involving the internal order of the other signatory’s merchant vessels], but shall lend forcible aid to the consuls, when they may ask it, to arrest and imprison all persons composing the crew whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the consuls, addressed in writing to the local authority . . . .

Consular Convention with France, Aug. 12, 1853, art. VIII, 10 Stat. 992, 996–97 (1853). In *Dallemagne v. Moisan*, an arrested seaman complained that a treaty could not constitutionally impose a function on the San Francisco chief of police—“being an officer of the State as distinguished from a Federal officer”—that would violate the state constitution. 197 U.S. 169, 173 (1905). The Court found simply that there was no inconsistency between the duty imposed by the treaty and the state constitution or state statutes “which forbids or would prevent the execution of the power by a state officer, *in*

The divergent takes on extending the anticommandeering principle to treaties reflect a familiar debate as to whether foreign affairs are materially different—in terms of constitutional (or extra-constitutional) authority,<sup>100</sup> the magnitude of the national interest,<sup>101</sup> or political safe-

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*case he were willing to execute it.*” Id. at 174 (emphasis added); see also id. at 174 (“The chief of police voluntarily performed the request of the consul as contained in the written requisition, and the arrest was, therefore, not illegal so far as this ground is concerned.”).

The Court’s construction is by no means obvious. In an earlier opinion regarding an incident involving American consul abroad, Attorney General Cushing, in an aside, seemed to regard the duty as mandatory:

I do not say the local authorities were bound to assume the responsibility of such custody; but they might well in comity do it; nay, it was their duty, in my opinion, at the call of the Consul, at least to lend him their aid in this respect, by the express terms of the convention.

I concede, in the fullest terms, the integrity of the local sovereignty; and that, instead of contradicting, seems to corroborate my view of the subject; for how shall the consuls maintain the internal order of the merchant-vessels of their nation,—how, in the foreign port, shall they imprison persons,—save through the assistance of the local authority? Are they to do it by their own unaided force in the presence of the local jurisdiction?

Surely, to allow this, would be to introduce the greatest disorders, which can be avoided only by having recurrence to the local authority for its own lawful action in behalf of the consul.

However this may be, my conviction is clear that the local authority, even if it may refuse to aid, cannot lawfully interpose to defeat, the lawful confinement of any members of the crew by the master, on board the ship, with advice and approbation of the consul.

8 Op. Att’y Gen. 73, 77 (1856).

It is not clear whether the Attorney General would have applied the same analysis to the administration of U.S. duties. In any event, it is notable that U.S. implementing legislation for similar treaties placed the burden of discharging a consul’s request squarely on the judiciary. See Act of Mar. 2, 1829, ch. 41, 4 Stat. 359, 360, amended by Act of Feb. 24, 1855, ch. 123, 10 Stat. 614, incorporated in 18 U.S. Revised Stat. § 5280 (1874) (stating that upon request of consul to arrest deserting seaman, “it shall be the duty of any court, judge, commissioner of any circuit court, justice, or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination”); 25 Op. Att’y Gen. 77, 79 (1903) (noting that the statute had been consistently worded for seventy-five years, and appears to have been regarded as legitimately implementing numerous similarly-worded treaties). In *Dallemagne* itself, indeed, the Court went on to hold that by the terms of the statute implementing that treaty and others dealing with consular affairs, the only proper means for effecting arrest was for the consul to present his request directly to a *United States* district court judge or other judicial official, as designated in the statute. See *Dallemagne*, 197 U.S. at 174–75 (citing Act of June 11, 1864, 13 Stat. 121, incorporated as U.S. Revised Stat. §§ 4079–81); see also id. at 175–76 (concluding that error was mere formality in light of subsequent review by U.S. district court on writ of habeas corpus).

In sum, whether or not motivated by the desire to avoid some nascent anticommandeering principle, these efforts to channel U.S. implementation toward the judiciary, and to read local obligations as volitional, suggest that consular treaty terms are not strong proof that commandeering was positively endorsed in the treaty context.

100. See Healy, *supra* note 14, at 1747–50 (reviewing literature).

101. See id. at 1750–53 (reviewing literature).

guards<sup>102</sup>—from domestic affairs. As a doctrinal matter, the more important point may be that extending anticommandeering would be inconsistent with *Holland's* view that the treaty power is separately delegated and thus not subject to the Tenth Amendment.<sup>103</sup> While Justice Holmes's reasoning concerns a different aspect of the Tenth Amendment than that emphasized in *New York* and *Printz*—that is, its literal reservation of powers to the states, rather than its supposition of separate constraints immanent in the notion of state sovereignty<sup>104</sup>—it arguably stands for the proposition that neither aspect retards the treaty power.<sup>105</sup> At the same time, *Holland* stopped short of suggesting that foreign relations authority is wholly extra-constitutional,<sup>106</sup> and conceded that there

102. Compare *id.* at 1753–55 (distinguishing treaty power based on role of Senate in protecting state interests), and Flaherty, *supra* note 88, at 1308–09 (same, with qualifications), with Carter, *supra* note 80, at 606–08 (denying significance).

103. See *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (asserting that “whether the treaty and statute are void as an interference with the rights reserved to the States . . . it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States,” given that “by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States . . . are declared the supreme law of the land”).

104. See *Printz*, 521 at 919 (invoking Tenth Amendment); *New York v. United States*, 505 U.S. 144, 155–57 (1992) (same). Professor Golove, *Holland's* most ardent modern-day defender, takes this tack in explaining that the decision, while relevant to latter-day anticommandeering and sovereign immunity issues, “itself does not compel any particular outcome.” Golove, *Treaty-Making and the Nation*, *supra* note 14, at 1087–88; see also *id.* (noting that *Holland* addressed “whether the treaty power is properly conceived as an independent grant of power ‘delegated’ to the national government,” as to which “no question of ‘reserved’ powers under the Tenth Amendment can arise,” but not whether the states possessed additional, “affirmative constitutional immunities”); cf. Henkin, *Foreign Affairs*, *supra* note 2, at 191 & n.\* (reading *Holland* as suggesting that the subject-matter objects of congressional authority, and their implied limitations, do not translate into the (arguably) subject-neutral delegation of treaty power).

If that is all *Holland* relied upon, then it is not terribly satisfactory. The treaty power's separate delegation may mean that it is not necessarily subject to the *same* reservations of state authority as pertain to Article I, but that does not mean that any particular implied reservation is ineffectual, nor provide any basis for distinguishing between subject-matter reservations (such as a reserved authority for states over matters of local commerce) and other types (like the anticommandeering principle). See Bradley, *Treaty Power I*, *supra* note 14, at 434–35 (criticizing delegation argument).

105. As Justice Holmes explained:

Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention.

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

106. But see *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316–18 (1936) (upholding congressional delegation of foreign affairs authority on the ground that the national government's external sovereignty vested automatically, without need for constitutional enumeration); see also *United States v. Pink*, 315 U.S. 203, 233 (1942) (emphasizing exclusive and complete vesting of foreign affairs in national government); *United States v. Belmont*, 301 U.S. 324, 330–31 (1937) (same).

might be “qualifications” to the treaty power.<sup>107</sup> Accordingly, most contemporary commentators concede that, notwithstanding *Holland*, non-express federalism constraints like the anticommandeering principle may also be read to cabin the treaty power to one degree or another.<sup>108</sup>

One impetus for considering these questions is the Vienna Convention on Consular Relations, which obligates signatories to inform a detained foreign national of the right to confer with the consul of his or her country.<sup>109</sup> There is little dispute that the Convention requires state and federal officials alike to notify detainees,<sup>110</sup> yet violations by states are re-

107. See *Holland*, 252 U.S. at 433; see also *Reid v. Covert*, 354 U.S. 1, 17 (1957) (plurality opinion) (stating that treaty power was limited by the Bill of Rights); *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.”).

108. This is noteworthy only among those taking a more expansive view of the national government’s authority. E.g., Golove, *Treaty-Making and the Nation*, supra note 14, at 1086–87 (noting possibility of subject matter limitations, state sovereign immunity, and the anticommandeering doctrine). Professor Bradley has cited a number of other, more categorical statements regarding *Holland*’s sweep, see Bradley, *Treaty Power II*, supra note 14, at 99 n.5, 102 n.21 (citing authorities), but a number are qualified in a fashion arguably consistent with limitations like the anticommandeering principle. See, e.g., Restatement (Third), supra note 22, § 302 reporter’s note 1 (noting that *Holland* “itself implied that international agreements were subject to the ‘prohibitory words’ of the Constitution,” and “[t]hey may also be subject to some implied constitutional limitations” (citations omitted)); id. § 907 reporter’s note 2 (noting Eleventh Amendment limitations); Henkin, *Foreign Affairs*, supra note 2, at 193–94 (conceding that “[t]he Constitution probably protects some few states’ rights, activities, and properties against any federal invasion, even by treaty,” including “perhaps remnants of state sovereign immunity,” such as “a treaty that commands state legislatures to adopt laws or that coopts state officials”); Neuman, *Global Dimension*, supra note 49, at 46 (“The reach of the separately enumerated treaty power to matters *ordinarily of local concern*, free from any ‘invisible radiation from the general terms of the Tenth Amendment,’ was settled in *Missouri v. Holland*.” (emphasis added)); Vázquez, *Treaties*, supra note 78, at 722 (defending “*Missouri v. Holland*’s basic holding that there are no federalism-based *subject matter limitations* on Congress’s power to implement treaties” (emphasis added)); id. at 731 (describing earlier article’s reading of *Holland* as “an overstatement when made”). Others evidence what Professor Bradley describes as the “nationalist view,” but without direct application to specific constraints like anticommandeering. See Lori Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 *Chi.-Kent L. Rev.* 515, 530 (1991) (arguing that the Senate should not espouse states’ rights in view of their “definitive repudiation” in *Holland* and via defeat of the Bricker Amendment).

109. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, art. 36, ¶ 1(b), 21 U.S.T. 77, 101, 596 U.N.T.S. 261, 292.

110. The Convention’s ratification history evidences the Senate’s understanding that state officers were obligated under the Convention, and that message has been reinforced by several lower court cases. See William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 *Vand. J. Transnat’l L.* 257, 268 (1998) (concluding that “the Senate fully recognized that state and local jurisdictions were required to provide consular notification when a foreign national was detained”); see also, e.g., *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996) (describing Vienna Convention

portedly endemic.<sup>111</sup> The most conspicuous and controversial omissions have occurred in capital cases, particularly the *Breard*,<sup>112</sup> *LaGrand*,<sup>113</sup> and *Mexican Nationals*<sup>114</sup> cases, in which the International Court of Justice vindicated the objections of foreign governments. But interpreting the Convention to direct the enforcement activities of state officials appears to violate *Printz*; were the federal government instead to require states to adopt conforming legislation, *New York* may be infringed. If that is correct, then the Constitution requires the U.S. government to take the lead in performing state notifications—impractical in practice—or, alternatively, to accept responsibility for recurring state transgressions.<sup>115</sup> The result seems to effect a cleavage between what the United States may constitutionally accomplish and its international obligations.

Much the same may be true in other areas as well. The TRIPs agreement, for example, imposes general obligations on national governments to adopt remedial schemes sufficient to protect intellectual property, including with respect to state infringements. As explained in the next section, those obligations pose difficulties to the extent that they require national laws, as the federal government is increasingly limited in the

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as imposing obligations on “arresting government[s]” generically, and crediting admission by Texas that its law enforcement officials had violated the Convention, but finding that violation did not warrant relief).

111. See Brook M. Bailey, Note, *People v. Madej*: Illinois’ Violation of the Vienna Convention on Consular Relations, 32 Loy. U. Chi. L.J. 471, 472 (2001) (“As of June 2000, eighty-seven foreign nationals from twenty-eight different countries were on death row in the United States. While not all of these foreign nationals allege that they were deprived of their rights under the Vienna Convention, there is overwhelming evidence that the failure on the part of the United States to notify them of their rights is the rule rather than the exception.” (citation omitted)). The allegations of widespread violations are also at issue in the ongoing *Mexican Nationals* litigation, which in and of itself seeks relief on behalf of fifty-four Mexican nationals. See *supra* note 16.

112. *Breard v. Greene*, 523 U.S. 371, 375–78 (1998) (holding that Paraguayan national had procedurally defaulted his claim regarding violation of the Vienna Convention on Consular Relations by failing to raise that claim in state courts, and that the government of Paraguay either lacked a private right of action or would find relief barred by the Eleventh Amendment).

113. See *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 104 (June 27), 40 I.L.M. 1069 (finding that the United States breached its obligations under the Convention by failing to notify two German citizens of their rights, then failing to permit review and reconsideration of their convictions and sentences, and then failing to take all possible measures to prevent the execution of one of the nationals pending the final judgment of the International Court of Justice).

114. See *supra* note 16 (describing controversy and provisional order).

115. See Vázquez, *Breard*, *supra* note 96, at 1323. There are, in this and other cases, noncoercive alternatives. With respect to the Vienna Convention in particular, the United States determined that the most effective means within its authority involved printing and distributing thousands of cards and booklets for the education of and use by federal, state, and local officials. Counter-Memorial of the United States (F.R.G. v. U.S.), 2000 I.C.J. Pleadings (*LaGrand Case*) ¶¶ 20–23 (Mar. 27). It also could have more actively supervised state and local officials, or hired a third party to do so, but the size and complexity of such an undertaking would be staggering.

means by which it may compromise state sovereign immunity. Yet those attentive to those concerns nonetheless routinely, and understandably, assume that national laws are the implementing means of choice,<sup>116</sup> perhaps because a national law directing that the states instead adopt enforcement procedures would violate *New York*.

3. *Remedial Limits: State Sovereign Immunity.* — Among the various fronts in the Court's new federalism, by far the most active—and probably the most roundly criticized—has concerned state sovereign immunity. As legions of scholars have explained, while the text of the Eleventh Amendment appears confined to diversity actions brought by individuals,<sup>117</sup> an underlying principle of state sovereign immunity has been extended to federal question cases<sup>118</sup> and to suits brought by foreign governments.<sup>119</sup> In recent years the Court has declared that such immunity further extends to “private” suits brought in state court<sup>120</sup> and before federal administrative tribunals,<sup>121</sup> and that Congress lacks the authority under Article I to abrogate state sovereign immunity.<sup>122</sup>

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116. Thus, for example, Professors Berman, Reese, and Young interpolate the term “national” in the obligation of TRIPs signatories to guarantee remedies “under their law.” See, e.g., Berman et al., *supra* note 10, at 1180 (“The overarching enforcement obligations placed on the United States under Part III of TRIPs are: to ‘ensure that enforcement procedures . . . are available under . . . [national] law so as to permit effective action against any act of infringement of intellectual property rights covered by’ the agreement; to make available ‘expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements’; to apply enforcement procedures so as to ‘avoid the creation of barriers to legitimate trade’; and to have enforcement procedures that are not ‘unnecessarily complicated or costly’ or that ‘entail unreasonable time-limits or unwarranted delays.’”).

117. See U.S. Const. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”). For examples of scholarship advancing this “diversity theory,” see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425, 1466–92 (1987); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 *Stan. L. Rev.* 1033, 1054–63 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 *Colum. L. Rev.* 1889, 1894 (1983). But see William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 *Harv. L. Rev.* 1372, 1395–96 (1989) (disagreeing with diversity thesis).

118. *Hans v. Louisiana*, 134 U.S. 1, 14–15 (1890).

119. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934).

120. *Alden v. Maine*, 527 U.S. 706, 754 (1999). But see *id.* at 735 (confirming that “[t]here are isolated statements in some of our cases suggesting that the Eleventh Amendment is inapplicable in state courts” (citing *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 204–205 (1991), *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 63 (1989), *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.2 (1985), *Maine v. Thiboutot*, 448 U.S. 1, 9 & n. 7 (1980), *Nevada v. Hall*, 440 U.S. 410, 418–21 (1979))).

121. *Fed. Mar. Comm’n v. S.C. Ports Auth.*, 122 S. Ct. 1864, 1868 (2002).

122. *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996). But see *Parden v. Terminal Ry. Co. of Ala. Docks Dep’t*, 377 U.S. 184, 190–94 (1964) (concluding that Congress has the power, notwithstanding sovereign immunity doctrine, to subject states to suit); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13–23 (1989) (plurality opinion) (same).

Because these decisions seem to advance a generally applicable thesis about the proper boundaries of the federal and state governments,<sup>123</sup> they raise the question whether the treaty power is subject to the same constraints. No Supreme Court case squarely addresses application to the treaty power, and given the nature of modern sovereign immunity doctrine, there is no relevant text to consult, either. Still, existing case law suggests the arguments that might be mustered in favor of immunity. An historical argument against treaty power exceptionalism was proffered in *Alden v. Maine*, which noted that Congress had refused to adopt an exception to the proposed Eleventh Amendment for cases arising under treaties.<sup>124</sup> The structural arguments recently invoked in domestic cases would also seem broadly applicable. If a lawsuit's affront to state "dignity" is really the touchstone,<sup>125</sup> the fact that a treaty is the basis for suit seems virtually irrelevant,<sup>126</sup> at least given the holding in *Principality of Monaco v. Mississippi*<sup>127</sup>—one of the cases begetting the extra-textual dimension of state sovereign immunity<sup>128</sup>—that foreign states, like private individuals, were not beneficiaries of any waiver implied in state acceptance of the constitutional scheme.<sup>129</sup> As regards Congress's power to abrogate im-

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123. *Fed. Mar. Comm'n*, 122 S. Ct. at 1889 (Breyer, J., dissenting) ("These decisions set loose an interpretive principle that restricts far too severely the authority of the Federal Government to regulate innumerable relationships between State and citizen. Just as this principle has no logical starting place, I fear that neither does it have any logical stopping point.").

124. See *Alden*, 527 U.S. at 735 (alluding to "Congress' refusal to modify the text of the Eleventh Amendment to create an exception to sovereign immunity for cases arising under treaties"); *id.* at 721 (citing 4 Annals of Congress 30, 476 (1794)). While the Court inferred the suggestion that "the States' sovereign immunity was understood to extend beyond state-law causes of action," *id.* at 735, given the federal nature of treaty claims, Congress's deliberations may not necessarily speak to whether federal question jurisdiction was assumed to have been implicated in the Eleventh Amendment, since the controversial treaty cases of the day were before federal courts on party-based, rather than subject-matter, jurisdiction; see *Gibbons*, *supra* note 117, at 1930, 1933, 1934–38.

125. See *Fed. Mar. Comm'n*, 122 S. Ct. at 1874 ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."). But see *id.* at 1880–81 (Stevens, J., dissenting) (contesting dignity rationale).

126. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 n.9 (2000) ("While the States do not have the immunity against federally authorized suit that international law has traditionally accorded foreign sovereigns, they are sovereigns nonetheless, and both comity and respect for our federal system demand that something more than mere use of the word 'person' demonstrate the federal intent to authorize unconsented private suit against them." (internal citations omitted)).

127. 292 U.S. 313 (1934).

128. The Court held that background "postulates which limit and control" made the states "immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention'." *Id.* at 322–23 (quoting *The Federalist* No. 81 (Alexander Hamilton)).

129. As the Court explained,

The foreign State lies outside the structure of the Union. The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan, and to the United

munity, moreover, the potential distinction between Articles I and II may now matter less than the fact that both are “antecedent provisions of the Constitution” relative to the Eleventh Amendment.<sup>130</sup> Perhaps for these reasons, the Supreme Court has thus far assumed that state sovereign immunity applies equally where treaties are concerned,<sup>131</sup> as have most

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States as the sovereign which the Constitution creates. We perceive no ground upon which it can be said that any waiver or consent by a State of the Union has run in favor of a foreign State. As to suits brought by a foreign State, we think that the States of the Union retain the same immunity that they enjoy with respect to suits by individuals whether citizens of the United States or citizens or subjects of a foreign State.

Id at 330.

130. See *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996) (“*Fitzpatrick* cannot be read to justify ‘limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution.’” (quoting *Pennsylvania v. Union Gas*, 491 U.S. 1, 42 (1989) (Scalia, J., dissenting))). Taken literally, this suggests that whenever Congress acts under the original Constitution, the Eleventh Amendment precludes it from abrogating state sovereign immunity. Professor Bandes, however, notes that the just-quoted passage from *Seminole Tribe* “does not mean that the appeal [to antecedent provisions] cannot be justified” so much as it means that *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), a Fourteenth Amendment case, cannot provide that justification. Susan Bandes, *Treaties, Sovereign Immunity, and “The Plan of the Convention,”* 42 Va. J. Int’l L. 743, 746 (2002). This probably reads *Seminole Tribe* too narrowly. The majority distinguished the Fourteenth Amendment, “adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution,” as something that “operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment,” a balance in which the treaty power was presumably also at play. *Seminole Tribe*, 517 U.S. at 65–66.

The original passage in Justice Scalia’s *Union Gas* dissent, on the other hand, sought particularly to differentiate the Fourteenth Amendment from Article I:

The plurality asserts that it is no more impossible for provisions of the Constitution adopted *concurrently* with Article III to permit abrogation of state sovereign immunity than it is for provisions adopted *subsequently*. We do not dispute that that is possible, but only that it happened. As suggested above, if the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers. An interpretation of the original Constitution which permits Congress to eliminate sovereign immunity only if it wants to renders the doctrine a practical nullity and is therefore unreasonable. The Fourteenth Amendment, on the other hand, was avowedly directed against the power of the States, and permits abrogation of their sovereign immunity only for a limited purpose.

*Union Gas*, 491 U.S. at 42 (Scalia, J., dissenting). This reasoning, to the extent indicative of the Court’s, reinforces the notion that the treaty power’s potential scope—and thus its potential for circumventing restrictions on Congress’s legislative authority—may be significant. See *infra* text accompanying note 141.

131. See *Federal Republic of Germany v. United States*, 526 U.S. 111, 112 (1999) (*per curiam*) (asserting, in declining original jurisdiction, that “a foreign government’s ability here to assert a claim against a State is without evident support in the Vienna Convention and in probable contravention of Eleventh Amendment principles”); *Breard v. Greene*, 523 U.S. 371, 377 (1998) (*per curiam*) (citing the Eleventh Amendment as “a separate reason why Paraguay’s suit might not succeed”); see also *Republic of Paraguay v. Allen*, 134 F.3d 622, 629 (4th Cir. 1998) (concluding that “because the violation of federal treaty law was not ongoing when this action was filed . . . the Eleventh Amendment does not permit

commentators.<sup>132</sup>

There are grounds, to be sure, for distinguishing the treaty power. Those reading *Holland* as holding that there are no federalism-related checks on the treaty power might dismiss state sovereign immunity in the bargain, though for reasons previously detailed that argument is not overwhelming.<sup>133</sup> The Court's reliance on structural evidence of immunity

the federal courts to provide a remedy against [state] officials sued . . . for their conceded past violations"); *United Mexican States v. Woods*, 126 F.3d 1220, 1222 (9th Cir. 1997) (remarking that "it is now well established that the [Eleventh] [A]mendment does immunize the states from [suits by foreign nations]"); *Consulate Gen. of Mexico v. Phillips*, 17 F. Supp. 2d 1318, 1323–27 (S.D. Fla. 1998) (reviewing Eleventh Amendment constraints on suits against states and the applicability of *Ex parte Young* exception).

Some have stressed, however, that even if state sovereign immunity doctrine applies with full force to treaties, the Eleventh Amendment's established exceptions should be applied. See, e.g., Lori Fisler Damrosch, *The Justiciability of Paraguay's Claim of Treaty Violation*, 92 Am. J. Int'l L. 697, 702 (1998) (observing that, prior to *Breard*, "[n]either *Monaco* nor any other case had involved a contention (comparable to Paraguay's) that a suit to enjoin state officers from perpetuating the continuing consequences of a treaty violation is compatible with the Eleventh Amendment," and that "the amendment should be construed as providing a federal forum for enforcing federal treaty obligations against state officials"); see also David Sloss, *Ex Parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 Wash. L. Rev. 1103, 1105 (2000) (arguing that "the Supremacy Clause creates an implied right of action for injunctive relief against state and local government officers who violate federal statutes or treaties"); *infra* notes 323–345 and accompanying text (evaluating scope of remedies consistent with state sovereign immunity).

132. See, e.g., Restatement (Third), *supra* note 22, § 302 reporter's note 3 (presuming that Eleventh Amendment applies); Henkin, *Foreign Affairs*, *supra* note 2, at 166 (assuming that Eleventh Amendment applies, and noting that "[t]here is also something left, too—how much cannot be said with confidence—of the sovereign immunity of the states, which would presumably limit federal regulation under foreign affairs powers as well"); Bradley, *Treaty Power I*, *supra* note 14, at 458 (asserting application of Eleventh Amendment based on *Breard* and similar cases, but conceding that prior to recent cases, "[t]he distinction made in *Holland* and *Reid* between federalism limitations on Article I powers and those on the treaty power at least raises the possibility that the treaty power should be treated differently from the commerce power with respect to the Eleventh Amendment"); Vázquez, *Treaties*, *supra* note 78, at 741 (concluding that, if prevailing doctrine is accepted, "state sovereign immunity doctrine is fully applicable to exercises of the Treaty Power"). But see, e.g., Jordan J. Paust, *Breard and Treaty-Based Rights Under the Consular Convention*, 92 Am. J. Int'l L. 691, 696 (1998) [hereinafter Paust, *Breard*] ("[T]he absolute supremacy and reach of treaties to the states under Article VI should condition the meaning of the Eleventh Amendment. Hence, courts should recognize that treaty-based rights form an exception to local state immunities."); Brief of the United States as Amicus Curiae at 30–32, *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998) (No. 96-2770), cert. denied sub nom. *Breard v. Greene*, 523 U.S. 371 (1998) (denying that Eleventh Amendment applies in foreign affairs cases); Brief of the United States as Amicus Curiae, *Breard*, at 15–16 (Nos. 97-1390 (A-738) & 97-8214 (A-732)) ("Thus, while we do not necessarily endorse the court of appeals' distinction between 'past' and 'ongoing' violations of the Convention for Eleventh Amendment purposes in this setting, we do agree that Paraguay and its representatives were properly denied the judicial relief that they seek."); cf. Bandes, *supra* note 130 (arguing for potential distinction of treaty power).

133. See *supra* text accompanying notes 103–108.

and its potential compromise “in the plan of the convention”<sup>134</sup> provide some more coherent bases for distinguishing the treaty power. One might argue that in foreign affairs, unlike in domestic matters, the states were never sovereign<sup>135</sup>—though whether that bears on their amenability to suit in domestic courts is another question. The Founders were greatly concerned, too, with the states’ record of breaching treaties, and perhaps considered the Supremacy Clause insufficient<sup>136</sup> (and perhaps even less adequate than in the case of mere statutory violations).<sup>137</sup> Simultaneously, they took special steps to ensure that the treaty power would not be used to abuse state interests.<sup>138</sup> Finally, treaty breaches may pose a graver risk to the national interest that requires more dramatic remedies to deter and make amends for state violations.<sup>139</sup>

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134. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–23 (citing “postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been ‘a surrender of this immunity in the plan of the convention.’” (quoting *The Federalist*, No. 81 (Alexander Hamilton))).

135. See Peter S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 *Loy. L.A. L. Rev.* 1399, 1460–61 (2000) (“Because state sovereignty has never been understood to extend to international affairs, the Eleventh Amendment would not appear to limit this aspect of Congress’ Article I powers.”). For a persuasive rebuttal, see Berman et al., *supra* note 10, at 1188–90.

136. See, e.g., Paust, *Breard*, *supra* note 132, at 696 (arguing that “the constitutional plan was that states are not to be immune from the reach of treaties”). Much of the historical evidence that can be cited, however, fails to support the need for overcoming immunity so much as the “mere” supremacy of federal law, including treaties. As noted in greater detail below, moreover, the Supremacy Clause itself can be the basis for alternative remedies that do not (yet) pose an affront to the sovereign immunity recognized by the Supreme Court. See Vázquez, *Treaties and the Eleventh Amendment*, *supra* note 78, at 735–39 (noting Eleventh Amendment alternatives applicable in the treaty context); *infra* notes 323–345 and accompanying text (same).

137. If the Supremacy Clause forms the backbone of the argument for treaty exceptionalism, it is important, certainly, to explain why statutes should be regarded differently (that is, as having lesser authority). Others have argued, in fact, that the case of treaties is properly extrapolated to all federal law. Judge Gibbons, for example, suggested that the U.S. interest in affording foreign states a remedy for treaty violations by states made it unlikely that the original Constitution was intended to preserve or establish state sovereign immunity from suit in *any* non-diversity cases. See Gibbons, *supra* note 117, at 1895–99. Accepting any such argument would, of course, require repudiating the course the Court recently reaffirmed in *Seminole Tribe*.

138. Unlike statutes, treaties require the President’s agreement and the consent of a Senate supermajority. See Vázquez, *Treaties and the Eleventh Amendment*, *supra* note 78, at 722. Ordinary legislation requires just one or the other—it may be passed without the President’s consent if a two-thirds supermajority overrides his or her veto, but with the President’s agreement requires only an ordinary majority. The significance of that difference turns in part on the Senate’s value in protecting state prerogatives, *id.* at 728, a matter open to debate. See *supra* note 31 and accompanying text.

139. *Id.* at 729–30. Given the degree to which young America was dependent on maintaining amicable relations with Europe, this claim is somewhat anachronistic. But even if one could claim that globalization has *increased* the importance of the treaty power, the Court would likely find that fact irrelevant to the constitutional inquiry. Cf. *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1871–72 & n.8 (2002) (regarding

On balance, these distinctions seem unlikely to dissuade a Court intent on establishing a full-fledged immunity principle. There is also reason to doubt their redemptive potential. For one, any distinction permitted the treaty power may not apply with equal force to the increasingly ubiquitous congressional-executive agreements—which are pursued in large part precisely because of the distinctive safeguards attending treaties—let alone separate legislation implementing treaties.<sup>140</sup> Moreover, to the extent that treaties or their equivalents are used, as in *Holland*, to circumvent otherwise-applicable state sovereign immunity restrictions, the Court is likely to be especially skeptical.<sup>141</sup>

If extended, state sovereign immunity would pose two kinds of problems for U.S. treaty obligations. First, limiting the remedies against the states generally undermines treaty supremacy and calls into question U.S. performance of its primary obligations. Cases involving state breaches of the Vienna Convention on Consular Relations, for example, suggest that the most obvious recourse for some of the detainees affected—to revisit their criminal convictions and sentences, or at least to stay execution—may be frustrated by immunity doctrines. The primary breach in these cases, of course, concerns the states' original omissions, and nothing in the Convention specifies the form of relief that must be provided. But the failure to provide effective relief arguably contributes both to the original transgression and its continuation, and may further offend customary international law norms regarding minimum remedies.<sup>142</sup> The supposition that the Eleventh Amendment bars such relief, though not definitively settled, contributed to the great international controversy surrounding the *Breard* and *LaGrand* cases.<sup>143</sup>

A second concern is that state sovereign immunity may breach U.S. undertakings directly relating to remedies. The most significant example

administrative agencies either as analogous to the courts contemplated at the Framing or as anomalies falling outside the constitutional scheme entirely).

140. Cf. Vázquez, *Treaties*, supra note 78, at 725 (noting that “[b]ecause this [supermajority] safeguard does not operate with respect to congressional-executive agreements, the case for exempting such agreements from state sovereign immunity is weaker than the case for exempting Article II treaties”).

141. *Seminole Tribe v. Florida*, 517 U.S. 44, 72–73 (1996) (“The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.”); see also supra note 130 (noting Justice Scalia’s dissent in *Union Gas*).

142. See *infra* text accompanying note 199.

143. Jonathan I. Charney & W. Michael Reisman, *Agora: Breard: The Facts*, 92 *Am. J. Int’l L.* 666, 673–75 (1998) (describing events turning on invocation of immunity); see supra notes 112, 131 (discussing *Breard*); see also *LaGrand Case (F.R.G. v. U.S.)*, 2001 *I.C.J.* 104, ¶ 115 (June 27), 40 *I.L.M.* 1069, 1097 (holding that United States, notwithstanding exigent circumstances and limitations imposed by its federal system, had violated Court of Justice order of provisional measures); *Counter-Memorial of the United States (F.R.G. v. U.S.)*, n.104, 2000 *I.C.J. Pleadings (LaGrand Case)* ¶¶ 121, 126 & nn. 26, 30 (Mar. 27) (alluding to Eleventh Amendment restrictions on U.S. intervention in state criminal proceedings).

is provided by TRIPs.<sup>144</sup> It was recently made clear that domestic efforts to ensure that the states respect intellectual property rights are significantly constrained.<sup>145</sup> If the Eleventh Amendment equally restricts the treaty power, U.S. obligations under TRIPs may similarly be compromised. TRIPs not only imposes a general obligation to maintain an effective system of remedies against any infringements of treaty-conferred intellectual property rights,<sup>146</sup> and sets out some fairness and due process criteria,<sup>147</sup> but also requires specific remedies for trademark and copyright infringements<sup>148</sup> and, with some differences, for patent infringe-

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144. TRIPs, *supra* note 10. For discussion, see Berman et al., *supra* note 10, at 1173–95; John O’Connor, Taking TRIPs to the Eleventh Amendment: The Aftermath of the College Savings Cases, 51 *Hastings L.J.* 1003, 1032–34 (2000). See generally Menell, *supra* note 135, at 1448–64 (describing the impact of state sovereign immunity on various international intellectual property agreements).

145. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 645–48 (1999) (enjoining Patent and Plant Variety Protection Remedy Clarification Act on the grounds that Congress lacked the authority to abrogate state sovereign immunity under Article I and had not established an adequate basis for abrogation under the Fourteenth Amendment); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672–87 (1999) (holding that because false advertising claims do not relate to a constitutionally recognized property right, relevant provisions of the Trademark Remedy Clarification Act abrogating state sovereign immunity could not be sustained as an exercise of congressional authority under the Fourteenth Amendment); see also Chavez v. Arte Publico Press, 204 F.3d 601, 607–08 (5th Cir. 2000) (enjoining Copyright Remedy Clarification Act based on *Florida Prepaid* decisions).

146. See TRIPs, *supra* note 10, art. 41(1), 33 I.L.M. at 1213–14 (“Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.”).

147. *Id.* art. 41(2), 33 I.L.M. at 1214 (requiring that enforcement proceedings “be fair and equitable,” and not “unnecessarily complicated or costly,” or “entail[ing] unreasonable time-limits or unwarranted delays”); *id.* art. 41(3) (encouraging the adoption of merits decisions in reasoned, written opinions, made available “without undue delay,” and based only on evidence on which the parties could be heard); *id.* art. 41(4) (requiring judicial review).

148. As helpfully categorized by Professors Berman, Reese, and Young, members are required to afford: (1) criminal penalties against certain kinds of infringements (art. 61); (2) preliminary and permanent injunctive relief to prevent infringements, or to cease those already occurring (arts. 44(1), 50(1)(a)); (3) procedures for seizing potentially infringing materials at a the member’s borders (arts. 51–60); (4) the ability to order intentional and negligent infringers to pay “damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person’s intellectual property right” (art. 45(1)); (5) the judicial authority to order those infringing to pay costs, potentially including appropriate attorney’s fees (art. 45(2)); and (6) in civil judicial proceedings, the power to order the seizure and disposal of infringing goods, and the ability to order the seizure and disposal of materials and implements used predominantly to create the infringing goods (art. 46). See Berman et al., *supra* note 10, at 1185–87.

ment.<sup>149</sup> Although its terms arguably accommodate the Eleventh Amendment to some degree,<sup>150</sup> and may in other regards be satisfied by federal statute<sup>151</sup> or guaranteed by the Due Process (or Takings) Clause,<sup>152</sup> it seems plausible that prevailing state sovereign immunity doctrine runs afoul of some of these remedial provisions—in particular, those requiring that damages be available for negligent infringement, authorizing state courts to compensate owner-plaintiffs for expenses, and providing the

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149. Member states satisfying conditions specified in Article 31 may limit the remedy for government use of patents (or use by government-authorized third parties) without authorization by the patent owner to remuneration, see TRIPs, *supra* note 10, art. 44(2), 33 I.L.M. at 1215, but it is unlikely that most instances of state patent regimes satisfy those conditions, particularly those relating to the efforts to notify and obtain permission from the patent owner, Berman et al., *supra* note 10, at 1184–85. One commentator argues that the inability of the United States to satisfy Article 31 is itself due to state sovereign immunity, but that is tenuous. See O'Connor, *supra* note 144, at 1032–33 (noting intellectual property has been left to “whims of state and whether they will waive sovereign immunity”).

150. See TRIPs, *supra* note 10, art. 44(2), 33 I.L.M. at 1215 (providing that “[i]n other cases, the remedies under this Part shall apply or, where these remedies are inconsistent with a Member’s law, declaratory judgments and adequate compensation shall be available.”). Professors Berman, Reese, and Young regard this loophole as confined to intellectual property other than patents, see Berman et al., *supra* note 10, at 1182–83, but that may not be the best reading. Though the preceding sentence (concerning remuneration as an adequate remedy for Member States complying with Article 31) is limited by its terms to patents, nothing indicates that the remainder of Article 44(2), quoted above, pertains only to rights *other* than those involving patents. (The “other cases” adverted to, instead, more likely refers to cases other than those in which Article 31 is satisfied, not to cases other than those involving patents.) In any event, they are surely correct in indicating uncertainty as to whether the remedies for state infringement required by the U.S. Constitution notwithstanding state sovereign immunity (and, thus, not barred by the “inconsistent” U.S. law of immunity) would be sufficient to satisfy these TRIPs minima, especially the requirement of “adequate compensation.” *Id.* at 1183–84. If they would not, then the full panoply of TRIPs remedies would continue to be obligatory.

151. Federal statutes provide the requisite criminal enforcement, preliminary and injunctive relief (courtesy of *Ex Parte Young*), border procedures, and the power to seize and dispose of infringing goods (and, in copyright matters, to seize implicated materials and implements), thereby satisfying the first three requirements indicated in note 148, *supra*, and partially satisfying the sixth. See Berman et al., *supra* note 10, at 1185–87.

152. In *Florida Prepaid & College Savings Bank*, the Supreme Court cautioned that state sovereign immunity was qualified by the constitutional requirement that states provide remedies to individuals when it willfully deprives them of liberty or property. It did not, however, clarify how the two principles were to be reconciled, other than signaling in *College Savings Bank* that liberty and property interests would not be construed too broadly. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 637 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672–75 (1999); see Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 *Yale L.J.* 1927, 1927–28 (2000) [hereinafter Vázquez, *Sovereign Immunity*] (noting that “[h]ow far the due process principle undoes the sovereign immunity principle depends . . . on how the Court defines ‘liberty’ and ‘property’”). For application to the specific remedies required by TRIPs, see Berman et al., *supra* note 10, at 1058–74, 1086–88.

power to seize and dispose of implicated materials and implements in patent and trademark matters.<sup>153</sup>

### B. *Non-Doctrinal Alternatives*

The Constitution defines federalism not only through judicially enforced principles, but also by creating national and state institutions that actively shape it. Two familiar types of non-judicial mechanisms—the safeguarding of state interests by national institutions, and state self-help—substitute for judicial intervention in important regards. But because they are not universally effective, nor independent of doctrine, they do not significantly detract from what is at stake in the courts.

1. *National Accommodation.* — As noted previously, national political practices account for some of the most vigorous protection of foreign relations federalism. Federal state clauses, incorporated in the negotiated instruments themselves, usually contain some kind of dispensation for signatories with federal structures.<sup>154</sup> Alternatively, a nation may unilaterally impose reservations, understandings, and declarations (RUDs) that condition consent to a treaty.<sup>155</sup> Once the treaty has been ratified,

153. Berman et al., *supra* note 10, at 1186–87.

154. See, e.g., American Convention on Human Rights, art. 28(1), opened for signature Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) (providing that “[w]here a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction”). Other prominent examples include the constitution of the International Labor Organization and a variety of instruments governing the treatment of refugees. See Ivan Bernier, *International Legal Aspects of Federalism* 172–87 (1973); Robert B. Looper, ‘Federal State’ Clauses in Multilateral Instruments, 32 *Brit. Y.B. Int’l L.* 162 (1955–1956); Max Sørensen, *Federal States and the International Protection of Human Rights*, 46 *Am. J. Int’l L.* 195 (1952); see also John Trone, *Federal Constitutions and International Relations* 12–16 (elaborating typology of federal state clauses); Henry Burmester, *Federal Clauses: An Australian Approach*, 34 *Int’l & Comp. L.Q.* 522, 522–28 (1985) (same). For further discussion, see *infra* note 168.

155. See generally Bradley & Goldsmith, *Conditional Consent*, *supra* note 33 (describing, and defending, practice). The legal consequences of particular RUDs, though, may be defined by the treaty in question. Some suggest that the U.S. federalism understanding relating to the International Covenant on Civil and Political Rights (ICCPR), for example, see *supra* note 19 (citing, and quoting, provision), fails of its purpose, and lacks legal effect, because it is inconsistent with the terms of the ICCPR. E.g., Spiro, *The States and International Human Rights*, *supra* note 18, at 577 & n.35; see *International Covenant on Civil and Political Rights*, Dec. 16, 1966, art. 50, 999 U.N.T.S. 171, 185, 6 *I.L.M.* 368 (“The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.”); cf. Neuman, *Global Dimension*, *supra* note 49, at 52 (suggesting that the ICCPR understanding “serve[s] no legal purpose[,]” because “[a]dding such a declaration of intent does not decrease the United States’ international obligations and does not decrease in the slightest the power of Congress to implement those obligations” (quoting Henkin, *The Ghost of Senator Bricker*, *supra* note 3, at 346)); Powell, *supra* note 27, at 266–67 & n.86 (noting Neuman’s argument). From the U.S. perspective, on the other hand, the understanding’s professed object was “not to modify or limit U.S. undertakings under the Covenant but rather to put our future treaty partners on notice with regard to the implications of our federal system

implementing measures may carve out exemptions for the states, or establish procedural hurdles to the implementation and enforcement of burdens imposed upon the states.<sup>156</sup> Finally, concerted state opposition may influence national decision-makers to prevail against the inclusion of terms offensive to states,<sup>157</sup> or even derail altogether the nation's participation in a treaty.<sup>158</sup>

Such devices signal that state interests may be protected, and frequently *are* protected, to a greater degree than anything guaranteed by the Constitution. There are several ways of understanding this relationship. First, perhaps this "excessive" political protection is somehow legally problematic. To the extent such objections turn on constitutional impediments other than federalism, I do not explore them further.<sup>159</sup> Professor Vázquez has suggested the irony that federalism RUDs, by charging states with treaty implementation, may violate the anti-commandeering principle,<sup>160</sup> but this seems mistakenly to regard such RUDs as the source of a duty to implement—when the duty, if it exists, is in-

concerning implementation." Report of the Committee on Foreign Relations, International Covenant on Civil and Political Rights, S. Exec. Rep. 102-23, at 18 (1992); see Bradley & Goldsmith, *Conditional Consent*, *supra* note 33, at 455.

156. See *supra* text accompanying notes 71-72 (describing provisions in NAFTA and Uruguay Round implanting legislation).

157. I would include within this category the range of techniques for negotiating the reduction of inconsistencies between international agreements and state laws. As Matt Schaefer has helpfully catalogued, these include: (1) "[e]ncouraging but not mandating the use of international and harmonized standards"; (2) "[n]egotiating obligations with which existing laws comply and future laws will (likely) comply"; (3) "[a]llowing 'grandfathering' or exemption of existing laws that do not conform to anti-protectionism and other central obligations"; (4) "[a]llowing states and provinces to voluntarily choose whether they will be bound to certain agreements and tailor the extent to which they will be bound." Schaefer, *Searching for Pareto Gains*, *supra* note 72, at 466; see *id.* at 466-75 (citing examples); Schaefer, *Twenty-First Century Trade Negotiations*, *supra* note 63, at 77-78 (same).

158. See *supra* text accompanying notes 18-19 (citing examples of U.N. Convention on the Rights of the Child and CEDAW).

159. See, e.g., Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, in *Politics, Values and Functions: International Law in the 21st Century* 197, 206-08 (Jonathan I. Charney et al. eds., 1997) (suggesting that "U.S. declarations making human rights treaties non-self-executing are ill-advised and probably unconstitutional," in that they "limit[] powers the Constitution grants to the courts"). But see Bradley & Goldsmith, *Conditional Consent*, *supra* note 33, at 442-51 (citing, and disputing, other constitutional objections); *id.* at 423-39 (skeptically reviewing international law objections). It is uncontroversial, however, that inappropriate RUDs may invalidate a nation's attempt to assent to participation in a multilateral instrument. Thus, while generally critical of legal objections to RUDs, Professors Bradley and Goldsmith are receptive to the notion that certain reservations might violate the requirement in the Vienna Convention on the Law of Treaties that reservations be compatible with the object and purpose of a treaty. *Id.* at 429-39; see Vienna Convention on the Law of Treaties, May 23, 1969, art. 19, 1155 U.N.T.S. 331, 336 [hereinafter Vienna Convention on the Law of Treaties] (stating object and purpose rule).

160. See Vázquez, *Breard*, *supra* note 96, at 1354-57; cf. Neuman, *Global Dimension*, *supra* note 49, at 52.

stead imposed by background norms of constitutional or international law.<sup>161</sup>

Second, the availability and prevalence of political safeguards might obviate any need for judicially enforced federalism,<sup>162</sup> or at least materially reduce its relevance.<sup>163</sup> Neither argument genuinely qualifies what is at stake. Political safeguards have undoubtedly diminished the frequency with which treaties inflict injuries on state interests, and political institutions play a more significant role in that regard than do the courts. But treaties still raise federalism issues, indicating that the national political branches are unable to protect state interests in all cases or that they do not wish to do so; there are good reasons, indeed, to suppose that each circumstance arises with some frequency.<sup>164</sup> But the Supreme Court has stressed that protecting state interests is not, in any event, the same thing as protecting state constitutional prerogatives,<sup>165</sup> and it is extremely un-

161. See Bradley & Goldsmith, *Conditional Consent*, *supra* note 33, at 455–56 (making similar argument).

162. See, e.g., Goldsmith, *supra* note 5, at 1674–76 (noting, in arguing for caution in the evaluation of state foreign affairs activities, that the national political branches often protect state interests). In this stronger form, the argument is a variant on the notion that the national government, particularly the Senate, acts as a sufficient guardian of state interests. Tushnet, *Federalism*, *supra* note 98, at 855 (“In the new constitutional order . . . the Supreme Court is not likely to have any *need* to develop constitutional doctrines dealing with power to regulate international affairs that limit national power in the name of federalism. Modesty, not revolution, is the order of the day.”); see also *id.* at 852–53 (asserting that hypothesizing “some international agreement that requires national action that intrudes on matters of state concern” may be “particularly misleading” because “in the new constitutional order . . . such agreements are exceedingly unlikely to be adopted”); *id.* at 854 (concluding that it is “quite unlikely that the United States will enter into treaties or international agreements raising serious federalism questions”). See generally Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* 388–415 (1980); 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, 545–46 (1954).

163. See, e.g., Leebron, *supra* note 70, at 176 n.4 (“[F]ederalism (in the sense of decentralizing power to the states) as a political value plays a more important role than the limited legal constraints federalism places on the implementation of trade agreement obligations.”); Matthew Schaefer, *Federal States in the Broader World*, 27 *Can.-U.S. L.J.* 35, 43 (2001) (“[T]he *Lopez* case and other cases dealing with commandeering will not inhibit the federal government from entering into international trade agreement obligations binding the states in areas such as services, investment, government procurement and subsidies. Instead, it is political constraints that may inhibit the federal government from pursuing liberalization of state measures in trade negotiations. Accordingly, state federal cooperation measures must be enhanced to reduce the political constraints on the federal government.”).

164. See *infra* text accompanying notes 272–278 (discussing drawbacks to asserting constitutional limits to treaty power).

165. See *New York v. United States*, 505 U.S. 144, 181–82 (1992) (“The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. . . . Where Congress exceeds its authority

likely that it would regard an appeal to political safeguards as a sufficient reason to limit the new federalism.<sup>166</sup>

Most important, the argument also overlooks the synergies between political acts and the Constitution. In the long term, federal state clauses and federalism RUDs might themselves establish a new constitutional norm respecting state sovereignty, perhaps even one superseding *Missouri v. Holland*.<sup>167</sup> In the short term, however, the arguments used in pursuing those terms, and the likelihood that they will prevail, depend substantially on how the courts have construed the existing Constitution. Federal state clauses that basically exempt federal governments from concrete responsibility for subnational compliance sometimes advert to “limitations” on the national government or to national responsibility “appropriate” to the federal system,<sup>168</sup> and provisions exhorting a more

relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials.”); see also *supra* note 31 (evaluating role of Senate as guardian of state interests).

166. See, e.g., *United States v. Morrison*, 529 U.S. 598, 616 & n.7 (2000) (denying that the protection of federalism is “solely a matter of legislative grace”); *id.* at 615 (concluding that congressional findings and method of justification confirm the risk that it would, left to its own devices, “completely obliterate the Constitution’s distinction between national and local authority”).

167. Some attribute great constitutional significance to political practices relating to the treaty power. See, e.g., Ackerman & Golove, *supra* note 22, at 890–96 (describing use of congressional-executive agreements as part of constitutional transformation creating an extra-constitutional instrument interchangeable with treaties); Powell, *supra* note 22, at 535–40 (describing and justifying executive branch regard for historical practices relating to foreign affairs); Spiro, *Constitutional Method*, *supra* note 22, at 1009–34 (articulating theory of “constitutional increments,” relying heavily on political practices, in likewise legitimating congressional-executive agreements). The Supreme Court has not yet gone so far, but it has stressed the value of practice as an interpretive tool. E.g., *Dames & Moore v. Regan*, 453 U.S. 654, 680–82 (1981) (relying in part on congressional acquiescence as legitimating executive power to engage in unilateral claims settlement); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (urging deference to “gloss” on constitutional text written by, *inter alia*, “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned”); *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (urging construction in light of “our whole experience,” rather than “mere[ ]” text). Practice may also have become relevant due to the paucity of precedent. *Dames & Moore*, 453 U.S. at 661 (remarking that “the decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases”).

168. The two examples are drawn from the original Draft Constitution of the International Labor Organization (ILO), which specified distinctive terms for federal states “the power of which to enter into conventions on labour matters is subject to limitations,” and the ILO’s amended Constitution, which instead addressed provisions “which the federal Government regards as appropriate under its constitutional system, in whole or in part, for action by the constituent states, provinces, or cantons rather than for federal action.” See Looper, *supra* note 154, at 167, 182; accord Bernier, *supra* note 154, at 175–77. The terms differ, it may be noted, not only in their thresholds for incompatibility (concrete limitations versus appropriateness), but also in the later provision’s decision to vest decisionmaking wholly in the subjective judgment of the federal government involved. Looper, *supra* note 154, at 183–84. For other examples of “objective” federal state clauses drawn in terms of limitations, but subject in practice to the

proactive role for national governments nonetheless show deference to the legal character of federal states.<sup>169</sup> Federal states not infrequently seek broader concessions based on the political feasibility of national implementation, but the arguments that have had purchase are based on more genuine constitutional limits.<sup>170</sup> Much the same may be said with respect to RUDs, exemptions in implementing legislation,<sup>171</sup> and out-

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subjective assessment of the government concerned, see Bernier, *supra* note 154, at 178–80 (citing, among others, the Refugees Convention of 1951, the Convention of 1956 on the Recovery Abroad of Maintenance, the Status of Stateless Persons Convention of 1954, the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Refugees Protocol of 1966, and the GATT and EFTA Agreements).

169. GATT 1947 provided in Article XXIV(12) that “[e]ach contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory,” General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXIV(2), 61 Stat. A-3, A-11, 55 U.N.T.S. 187, 194, which was understood to reflect national responsibility “to the extent a federal government had the constitutional authority to ensure observance of a GATT obligation.” Schaefer, *Searching for Pareto Gains*, *supra* note 72, at 463 & nn.105–106 (citing authorities). GATT 1994 attempted to clarify that national responsibility was independent of, and broader than, the ability to take remedial action. See *Understanding on the Interpretation of Article XXIV of the GATT 1994*, 33 I.L.M. 1125, 1163 (1994), reprinted in H.R. Doc. No. 103-316, at 1347 (1994) (quoting amended Article XXIV (“Each member is fully responsible under GATT 1994 for observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.”)). The NAFTA, in contrast, sought to make the responsibility unequivocal. NAFTA, *supra* note 72, art. 105, 32 I.L.M. at 298 (providing that “[t]he Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments”).

170. This is well illustrated by the drafting history of Article XXIV(12) of GATT 1947, where arguments by the United States and Australia based on constitutional limits appear to have won the day, see Canada: Measures Affecting the Sale of Gold Coins, Sept. 17, 1985, GATT Doc. L/5863, ¶¶ 53–56 1985 WL 291500 (unadopted GATT panel report), albeit without stopping federal systems like the United States and Canada from pressing—and having rejected—arguments for broader dispensation. See, e.g., *id.* ¶ 56 (concluding that, notwithstanding broader Canadian claims, “Article XXIV:12 applies only to those measures taken at the regional or local level which the federal government cannot control because they fall outside its jurisdiction under the constitutional distribution of competence.”); United States Measures Affecting Alcoholic and Malt Beverages, June 19, 1992 GATT B.I.S.D. (39th Supp.) at 206, 296 ¶¶ 5.78, 5.79 (1993) (GATT panel report) (rejecting similar claim by United States, in similar terms); see also Looper, *supra* note 154, at 165–68 (describing Rapporteur’s acceptance, in connection with drafting of ILO Constitution in 1919, of U.S. arguments relating to federal limitations, premised on the notion that “the Federal Government could not undertake obligations which it would not be able to fulfil”); *id.* at 188–90 (noting pertinence of genuine constitutional limitations to collective understanding of “appropriateness” clause initially drafted for UN Draft Covenant on Human Rights).

171. See, e.g., S. Rep. No. 103-412, at 221 (1994) (“[S]ection 102 contains provisions and establishes procedures to ensure that the authority of the World Trade Organization (WTO) does not supersede the sovereign powers of State governments as established by the 10th Amendment to the U.S. Constitution.”)

right refusals to participate based on federalism grounds.<sup>172</sup>

To be sure, the arguments mustered by national authorities may be based on erroneous or self-serving interpretations of the Constitution,<sup>173</sup>

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172. See, e.g., Henkin, *Foreign Affairs*, supra note 2, at 191–92 (noting that even following *Missouri v. Holland*, “official American negotiators continued to assert that the United States could not by treaty regulate, say, armaments manufacturing, because manufacturing was a local activity reserved for regulation by the states”); Pitman B. Potter, *Inhibitions upon the Treaty-Making Power of the United States*, 28 *Am. J. Int’l L.* 456, 457–61 (1934) (citing examples of the International Conventions of 1910 and 1921 for the Suppression of the Traffic in Women and Children, a 1928 private international code, and proposed agreements for the treatment of indigent foreigners).

173. Federal state clauses have been subjected to sustained criticism on this ground. See Henkin, *Foreign Affairs*, supra note 2, at 192 & n.168 (suggesting that U.S. representatives “sometimes” advocated federal state clauses with “arguments reflecting mistaken constitutional, ‘reserved rights’ limitations on the treaty-making powers”); id. at 464–65; Golove, *Treaty-Making and the Nation*, supra note 14, at 1241–42 & n.551 (claiming that “[a]most uniformly,” national endorsement of states’ rights positions “were made to foreign governments in explanation of why the United States was unwilling to conclude treaties that our friends and allies were pressing upon us,” and that “[t]he conventions were generally ones which the executive viewed as unfavorable to our interests and which, given the sensitivity of the Senate to the interests of the states, could not in any case be approved”); id. at 1272–73 (same); Looper, supra note 154, at 164–71 (arguing more generally that during the drafting of the ILO Constitution in 1919, federal states collectively exaggerated their constraints, since none lacked the power to enter into treaties on labor matters); Potter, supra note 172, at 461–62; Sørensen, supra note 154, at 198 (suggesting that the U.S. position regarding Draft Covenant on Human Rights was “based upon the existing division of powers between Federal and State authorities and does not try to answer the question to what extent it would be possible within the present constitutional framework to enlarge the field of Federal jurisdiction”). Similar criticisms have been voiced regarding the positions asserted more recently in connection with U.S. RUDs, though perhaps fewer since the new federalism decisions. Compare, e.g., Powell, supra note 27, at 267 (“At the international level, the United States often points to deference to states’ rights as the reason why it cannot meet international human rights requirements. In fact, it is not clear whether the federal government can impose these requirements on state and local governments through federal directives without violating the anticommandeering doctrine, which prohibits the federal government from issuing such directives.”), with Henkin, *The Ghost of Senator Bricker*, supra note 3, at 345–46 (distinguishing between RUDs based on principle that treaty obligations will not be adopted where inconsistent with the Constitution, and “federalism clauses” based on legal misperceptions or for political ends).

Claims that U.S. negotiators have been disingenuous ring true in at least some instances. But one need not consider each branch autonomous in constitutional interpretation, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *Geo. L.J.* 217, 221 (1994), to concede that the President might legitimately find it inappropriate to exploit the outer bounds of national authority, especially if he also perceived that the decision in *Holland* was explicable on narrower and more conventional grounds. See supra note 46 (citing authorities claiming that *Holland* might have been justified under the Foreign Commerce Clause). That kind of claim, at least, would be unfair to dismiss as “self-denying—and self-interested.” See Golove, *Treaty-Making and the Nation*, supra note 14, at 1242. But see Potter, supra note 172, at 461–62 (noting that the “simplest explanation” is that U.S. claims to lack national authority are “merely an excuse for not doing something which the United States does not wish, as a matter of policy, to do”).

or may even be inconsistent with one another.<sup>174</sup> But the point remains that judicial perspectives help to establish a belief system about what federalism requires, serve rhetorical ends, and may verify or belie the premises for political acts. The frequent criticism by legal academics of political appeals to federalism, indeed, assumes that the “true” construction of federal constraints is highly relevant to their consensual accommodation by political institutions.

2. *State Self-Help*. — Even if national political safeguards of state interests in foreign relations do not eclipse the new federalism, another political alternative—state self-help—may.<sup>175</sup> States may, for example, adopt legislation or conduct activities in such a way as to diminish the need for federal intervention and, accordingly, for reliance on their constitutional immunities. But wholesale displacement is relatively rare.<sup>176</sup> Such activities may also deter federal intervention by raising its political costs, but here too the effect is probably marginal and potentially even negative (state activities may, after all, inspire preemption),<sup>177</sup> and the courts may nonetheless read state authority narrowly.<sup>178</sup>

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174. The United States and Canada, for example, staked out facially contradictory positions relating to the scope of Article XXIV:12 in successive litigation against one another. See Kenneth J. Cooper, Note, To Compel or Encourage: Seeking Compliance with International Trade Agreements at the State Level, 2 *Minn. J. Global Trade* 143, 151–56 (1993) (describing panel proceedings); see also Golove, *Treaty-Making and the Nation*, supra note 14, at 1242 & n.552 (comparing examples of treaties to which the United States was willing to subscribe and those it rejected). It is unsurprising, though, for different political branches to take legal positions that are inconsistent with one another, and even for different views to be expressed within each branch—particularly over the course of time, when judicial views themselves have evolved.

175. I focus here on the relationship between state foreign relations activities and the need to extend the new federalism, but it should be noted that state judiciaries may also play a role by construing state constitutions in light of international law. E.g., Joan Fitzpatrick, *The Preemptive and Interpretive Force of International Human Rights Law in State Courts*, 90 *Am. Soc’y Int’l L. Proc.* 262 (1996). Part II of this Article suggests a somewhat similar tack, though I focus there on the interpretation of national (not state) constitutions, and solely with respect to international agreements (not the customary international law of human rights).

176. Even absent widescale state action on a particular topic, individual state programs might render issues like state sovereign immunity or commandeering irrelevant, but they would not eliminate the significance of constitutional doctrine for the remaining states. The degree to which states are inclined to seize the reins, in any event, may depend on their sense of constitutional entitlement: whether a state perceives its actions to be constitutionally legitimate (and unlikely to be struck down by a court absent congressional action), or (even better) an exercise of authority that only the states possess, should influence its willingness to take the initiative.

177. But see Swaine, *Negotiating Federalism*, supra note 2, at 1248–49 (noting that, with the exception of an episode in the 1970s in which the federal government preempted state Arab boycott legislation, the federal government has rarely responded in a concrete way to state initiatives).

178. For example, the U.S. Congress failed to address existing state legislation when subsequently enacting its own legislation on Burma, and further left the precise topic of state legislation untouched, but the Supreme Court nonetheless held that Massachusetts law had been preempted. See supra note 5 and accompanying text.

More dramatically, state conducted foreign relations might undermine the perceived federal monopoly on foreign affairs: to the extent that such activities create new sovereign identities, while avoiding the problems associated with state interference, they arguably undermine the justifications for federal exclusivity and for plenary federal power. If so, the treaty power might wither of its own accord, irrespective of whether states had more specific doctrinal defenses that they could assert. Alternatively, state activities might indirectly contribute to those defenses by decreasing the functional argument for preserving an unfettered treaty power.<sup>179</sup>

As I have argued elsewhere, though, existing state foreign relations activities have nothing like this kind of transformational character.<sup>180</sup> Their uncertain constitutional status probably retards their growth, and the Supreme Court has been slow to clarify matters.<sup>181</sup> In the interim, national governments still dominate international relations, and to the extent the states participate, foreign governments scarcely hold the United States harmless. Where the situation warrants national intervention, the federal government possesses a number of tools that are reasonably adequate to exterminate divisive or disruptive state activities—including not only the treaty power, but also the power to regulate foreign commerce.<sup>182</sup> Even if those tools do not necessarily allow the federal government to achieve *its* aims in international affairs, their continued presence dampens any prospect for a state-induced revolution in foreign relations authority.

The link between any diminution in practice of federal exclusivity and federal plenary authority is also tenuous. State-foreign relationships may sometimes supplant the need for federal intervention, but they are not invariably so sufficient as to obviate the need for the federal capacity to intervene.<sup>183</sup> The treaty power's extraordinary scope, finally, derives in part from the specific nature of the constitutional grant and its relation to the Tenth Amendment, and so may survive even were the functional case to crumble.<sup>184</sup> None of this is to argue, of course, that state foreign rela-

179. See, e.g., Spiro, *Foreign Relations Federalism*, *supra* note 5, at 1272, 1275 (explaining that “the treaty power may now wane along with the exclusivity principle,” since given the possibility of targeted retaliation against states, “[a]s the rising international profile of the states undermines the need to insulate foreign relations from state interference, it will also undermine the justification for unbounded affirmative powers in the area”).

180. See Swaine, *Negotiating Federalism*, *supra* note 2, at 1237–45.

181. See Swaine, *Crosby*, *supra* note 5, *passim*.

182. Cf. Spiro, *Foreign Relations Federalism*, *supra* note 5, at 1273 (noting that “even if new limits to the treaty power are discovered, other federal powers—most notably the foreign Commerce Clause—will remain as alternative sources of federal authority”).

183. Professor Spiro, again, appears to acknowledge this. See *id.*, at 1272–73 n.183 (noting that “to the extent that any given issue implicates many or most of the American states, obviously, continued national supervision makes sense against the possibly high costs of coordinating a large number of state authorities”).

184. See *supra* text accompanying notes 103–105.

tions activities are constitutionally insignificant.<sup>185</sup> But *independent* state foreign relations activities hold little prospect either for supplanting the federal treaty power or for the perceived need for its constitutional limitation. Just as with the national political branches, state activities are shaped in part by judicial readings of the Constitution, and do a better job of extending their impact—and, potentially, enhancing the significance of doctrine extending subject-matter, anticommandeering, and sovereign immunity doctrines to the treaty power—than of reducing their significance.

## II. INTERNATIONAL LAW AND THE CONSTITUTION: ACCOMMODATING FEDERALISM

If we assume, therefore, that the U.S. Constitution plausibly establishes—or could shortly be held to so establish—federalism limitations on the treaty power, what would become of U.S. treaty obligations? The answer depends in part on the relationship between international and U.S. constitutional law. Any conflict would be dissipated, for example, if international law blithely accepted U.S. constitutional constraints, or if U.S. constitutional law yielded to U.S. treaty obligations.

Rather than being so accommodating, however, international law and U.S. constitutional law seem to exhibit a kind of passive hostility toward one another. From the international law vantage, international law prevails over any domestic law.<sup>186</sup> Constitutions, then, “are merely facts”<sup>187</sup>—that is, like the rest of national law, they have no bearing on the responsibilities that a nation undertakes within the international community. But from the vantage of the U.S. legal system, international law has no bearing on the Constitution, which operates as an absolute constraint on how U.S. obligations may be observed.<sup>188</sup>

As it turns out, these separation theses—the mutually held notions that international law and constitutional law have no bearing on one another—are vulnerable at the margins. International law imposes a duty on national governments to pursue the good faith exploitation of national legal institutions, including constitutions, in order to adhere to

185. The case can be more easily made, for example, that such activities undermine dormant foreign relations preemption, which relies more heavily on the ability of federal courts to vet state political conduct—a task that is likely to grow more difficult, and less constitutionally sound, as more activities become subject to review. See *supra* note 5.

186. See, e.g., Advisory Opinion, *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 I.C.J. 12, 34, ¶ 57 (Apr. 26) (noting that it is a “fundamental principle of international law that international law prevails over domestic law”).

187. See *Case Concerning Certain German Interests In Polish Upper Silesia*, Merits, 1926 P.C.I.J. (ser. A) No. 7, at 19.

188. Restatement (Third), *supra* note 22, § 115(3). For the suggestion that this view is at least in part an anomaly of U.S. legal thought, see Detlev F. Vagts, *The United States and its Treaties: Observance and Breach*, 95 Am. J. Int'l L. 313, 329 (2001) [hereinafter Vagts, *The United States and its Treaties*].

treaty obligations. Conversely, constitutional doctrine episodically encourages constructions that permit the United States to perform its international obligations, and the new federalism seems particularly amenable to this kind of analysis. As I explain below, however, applying that approach to already identified constitutional alternatives is ultimately indeterminate: while the conventional means of working around the anticommandeering and state sovereign immunity principles might not work so well in the treaty context, it is difficult to conclude that they would justify a rejection or significant alteration of extending those doctrines.

### A. *Accommodation Under International Law*

It is easy to cite chapter and verse illustrating international law's indifference to federalism. First, nations are not permitted to invoke their federal structure as an excuse for breach. Article 27 of the Vienna Convention on the Law of Treaties, to which the United States apparently subscribes,<sup>189</sup> provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty,"<sup>190</sup> and in doing so states a preexisting principle of customary international law that makes no exception for federal states.<sup>191</sup> Second, central governments are responsible for any breaches by their state components.<sup>192</sup> Whether

189. See Bradley & Goldsmith, *Conditional Consent*, supra note 33, at 424 (noting, with reservation, general acceptance—including among executive branch officials—of Vienna Convention as reflecting customary international law of treaties); Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 *Stan. J. Int'l L.* 117, 149–50 (2001) (concluding, based on statements by the U.S. representative to the conference on the Vienna Treaties Convention, that the United States subscribed to the duty of good faith as expressed therein); Vagts, *The United States and its Treaties*, supra note 188, at 324 & n.91 (asserting that "the United States has regularly taken the position in negotiations with other nations that their statutes cannot override treaty obligations," and citing examples); cf. Restatement (Third), supra note 22, § 321 (following Article 26 of the Vienna Convention on Treaties).

190. Vienna Convention on the Law of Treaties, supra note 159, art. 27, 1155 U.N.T.S. at 339. Article 27 notes, though, that it is intended to be consistent with Article 46. *Id.*; see *infra* text accompanying note 214.

191. Restatement (Third), supra note 22, § 111 cmt. a; *id.* § 115 cmt. b; Bernier, supra note 154, at 83–86; 1 Ian Brownlie, *System of the Law of Nations: State Responsibility* 141 (1983) [hereinafter Brownlie, *System*]; 1 Oppenheim's *International Law* 254 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); see, e.g., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, ¶ 139, Oct. 1, 1999, Inter-Am. Ct. H.R. (ser. A) No. 16, at 562 (1999) (invoking rule that "a State cannot plead its federal structure to avoid complying with an international obligation" (quoting Garrido & Baigorria Case, *Reparations* (art. 63(1) American Convention on Human Rights), Judgment of Aug. 27, 1998, Inter-Am. Ct. H.R. (ser. C) No. 39, ¶ 46 (1998))).

192. E.g., *State Responsibility: Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading*, art. [5](1), in *Report of the International Law Commission: Fifty-Second Session, UN GAOR, 55th Sess., Supp. No. 10, appx. at 125, U.N. Doc. A/55/10 (2000)* [hereinafter *Draft Articles on State Responsibility*] ("[T]he conduct

they compel state governments to mend their ways, or instead choose to suffer the breaches and provide reparation, is in the first instance up to the central government. But a particular country's constitutional difficulties are its own, and a choice in all events that is not to be visited upon the rest of the world.<sup>193</sup>

This apparent indifference is striking, in part because its rhetoric suspiciously echoes that used to describe the supposed irrelevance of states to U.S. foreign relations law.<sup>194</sup> As a matter of practice, federal governments do in fact seek indulgences in international agreements;<sup>195</sup> sometimes they are resisted because they lack bargaining power, or because accommodating their requests is perceived to confer on them an unfair

of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.”); Bernier, *supra* note 154, at 84–88 (discussing leading international law cases and concluding that “there can be no doubt that a federal state is responsible for the conduct of its member states”); 1 Brownlie, *System*, *supra* note 191, at 141 (noting that liability for violations by a state’s “subordinate and provincial divisions . . . is hardly surprising”). For the avoidance of doubt, this principle is specifically reiterated in agreements like GATT 1994 and NAFTA. See *supra* note 169.

193. See, e.g., *Hyacinthe Pellat Case (Fr. v. Mex.)*, 5 R.I.A.A. 534, 536 (1929) (citing “the principle of the international responsibility . . . of a federal state for all the acts of its separate States which give rise to claims by foreign States . . . even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law”); accord *LaGrand Case (F.R.G. v. U.S.)*, 1999 I.C.J. 9, 16 ¶ 28 (Provisional Measures of Mar. 3) (stating that “the international responsibility of a State is engaged by the action of the component organs and authorities acting in that State, whatever they may be”); see also *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries 97–98* (James Crawford ed., 2002) [hereinafter *Crawford*] (discussing cases that highlight the duty of a federal state to ensure compliance with its international obligations by subordinate states).

194. Compare *The Montijo (U.S. v. Colom.) (U.S.-Colom. 1875)*, 2 John Bassett Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party* 1421, 1439–40 (1898) (explaining that “[f]or treaty purposes the separate States are nonexistent”), and Robert C. Lane, *Federalism in the International Community*, in 2 *Encyclopedia of Public International Law* 375, 375 (Rudolf Bernhardt ed., 1995) (“Traditionally, international law has responded to the particular problems of federalism by ignoring them. A federal division of competences was purely a municipal matter.”), with *supra* note 2 and accompanying text (citing authorities relative to U.S. foreign relations law).

195. See Brian R. Opeskin, *International Law and Federal States*, in *International Law and Australian Federalism* 1, 3 (Brian R. Opeskin & Donald R. Rothwell eds., 1997) (“In relation to the power to implement treaties, internal limitations on federal States may encourage them to negotiate concessions in treaties, by which their obligations are lessened in comparison with unitary States.”); see also, e.g., *Looper*, *supra* note 154, at 164–71, 181–82, 188–200 (describing efforts by the United States and other federal governments to obtain concessions relevant to the International Labor Organization and the draft Covenants on Human Rights). But see, e.g., *infra* note 284 and accompanying text (noting Australia’s decision to cease seeking such exemptions, due in part to the resistance of other nations).

and inappropriate advantage,<sup>196</sup> but sometimes other nations accommodate their requests in order to secure their participation.<sup>197</sup> The indifference perspective, however, presupposes that such requests are unsuccessful, and it is worth considering whether matters are materially different when federal state clauses are *not* adopted. Federal nations often ratify anyway, raising the question of whether federal state clauses are really necessary to induce participation. But there is also the pregnant possibility that such nations will nonetheless yield, ultimately, to the strictures of federalism. Suggestions that a federal structure serves as an excuse for noncompliance are considered heretical,<sup>198</sup> but the fact remains that it is manifestly harder for federal governments to ensure compliance, and the abstract availability of remedies for noncompliance hardly makes up the difference.<sup>199</sup>

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196. E.g., 1 Oppenheim's International Law, *supra* note 191, at 254 (noting that federal state clauses "may be considered contrary both to the requirement of reciprocity in treaties and to the effectiveness of a substantial part of international law in matters of general interest"); Opeskin, *supra* note 195, at 4 (noting that "[o]ne of the seven fundamental principles on which the United Nations is built is the sovereign equality of States. A corollary of this principle is that States generally seek to ensure that treaties apply equally to all who have undertaken their obligations"); see also, e.g., Looper, *supra* note 154, at 190–92, 194, 198 (describing successful objections by states to proposed federal state clause in Draft Covenants on Human Rights).

197. See Opeskin, *supra* note 195, at 5 ("The value of widespread participation in multilateral treaties suggests that federal States should be specially accommodated in international legal relations."); *id.* ("There is little doubt that the failure to make special provision for federal States has adversely affected their timely participation in certain treaties, particularly those dealing with human rights, labour standards and educational matters.").

198. Thus, for example, Professor Looper claims that "[it] could hardly be more erroneous" to opine, as one Canadian commentator did, that federal states enjoy an advantage over unitary states insofar as "they can adhere to conventions of the most edifying character without the prospect of having to take the immediate responsibility of implementing them or to incur the odium incidental to default." Looper, *supra* note 154, at 162 n.1 (quoting Angus, *The Canadian Constitution and the United Nations Charter*, 12 *Can. J. Econ. & Pol. Sci.* 127, 133 (1946)).

199. In the event that a nation's continued failure to fulfill its obligations amounts to an international wrong, it would ordinarily be responsible for some form of restitution. See Draft Articles on State Responsibility, *supra* note 192, art. 36 ("A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) Is not materially impossible; (b) Would not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."); Restatement (Third), *supra* note 22, § 901 cmt. d; Frederic L. Kirgis, *Restitution as a Remedy in U.S. Courts for Violations of International Law*, 95 *Am. J. Int'l L.* 341, 343 (2001). But few are under the illusion that international remedies actually make the victims of a treaty breach whole. Cf. Henkin, *Foreign Affairs*, *supra* note 2, at 235 & 507 n.9 (noting limited availability of both political sanction, specific performance, and restitution under international law and restitution).

International lawyers and diplomats do not turn a blind eye toward the difficulties that federal governments may face,<sup>200</sup> nor do they naively satisfy themselves with the prospect of remedies.<sup>201</sup> Instead, international law addresses federalism indirectly through the meta-obligation of *pacta sunt servanda*—the fundamental principle that treaties are to be obeyed—and its corollary duty of good faith (to which I will refer, in the aggregate, as a duty of good faith).<sup>202</sup> Article 26 of the Vienna Treaties Convention, for example, provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>203</sup>

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200. Louis Henkin, Federalism, Decentralization and Human Rights, in *Federalism and Decentralization: Constitutional Problems of Territorial Decentralization in Federal and Centralized States* 391, 391 (Thomas Fleiner-Gerster & Silvan Hutter eds., 1987) (acknowledging that “whether a state is unitary or federal, centralized or decentralized, is not irrelevant to its human rights system and condition”); Walter Rudolf, Federal States, in *2 Encyclopedia of Public International Law*, supra note 194, at 369–70 (noting that “the problem whether the states are bound by treaties and treaty implementing laws of the federation or whether they may legislate contrary to existing federal norms has not been satisfactorily solved”); Schaefer, *Twenty-First Century Trade Negotiations*, supra note 63, at 72 (explaining that “negotiators in unitary states have been frustrated in their attempts to negotiate comprehensive binding obligations applicable to sub-federal governments in several non-tariff and new area agreements, including those on government procurement, trade-in-services, and investment. Indeed, unitary states often raise concerns that trade agreements leave an imbalance in obligations between themselves and those nations with a federal system of government”); Schaefer, *Searching for Pareto Gains*, supra note 72, at 464–65 (noting dissatisfaction by European negotiators with scope of federal state obligations prior to Uruguay Round).

201. Cf. 1 Oppenheim’s *International Law*, supra note 191, at 254 (stating that national governments are “in principle” responsible for subnational breaches).

202. Many extol *pacta sunt servanda* as one of the most important principles in international law. See, e.g., Restatement (Third), supra note 22, § 321 cmt. a (describing *pacta sunt servanda* as lying “at the core of the law of international agreements [as] perhaps the most important principle of international law”); The Vienna Convention on the Law of Treaties: *Travaux Préparatoires* 210–12 (Ralf Günter Wetzels & Dietrich Rauschning eds., 1978) (documenting statements from various countries during treaty negotiations regarding the significance of *pacta sunt servanda*); Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 *Int’l Org.* 175, 185 (1993) (reiterating *pacta sunt servanda* as tenet of international law). The meaning, though, has varied over time and among commentators, who have also divided over whether the principle constitutes a general principle of international law or rather customary international law. See Josef L. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda*, 39 *Am. J. Int’l L.* 180, 180–81 (1945); Hans Wehberg, *Pacta Sunt Servanda*, 53 *Am. J. Int’l L.* 775, 781–83 (1959). For purposes of this discussion, I simply rely on the generally accepted terms of the obligation, and assume that all relevant participants accept them.

203. See Vienna Convention on the Law of Treaties, supra note 159, art. 26; id. art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”); Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, Annex, at 124, U.N. Doc. A/8082 (1970), reprinted in 9 *I.L.M.* 1292, 1297 (1970) (“Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.”); Restatement (Third), supra note 22, § 321 (“Every international agreement in force is binding upon the parties to it and must be performed by them in

This principle does a yeoman's work in reconciling treaties with the realities of federalism. It supports, of course, the notion that a state's international responsibilities prevail over any inconsistent domestic law.<sup>204</sup> More particularly, it imposes an affirmative duty to bring internal legislation, at whatever level of government, into line with treaty obligations.<sup>205</sup> Nations are unambiguously responsible for enacting domestic legislation necessary to implement their treaty obligations,<sup>206</sup> and likewise cannot enforce laws that conflict with their international duties (or,

good faith."); see also, e.g., Gabcikovo-Nagymaros Project (Hungary/Slovakia), 1997 I.C.J. 7, 78–79 ¶ 142 (Sept. 25) (indicating principle of good faith, reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, requires "that the Parties find an agreed solution within the cooperative context of the Treaty," and "obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized"). See generally *Land and Maritime Boundary Between Cameroon and Nigeria* (Cameroon v. Nig.), 1998 I.C.J. 275, 296 ¶ 38 (June 1) (citing extensive support for principle).

204. See Vienna Convention on the Law of Treaties, *supra* note 159, art. 27; Restatement (Third), *supra* note 22, § 321 cmt. a (observing that *pacta sunt servanda* "includes the implication that international obligations survive restrictions imposed by domestic law"); Anthony Aust, *Modern Treaty Law and Practice* 144 (2000) (describing Article 27 as a "corollary" of the duty of good faith); see also, e.g., Advisory Opinion No. 17, *Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration, Signed at Neuilly-Sur-Seine on November 27th, 1919*, 1930 P.C.I.J. (ser. B) No. 17, at 32 (July 31) ("[I]t is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."); *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, 1932 P.C.I.J. (ser. A/B) No. 44, at 22–24 (Feb. 4) (describing relations between Poland and Free City of Danzig).

205. See Restatement (Third), *supra* note 22, § 321 cmt. b (explaining that, under *pacta sunt servanda*, "[a] state is responsible for carrying out the obligations of an international agreement," and that while "[a] federal state may leave implementation to its constituent units . . . the state remains responsible for failures of compliance"); see also, e.g., Advisory Opinion No. 10, *Exchange of Greek and Turkish Populations*, 1925 P.C.I.J. (ser. B) No. 10, at 20 (Feb. 21) ("[A] State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken."); Wehberg, *supra* note 202, at 785 (citing authorities).

206. Anthony D'Amato, *Good Faith*, in 2 *Encyclopedia of Public International Law*, *supra* note 194, at 599, 600 (according to natural law origins of good faith principle, "a treaty should be implemented in a way that fulfils the purposes of the joint undertaking, including the exchange of reciprocal obligations"). This principle is consistent with U.S. constitutional law. See *Missouri v. Holland*, 252 U.S. 416, 432 (1920) ("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."); Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1568 (1984) [hereinafter Henkin, *International Law*] ("[B]oth Congress and the President have the duty and authority to carry out the international obligations of the United States . . ."). This is true irrespective of whether a treaty is self-executing. See Henkin, *Foreign Affairs*, *supra* note 2, at 203–04 (suggesting that whether or not a treaty is self-executing, "[i]t is the [ ] obligation [of the President and Congress] to do what is necessary to make it a rule for the courts if the treaty requires that it be a rule for the courts, or if making it a rule for the courts is a necessary or a proper means for the United States to carry out its obligation."). While some have argued that the non-self-executing doctrine is itself inconsistent with *pacta sunt servanda*, since it permits delay in implementing treaty

of course, adopt any new laws of that character);<sup>207</sup> if additional legislation is required because of some peculiarity of the nation's domestic legal order, so be it.<sup>208</sup> It follows that federal states are obliged to take legal action to preempt or otherwise disable inconsistent subnational law. A general supremacy doctrine takes care of that when a national government ratifies a self-executing treaty, or enacts implementing legislation, within an area of competence.<sup>209</sup> But other features of a nation's constitutional order may mean that the obligation is not automatically discharged. If, for example, a principle of U.S. constitutional federalism precludes commandeering, auxiliary federal spending legislation or conditional preemption may be necessary.<sup>210</sup> Similarly, considerations of state sovereign immunity may compel the United States to appoint itself as the guardian of foreign interests.<sup>211</sup> Just like the national government must use all appropriate institutions and legislative devices to fulfill obligations that can be accomplished at the national level, it is equally obliged to use the tools at its disposal—and to create new tools if none are available—to ensure that subnational institutions fall into line.<sup>212</sup>

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obligations, see Ramji, *supra* note 189, at 150, delay is hardly inevitable, and a nation may in good faith act swiftly and punctiliously in adopting implementing legislation.

These issues differ, it should be noted, from the question of whether Congress or the President has the constitutional authority to refuse to implement international law. See Henkin, *Foreign Affairs*, *supra* note 2, at 234–35; Henkin, *International Law*, *supra*, at 1568. It is likewise different from the less settled question of whether Congress is constitutionally entitled to refuse to pass implementing legislation or to appropriate necessary funds. Restatement (Third), *supra* note 22, § 111 reporters' note 7; Henkin, *Foreign Affairs*, *supra* note 2, at 204–06.

207. See, e.g., *North Atlantic Coast Fisheries*, (Gr. Brit. v. U.S.), 11 R.I.A.A. 167, 188 (Perm. Ct. Arb. 1910) (“But from the Treaty results an obligatory relation whereby the right of Great Britain to exercise its right of sovereignty by making regulations is limited to such regulations as are made in good faith, and are not in violation of the Treaty.”).

208. In the United States, for example, it is thought that implementing treaties of a certain character—for example, requiring the spending of money—may require separate action by Congress. See Restatement (Third), *supra* note 22, § 111 cmt. i; *id.* § 111 reporters' note 6 (noting lack of definitive authority). The source of this obligation is often assumed to be domestic, and somewhat hazy, but it is surely clearer as a matter of international law. Whether Congress is obligated to follow through as a matter of constitutional law is not clear, see *supra* note 207, but its sense of a “certain obligation” may be better understood as being derived from international law. Wright, *Control*, *supra* note 2, at 353–54 (“[T]here are many acts which the treaty power cannot itself perform or the performance of which it cannot authorize by any organ other than Congress, yet Congress is under a certain obligation to perform them when necessary for carrying out a treaty. . . . [T]he constitutional duty of Congress must be considered as an understanding of the Constitution, rather than a law.”).

209. See Restatement (Third), *supra* note 22, § 115(2). Arguably, at least, even a non-self-executing treaty not yet formally implemented as federal law “may sometimes be held to be federal policy superseding State law or policy.” *Id.* § 115 cmt. e.

210. See *infra* notes 298–299 and accompanying text.

211. See *infra* text accompanying notes 334–339.

212. See, e.g., *Iran v. United States*, 26 I.L.M. 1592, 1598–99 (Iran-U.S. Cl. Trib. Rep. 1987) (holding that, even if no particular enforcement procedure can be specified, the principle of good faith “makes it incumbent on each State Party to provide some

Good faith, then, means that international law is not wholly estranged from domestic law, but instead compels national institutions to exploit the interstices of their federal structure. But what if that is insufficient? What if constitutional law impedes the use of the most efficacious kinds of implementation? The textbook answer, again, is that treaty obligations are not limited by national constitutions.<sup>213</sup> Nations with federal systems should consider the compatibility of treaties with their constitutional orders before concluding them, because any errors are almost certainly not a basis for extricating themselves afterward.<sup>214</sup> Should they err, during the pendency of the treaty they are obliged to amend their constitutions or risk international default.<sup>215</sup>

This is strong medicine, though, and international practice actually treats domestic constitutional law somewhat more gingerly than that—even while creating a complimentary duty, as I explain immediately below, on the part of nations interposing constitutional obstacles. Deference may be most manifest in the process of treaty negotiation. As previously noted, federal state clauses are not infrequently negotiated based on an elevated respect for constitutional impediments to treaty obliga-

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procedure or mechanism whereby enforcement may be obtained within its national jurisdiction, and to ensure that the successful Party has access thereto. If procedures did not already exist as part of the State's legal system they would have to be established, by means of legislation or other appropriate measures"); Potter, *supra* note 172, at 470 ("The state is under obligation to maintain machinery adequate to discharge its international obligations."); cf. Gillian White, *The Principle of Good Faith, in The United Nations and the Principles of International Law* 230, 240 (Vaughan Lowe & Colin Warbrick eds., 1994) ("The obligation to perform treaty commitments in good faith applies equally to situations in which the provision fails to be carried out by the State itself . . . and to those in which the provisions are implemented by its nationals.").

213. See, e.g., Restatement (Third), *supra* note 22, § 111 cmt. a; *id.* § 115 cmt. b.

214. See Vienna Convention on the Law of Treaties, *supra* note 159, art. 46(1) ("A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance."); *id.* art. 46(2) ("A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.").

215. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libya v. U.K.*), 1992 I.C.J. 3, 32 (Apr. 14) (separate opinion of Shahabuddeen, J.) ("Inability under domestic law to act being no defence to non-compliance with an international obligation, in order to make such compliance in a case of this kind a State may well find that, if it is not to breach its internal legal order, it may have not only to legislate in the ordinary way, but to undertake some appropriate measure of constitutional amendment, and to do so speedily."); see also Malcolm N. Shaw, *International Law* 104 (4th ed. 1997) ("[D]espite the many functions that municipal law rules perform within the sphere of international law, the point must be emphasized that the presence or absence of a particular provision within the internal legal structure of a state, including its constitution if there is one, cannot be applied to evade an international obligation."). Thus, in the seminal debate over the original federal state clause relating to the International Labor Organization, the Belgian representative responded to American pleas for special dispensation by suggesting that the true solution lay in amending the American Constitution. See Looper, *supra* note 154, at 166.

tions,<sup>216</sup> limitations reflecting a more general understanding that a party's constitutional constraints are less tractable.<sup>217</sup> But sometimes constitutional law is also treated differently once a treaty is fashioned.<sup>218</sup> The recent *LaGrand* proceedings, for example, were concluded by a provisional order that attempted unsuccessfully to constrain both the United States and the state of Arizona's death penalty procedures.<sup>219</sup> But in its merits proceeding, the International Court of Justice—reacting to U.S. arguments concerning the limits imposed by its federal system<sup>220</sup>—noted that its provisional order “did not require the United States to exercise powers it did not have,” but rather established an obligation “to take all measures at its disposal” to prevent the German national's execution prior to the Court's final decision.<sup>221</sup>

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216. See *supra* text accompanying notes 154, 164, 168–170.

217. An experienced legal adviser and academic recently described the role constitutional objections may play in negotiations:

It is not always easy for delegations from other countries to judge to what extent a ‘legal objection’ constitutes a real legal problem or whether it in fact conceals a political or policy objection to a proposal. The fact that a new agreement may contain provisions which are incompatible with existing national legislation . . . does not usually in itself provide a convincing reason not to enter into that agreement. . . . Most negotiators are aware of that fact and accept that amendments are inevitable.

Yet . . . where a proposed provision in a new agreement would conflict with a national constitution or the legislation of semi-sovereign states of a federal state, a ‘legal objection’ may become a real and justifiable objection in the negotiations.

Johan G. Lammers, *The Role of the Government Lawyer in International Environmental Negotiations*, in *Essays on the Law of Treaties* 143, 148–49 (Jan Klabbers & René Lefeber eds., 1998); see, e.g., Aust, *supra* note 204, at 161 (noting that U.S. objections regarding the national government's ability to direct state and local governments in conferring tax exemptions led to confining UK-US Air Services agreement to “best efforts”).

218. The higher status of constitutional law would have been routinely observed in a prior version of the draft Articles on State Responsibility. See Ian Brownlie, *Principles of Public International Law* 617–18 (5th ed. 1998) [hereinafter *Brownlie, Principles*] (noting “constitutionalist” position and its critics). Compare [1951] 2 Y.B. Int'l L. Comm'n 73, U.N. Doc. A/CN.4/L.28 (providing, in draft Article 2 relating to state responsibility, that “[a] treaty becomes binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose”), with [1966] 2 Y.B. Int'l L. Comm'n 169, 240–42, U.N. Doc. A/6309/Rev. (rejecting draft Article 2, and summarizing criticisms).

219. *LaGrand Case* (F.R.G. v. U.S.), 1999 I.C.J. 9, 16 (Request for the Indication of Provisional Measures of Mar. 3).

220. *LaGrand Case* (F.R.G. v. U.S.), 40 I.L.M. 1069, 1091 ¶ 95 (June 27, 2001) (noting that U.S. pleadings cited as a “constraining factor . . . the character of the United States of America as a federal republic of divided powers”).

221. *Id.* at 1097; cf. Consolidated Version of the Treaty on European Union, art. 24, 1997 O.J. (C 340) 145, 161 (1997) (providing that while the European Union, acting through its institutions, may enter into certain agreements without participation by its Member States, “[n]o agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure”).

Distinguishing to a limited degree between constitutional and other domestic law constraints is entirely rational. Styles of constitutional interpretation vary considerably, and outsiders may be especially inclined to defer, perhaps particularly as to vaguer, structural questions like foreign relations authority and federalism that purportedly bind the other party's hands (and perhaps even more to nations that, like the United States, lack a constitutional court to enhance the clarity of such matters).<sup>222</sup> Nations are also highly defensive about entitling others to interpret their

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The continued relevance of domestic constitutions to international remedies was also evident in the provisional relief proceedings before the International Court of Justice in the *Mexican Nationals* case, which once again concerned violations by U.S. states of the Vienna Convention. Mexico's oral submissions emphasized that domestic constitutional limitations were no excuse for breach, but at the same time argued that principles of federal supremacy afforded the United States the means of complying with the requested relief. E.g., Oral Pleadings (Jan. 23, 2003, 9:30 a.m. Sitting) at 40–43, *Avenas and Other Mexican Nationals* (Mex. v. U.S.), at [http://www.icj-cij.org/icjwww/idocket/imus/imuscr/imus\\_icr2003-01\\_20030121.PDF](http://www.icj-cij.org/icjwww/idocket/imus/imuscr/imus_icr2003-01_20030121.PDF) (on file with the *Columbia Law Review*) (statement of Donald Francis Donovan). The United States, for its part, readily acknowledged the formal irrelevance of constitutional limits, but repeatedly invoked domestic constraints as a reason why the Court should refrain from stipulating a particular process or outcome. Oral Pleadings (Jan. 23, 2003, 11:30 a.m. Sitting) at 31, *Avenas and Other Mexican Nationals* (Mex. v. U.S.), at [http://www.icj-cij.org/icjwww/idocket/imus/imuscr/imus\\_icr2003-02\\_20030121.PDF](http://www.icj-cij.org/icjwww/idocket/imus/imuscr/imus_icr2003-02_20030121.PDF) (on file with the *Columbia Law Review*) (statement of James H. Thessin) (stating that “we will not debate with Mexico the legal principles involved in implementing United States international obligations . . . [but] would merely note that the relationship between the . . . federal government and its states is one of great sensitivity, marked by the deference to the states in certain areas, including . . . criminal law”); *id.* at 32 (claiming that “Mexico’s requested orders in this case could well test the limits of federal authority, if they would not go beyond it”); *id.* at 33 (concluding that “the requested provisional measures would drastically interfere with United States sovereign rights and implicate important federalism interests”); accord Oral Pleadings, Jan. 23, 2003, 6:00 p.m. Sitting) at 19–20, *Avenas and Other Mexican Nationals* (Mex. v. U.S.) (statement of Daniel Paul Collins); *id.* at 22 (statement of Elihu Lauterpacht); *id.* at 25, 27 (statement of William H. Taft, IV); see also Oral Pleadings, Jan. 23, 2003, 3 p.m. Sitting) at 21–22, *Avenas and Other Mexican Nationals* (Mex. v. U.S.), at [http://www.icj-cij.org/icjwww/idocket/imus/imuscr/imus\\_icr2003-03\\_20030121.PDF](http://www.icj-cij.org/icjwww/idocket/imus/imuscr/imus_icr2003-03_20030121.PDF) (on file with the *Columbia Law Review*) (statement of Donald Francis Donovan) (noting tension between U.S. concession that internal limitations were irrelevant to the case for provisional measures and its submission that the “complications of federalism” were a basis for limiting relief). The Court took note of the U.S. pleas relating to federal constraints, see *Mexican Nationals Order*, *supra* note 16, at 10 ¶ 37, 12 ¶¶ 47–48, but disavowed any implications for the “entitlement of the federal states within the United States to resort to the death penalty” or pretense to acting “as a court of criminal appeal,” concluding that “the Court may indicate provisional measures without infringing these principles”—rather than concluding that the principles were immaterial. *Id.* at 12 ¶ 48.

222. E.g., Aust, *supra* note 204, at 157 (noting that interpreting the position of treaties under the U.S. Constitution is “remarkably complex” (internal quotations omitted)). See generally Mauro Cappelletti, *The Judicial Process in Comparative Perspective* 311–17 (Paul J. Kollmer & Joanne M. Olson eds., 1989) (discussing interaction between domestic constitutional law and transnational legal obligations).

constitutive rules,<sup>223</sup> save where the matter is self-evident.<sup>224</sup> Finally, differentiating constitutions is warranted by one of the principal bases for ignoring national law constraints: precisely because constitutions are harder to amend, the prospect that a nation would purposefully evade a treaty obligation by adopting a constitutional amendment seems significantly less great than the likelihood that it would amend ordinary legislation.<sup>225</sup>

These same conditions, of course, create an incentive for nations to exaggerate their constitutional restraints, the better either to defeat a proposed treaty term or to secure an exception from it. The vague quality of the objections often raised by federal nations suggests that they are reluctant to overplay their hands, perhaps for fear of losing credibility.<sup>226</sup> As a more formal matter, the duty of good faith probably requires re-

223. The generally protected status of domestic law is evidenced by, among other things, the principle that the construction by national courts of their own laws is binding on international tribunals, and the bar against international tribunals declaring national laws invalid. Brownlie, *Principles*, supra note 217, at 40. The defensive treatment of constitutional law, particularly as to institutional relations, was reflected in discussions of draft Article 6 of the Vienna Convention on the Law of Treaties, which initially provided that component governments had treaty-making capacity if their constitutions so provided; Canada, among other countries, objected that such a provision might empower a foreign nation to interpret another's constitution, and the provision was dropped. See Restatement (Third), supra note 22, § 311 reporters' note 2; Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 *Am. J. Int'l L.* 495, 506–08 (1970).

224. See Vienna Convention on the Law of Treaties, supra note 159, art. 46, 1155 U.N.T.S. at 343.

225. See Shaw, supra note 215, at 102 (stating that it is “obvious” why national law cannot be used to excuse international obligations, as “[a]ny other situation would permit international law to be evaded by the simple method of domestic legislation”); accord *id.* at 104. That is not to say that certain stances are not inherently suspect. Constitutional interpretations may be scrutinized, for example, if they have the effect of resulting in differential burdens, such as between a federal state and non-federal members. Cf. *Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6, 72–73 (Feb. 3) (separate opinion of Judge Ajibola) (“‘Good faith’ implies that all parties to a treaty must comply with and perform all their obligations. They may not pick and choose which obligations they would comply with and which they would refuse to perform, ignore or disregard. Treaties like any agreement may contain obligations ‘beneficial’ or ‘detrimental’ to a particular party or parties, nevertheless, all the obligations, whether executory or not, must be performed.”); *id.* at 73 (“[P]erformance in good faith means not only mere abstention from acts likely to prevent the due performance of the treaty, but also presupposes a fair balance between reciprocal obligations.” (quoting T.O. Elias, *The Modern Law of Treaties* 43 (1974))). It should also be stressed that there may be other bases, like the need to treat states equally, that might favor disregarding concerted constitutional impediments as a matter of international law. Cf. Quincy Wright, *International Law in its Relation to Constitutional Law*, 17 *Am. J. Int'l L.* 236, 236 (1923) (“The traditional treatment of international law has almost if not wholly disassociated it from constitutional law. . . . The extent of a state's territory, the character of its people, or its form of government was no concern of international law.”).

226. See *infra* note 280 and accompanying text.

fraining from any such conduct during negotiations,<sup>227</sup> and more clearly (buttressed by *pacta sunt servanda*) requires avoiding such misrepresentations in the course of treaty performance.<sup>228</sup> It also follows, I believe, that nations *not* electing to amend their constitutions have a responsibility under international law to interpret them in a fashion consistent with their treaty obligations—not only, that is, because they are at pains of conforming their domestic law with their international obligations, but also because their representations regarding constitutional limitations are accorded particular respect. To choose an extreme example, the United States would breach its duty of good faith were it to interpret the Supremacy Clause as relating solely to treaties of the kind known to the Framers, to the prejudice of modern human rights conventions to which the United States had subscribed. Courts, being equally subject to international obligations, are as a matter of international law no more at liberty to construe a constitution in a manner prejudicial to treaty obligations than a legislature is at liberty to override the treaty directly.<sup>229</sup>

A duty to interpret constitutions in keeping with treaty obligations clearly raises collateral issues at the international level—such as the possibility that different treaties might impose inconsistent interpretive obligations,<sup>230</sup> and so on—even if we put to one side the possibility of any like

227. See White, *supra* note 212, at 233–34 (describing duty to negotiate in good faith); see also D’Amato, *supra* note 206, at 599 (“The principle of good faith requires parties to a transaction to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage that might result from a literal and unintended interpretation of the agreement before them.”). But cf. J.F. O’Connor, *Good Faith in International Law* 111 (1991) (noting potential for a duty of good faith in treaty negotiations, but also noting the absence of any jurisprudence or commentary).

228. Cf. *Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6, 72 ¶ 82 (Feb. 3) (separate opinion of Judge Ajibola) (“If there is an obligation on the part of all the parties not to defeat the object and purpose of a treaty prior to its entry into force (Article 18 of the Vienna Convention), the parties are a fortiori also under obligation not to defeat such objects and purposes of a treaty when it has ultimately entered into force. In fact, the original International Law Commission draft of Article 18 of the Vienna Convention contained a provision, subsequently discarded as unnecessary, that the parties to a treaty (after its execution) must refrain from any act that may prevent its application.” (citing 4 Y.B. Int’l L. Comm’n, vol. II, at 7 (1952))).

229. See, e.g., *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 9, at 24 (Sept. 7) (holding the state responsible for judicial breaches of international obligations); Crawford, *supra* note 193, at 95–96 n.113 (citing additional authorities). The stress on existing obligations is deliberate. While others have suggested international law limitations on the capacity of any state to encumber its treaty-making authority even as to permissive, prospective treaty obligations, the grounds for such an obligation seem very weak. But cf. Potter, *supra* note 172, at 470 (asserting that “it would not seem that the state could, by statute or constitutional provision, destroy, deny that it or its government possessed, or forbid the general exercise of, the treaty-making power conferred by international law”); *id.* at 463–64, 473 (discussing same).

230. Resolving that question is beyond the scope of this Article, since the constitutional constraints at issue here—namely, those arguably entailed by the new federalism—are almost certainly impediments, rather than conditions precedent, to any

obligation for customary international law.<sup>231</sup> And there are significant limits in practice. Treaty terms themselves, obviously, may limit the effective reach of good faith by truncating the obligations of signatories.<sup>232</sup> Nations concerned about the difficulty of accommodating particular obligations within their constitutional schemes may also negotiate exemptions, of which federal state clauses are a leading example.<sup>233</sup> Should such efforts fail, concerned nations may adopt RUDs specifically addressing their country's position,<sup>234</sup> and of course may decline altogether to

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treaty. I would provisionally venture, however, that treaty-driven interpretation would be defeated either by evidence of a conflicting treaty provision or by a plausible argument that future obligations might require a contrary constitutional understanding. The result, in all likelihood, will be a focus on structural questions of the kind under discussion, rather than those germane to a particular treaty; with respect to the latter questions, domestic law may instead require that the treaty be interpreted in light of the national constitution, see *supra* note 76, and international law may best be serviced by the orthodox disregard for domestic legal constraints within the purview of that treaty.

231. U.S. advocates of an interpretative approach often consider the questions together, or without differentiation. See, e.g., Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, 11 *Duke J. Comp. & Int'l L.* 5, 16 (2001) ("Where constitutional provisions permit differing possible interpretations, both consistent and inconsistent with international law, there is a strong argument in favor of construing the constitution and international law consistently."); Joan Fitzpatrick, *The Relevance of Customary International Norms to the Death Penalty in the United States*, 25 *Ga. J. Int'l & Comp. L.* 165, 179–80 (1995–1996) (citing "strong reasons to interpret unclear constitutional provisions so as to be consistent with international norms where possible"). But at the international level, customary international law is on increasingly precarious footing. See Edward T. Swaine, *Rational Custom*, 52 *Duke L.J.* (forthcoming) (noting criticisms). As a matter of U.S. domestic law, moreover, the role of customary international law in U.S. courts is increasingly contested and incontestably less well defined than with treaties. Compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 *Harv. L. Rev.* 815, 860–70 (1997), with Harold Hongju Koh, *Commentary: Is International Law Really State Law?*, 111 *Harv. L. Rev.* 1824 (1998). By way of contrast, other nations incorporate customary international law much more readily than treaty obligations. See Wildhaber & Breitenmoser, *The Relationship Between Customary International Law and Municipal Law in Western European Countries*, 48 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 163, 179–204 (1988), translated in Lori F. Damrosch et al., *International Law: Cases and Materials* 238, 238–40 (4th ed. 2001) (describing disparate treatment of customary international law in German, Italian, Austrian, and Greek constitutions).

232. As has often been observed, good faith "is not in itself a source of obligation where none would otherwise exist." *Border and Transborder Armed Actions (Nicar. v. Hond.)*, 1988 I.C.J. 69, 105 ¶ 94 (Dec. 20) (opinion on jurisdiction and admissibility).

233. A federal state clause may even tip the balance in favor of leaving uncertain constitutional authority unexplored. See *Canada: Measures Affecting the Sale of Gold Coins*, *supra* note 170, ¶ 58 ("[I]f Article XXIV:12 is to fulfil its function of allowing federal States to accede to the General Agreement without having to change the federal distribution of competence, then it must be possible for them to invoke this provision not only when the regional or local governments' competence can be clearly established but also in those cases in which the exact distribution of competence still remains to be determined by the competent judicial or political bodies.")

234. As with purely domestic restraints, these may have domestic significance even where they lack international force. In addressing the federalism understanding adopted

enter into a treaty that poses a serious risk of conflict with their constitutions. At the domestic level, well-grounded constitutional principles may be insurmountable,<sup>235</sup> as may more pedestrian limits imposed by legislation particular to the treaty.<sup>236</sup>

These limits, which would place international and constitutional law back at loggerheads with one another, may be more significant than would initially be apparent. As stressed earlier, domestic institutions enjoy a comparative advantage when it comes to interpreting and applying local law—especially constitutional law—thus making it difficult or impossible to challenge a national court’s judgment regarding the compatibility of a treaty and its constitution.<sup>237</sup> As is usually the case with international law, the principle ultimately depends heavily on national recognition and enforcement, and any concerted resistance will likely be effective. Courts may be especially reluctant to interpose international restraints against national political institutions, which would seem to augur poorly for individual rights established under international law.<sup>238</sup>

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in connection with the ICCPR, see *supra* notes 19 and 155, for example, a State Department official commented that:

It is important to note that this provision is not a reservation and was not intended to modify or limit U.S. obligations under the Covenant, but rather concerns the steps to be taken domestically by the respective federal and state authorities. The understanding serves to emphasize domestically that there is no intent to alter the constitutional balance of authority between the state and local governments or to use the provisions of the Covenant to ‘federalize’ matters now within the competence of the states.

David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 *DePaul L. Rev.* 1183, 1202 (1993).

235. It is important to be clear about this point. Just as the obligation to interpret domestic statutes in keeping with international law yields where the statutory meaning is unambiguous, see *infra* note 255 (citing authorities), an interpretive obligation could not as a matter of *domestic* law override an established or otherwise unambiguous meaning, even if the consequence at an international level would be to put the United States in dereliction of its treaty obligations. The same may be the case where national constitutions exclude any such interpretive method, such as by directing courts to look only to originalist (and non-probative) materials or otherwise constraining their discretion. Having said that, the fact that constitutional text is inconsistent with an obligation imposed by international law may not be sufficient if that text has in practice been ignored, and courts have in fact adopted an eclectic interpretive approach. See Potter, *supra* note 172, at 464. As Part III explains, that is precisely the case with the Compact Clause.

236. See, e.g., 19 U.S.C. § 3512(a) (2000). Section 3512(a) provides:

No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect. . . . Nothing in this Act shall be construed (A) to amend or modify any law of the United States . . . or (B) to limit any authority conferred under any law of the United States.

*Id.*

237. See *supra* text accompanying note 224.

238. As one commentator summarized the “judicial misgivings,”

First, courts tend to interpret narrowly those articles of their national constitutions that import international law into the local systems, thereby

Still, perhaps comforted by these international and national limits, a number of nations have explicitly recognized the relevance of international law to interpreting their constitutions. Their commitments to so doing are often limited in one regard or another—some nations are especially focused, for example, on using international human rights norms to interpret constitutional liberties,<sup>239</sup> and others are implicitly or explicitly concerned solely with accommodating customary international law.<sup>240</sup>

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reducing their own opportunities to interfere with governmental policies in the light of international law. Second, national courts tend to interpret international rules so as not to upset their governments' interests, sometimes actually seeking guidance from the executive for interpreting treaties. Third, courts use a variety of 'avoidance doctrines,' either doctrines that were specifically devised for such matters, like the act of state doctrine, or general doctrines like standing and judiciability, in ways that give their own governments, as well as other governments, an effective shield against judicial review under international law.

Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 *Eur. J. Int'l L.* 159, 161 (1993).

239. Article 10(2) of the Spanish Constitution, for example, provides that its fundamental rights and guarantees are to be interpreted consistently with the Universal Declaration of Human Rights and the pertinent treaties and agreements to which Spain is a party. *Constitución [C.E.]* tit. I, art. 10, cl. 2. South Africa recently adopted a similar constitutional provision. *S. Afr. Const.* ch. II, § 39 (providing, in relevant part, that "[w]hen interpreting the Bill of Rights, a court . . . (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law"); see Catherine Adcock Admay, *Constitutional Comity: Mediating the Rule of Law Divide*, 26 *N.C. J. Int'l L. & Com. Reg.* 723, 729–30 (2001) (discussing provision); Ronald C. Slye, *International Law, Human Rights Beneficiaries, and South Africa: Some Thoughts on the Utility of International Human Rights Law*, 2 *Chi. J. Int'l L.* 59, 67–68 (2001) (same); Andre Stemmet, *The Influence of Recent Constitutional Developments in South Africa on the Relationship Between International Law and Municipal Law*, 33 *Int'l Law.* 47, 63–65 (1999) (same). Italian and Japanese courts have reached similar results as a matter of judicial interpretation. See Francesco Francioni, *The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience*, in *Enforcing International Human Rights in Domestic Courts* 15, 30–32 (Benedetto Conforti & Francesco Francioni eds., 1997) (citing case law); Yuji Iwasawa, *International Human Rights Adjudication in Japan*, in *Enforcing International Human Rights in Domestic Courts*, supra, at 223, 281–83, 292 (noting that Japanese courts, despite generally being hostile to the direct invocation of international human rights conventions, have been receptive to their use in interpreting the Japanese constitution).

240. See supra note 231 (citing examples of nations regarding customary international law with particular fever). One of the leading federal systems, Germany, provides a useful example. Article 25 of the Basic Law (*Grundgesetz*) establishes the supremacy of international law without expressly distinguishing between treaties and customary international law. *Grundgesetz [GG] [Constitution]* art. 25 (F.R.G.) ("Die allgemeinen Regeln des Völkerrechtes sind Bestandteil des Bundesrechtes. Sie gehen den Gesetzen vor und erzeugen Rechte und Pflichten unmittelbar für die Bewohner des Bundesgebietes."); *The Basic Law (Grundgesetz): The Constitution of the Federal Republic of Germany* (May 23, 1949) (Axel Tschentscher trans., 2002), available at [http://www.oefre.unibe.ch/law/the\\_basic\\_law.pdf](http://www.oefre.unibe.ch/law/the_basic_law.pdf) (on file with the *Columbia Law Review*) (translating Article 25 as providing that "[t]he general rules of public international law constitute an integral part of federal law. They take precedence over statutes and directly create rights and duties for the inhabitants of the federal territory"). In practice, however,

Some nations, however, appear to suffer neither qualification, including federal systems like Mexico<sup>241</sup> and India.<sup>242</sup> Australia<sup>243</sup> and

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Article 25 has not been applied to treaties. See Wildhaber & Breitenmoser, *supra* note 231, at 238. But cf. George Slyz, *International Law in National Courts*, 28 N.Y.U. J. Int'l L. & Pol. 65, 81 n.78 (1996) (noting general agreement that treaty provisions not reflecting general principles of customary international law are not addressed by Article 25, but noting reliance by court on Article 25 in rejecting later-in-time supremacy of federal law over treaty).

Perhaps reflecting this schism, the German constitutional court (Bundesverfassungsgericht) has "opened the German constitution itself to the consideration of international human rights standards." Bruno Simma et al., *The Role of German Courts in the Enforcement of International Human Rights*, in *Enforcing International Human Rights in Domestic Courts*, *supra* note 239, at 71, 95 (citing case law). Its so-called *Solange* decisions, on the other hand, indicate a serious, if diminishing, insistence on the supremacy of the Basic Law over any inconsistent dictates of European Community law. See *Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 2 C.M.L.R. 540, 554 ¶ 35 (BverfG 1974) (F.R.G.) (*Solange I*) (holding that "as long as" European integration had not established fundamental rights comparable to those provided in the German constitution, the German Constitutional Court would review references from lower national courts involving perceived conflicts between Community law as interpreted by the European Court of Justice and fundamental constitutional rights); *In re Wünsche Handelsgesellschaft*, 3 C.M.L.R. 225, 265 ¶ 48 (BverfG 1987) (F.R.G.) (*Solange II*) (holding that "so long as" European Communities institutions "generally ensure an effective protection of fundamental rights vis-a-vis the sovereign power of the Communities [that is] substantially similar to [that] required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights," the court would decline to review secondary Community legislation for consistency with fundamental rights arising under German law); *Brunner v. European Union Treaty*, 1 C.M.L.R. 57, 89 ¶ 49 (BverfG 1994) (F.R.G.) (*Solange III*, also known as the *Maastricht Decision*) (cautioning that if European Community institutions "were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Act of Accession, the resultant legislative instruments would not be legally binding within the sphere of German sovereignty," thus requiring the Constitutional Court to "review legal instruments of European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred on them or transgress them," but finding that standard satisfied).

241. See, e.g., Jorge Cicero, *International Law in Mexican Courts*, 30 Vand. J. Transnat'l L. 1035, 1084-85 (1997) (describing decision in which the Mexican Supreme Court "us[ed] the [ILO] Convention as an interpretive aid," thereby "treat[ing] it as enjoying constitutional rank without expressly declaring so").

242. See, e.g., Vijayashri Sripathi, *Human Rights in India—Fifty Years After Independence*, 26 Denv. J. Int'l L. & Pol'y 93, 126 (1997) (noting Indian decision interpreting its constitution so as to be consistent with the country's treaty obligations, in light of constitutional provision requiring that the "State shall endeavor to foster respect for international law and treaty obligations in the dealings of organized people with one another").

243. One of the chief proponents of interpreting Australian constitutional principles in keeping with treaty commitments and customary international law, Justice Michael Kirby of Australia's High Court, has authored several opinions taking that view, but cautioned that "the 'interpretive principle' . . . probably represents, at this time, a minority opinion in Australia, [but] it seems likely to me that it will ultimately be accepted as the rapprochement between international law (including that of human rights) and domestic law gathers pace in the coming millennium." Michael Kirby, *The Road from Bangalore: The First Ten Years of the Bangalore Principles of Human Rights Norms* (1998), available at

Canada,<sup>244</sup> for their parts, are each receptive toward using international human rights standards for interpretive purposes.<sup>245</sup> On the particular question of whether national treaty powers should be read broadly to accommodate international obligations, Australia shows a greater solicitude,<sup>246</sup> but the differing result in Canada does not so much disregard

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[http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_bang11.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_bang11.htm) (on file with the *Columbia Law Review*) (citing Australian, English, and New Zealand decisions); see also *Ex parte Epeabaka*, 206 C.L.R. 128, 151–53 (2001) (Kirby, J.) (espousing interpretive approach as basis for decision); *Kartinyeri v. The Commonwealth*, 195 C.L.R. 337, 417–19 (1998) (Kirby, J.) (same); *Newcrest Mining (WA) Ltd. v. The Commonwealth*, 190 C.L.R. 513, 656–71 (1997) (Kirby, J.) (same); Michael Kirby, *The Impact of International Human Rights Norms: “A Law Undergoing Evolution,”* 25 *W. Australian L. Rev.* 130 (1995) (describing approach).

244. The role of international law in Canadian courts is deeply confused, or at best complex. See Karen Knop, *Here and There: International Law in Domestic Courts*, 32 *N.Y.U. J. Int’l L. & Pol.* 501, 512–14 (2000). But international human rights treaties appear to regularly be used to interpret Canada’s bill of rights, the Charter of Rights and Freedoms, which was promulgated contemporaneous with and in light of some of the leading international instruments. Anne Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* 33–66 (1992) [hereinafter Bayefsky, *International Human Rights Law*]; Anne Bayefsky, *International Human Rights in Canadian Courts, in Enforcing International Human Rights in Domestic Courts*, supra note 239, at 295, 307–12, 315–20; Koren L. Bell, *From Laggard to Leader: Canadian Lessons on a Role for U.S. States in Making and Implementing Human Rights Treaties*, 5 *Yale Hum. Rts. & Dev. L.J.* 255, 260 & n.20 (2002); Knop, supra, at 512; cf. Alexander H.E. Morawa & Christopher Schreur, *The Role of Domestic Courts in the Enforcement of International Human Rights—A View from Austria, in Enforcing International Human Rights in Domestic Courts*, supra note 239, at 175, 176 (noting express incorporation of the European Convention on Human Rights, ratified by Austria in 1958, in constitutional revisions of 1964).

245. As such, they illustrate a growing, if still exceptional, practice. See Trone, supra note 154, at 118–19 (citing examples of constitutional provisions and judicial practices requiring that constitutional rights be construed in keeping with human rights treaties, and characterizing such applications as “relatively novel” but “increasingly among established and emerging democracies”).

246. Section 51 (xxix) of the Australian Constitution provides that the national parliament “shall, subject to the Constitution, have the power to make laws for the peace, order and good government of the Commonwealth with respect to: . . . External affairs . . .” *Austl. Const.* § 51 (xxix). Though various High Court opinions had earlier suggested that this authority would be viewed broadly, the opinions in two landmark decisions in the early 1980s confirmed both the relative scope of national authority over external affairs, and, ultimately, the absence of any additional criteria for exercising that authority; in the view of one contemporary commentator, the decisions established “[t]here is . . . no constitutional basis on which Australia can internationally assert problems of lack of constitutional power as a reason for inclusion of a federal clause in a treaty.” *Burmester*, supra note 154, at 528–29; see *Tasmanian Dam Case (Commonwealth v. Tasmania)*, 158 C.L.R. 1 (1983); *Koowarta v. Bjelke-Petersen*, 153 C.L.R. 168 (1982).

The arguments mustered are diverse and divergent, reflecting the High Court practice of issuing individual opinions. But the importance (if not precisely the imperative) of interpreting the Australian law so as to facilitate the negotiation and implementation of international obligations, both for reasons of national interest and international law, was repeatedly sounded. See, e.g., *Tasmanian Dam Case*, 158 C.L.R. at 127 (Mason, J.) (noting consequences for Australia of narrowly construing national legislative authority); *id.* at

the interpretive method as illustrate the limits that may be imposed, as a matter of domestic law, by constitutional text<sup>247</sup>—making it hazardous to

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171–72, 178 (Murphy, J.) (regarding it as sufficient to establish constitutionally, inter alia, that legislation implements any international law or treaty, and concluding that obligations as defined by international law suffice to establish domestic authority over external affairs); id. at 219 (Brennan, J.) (finding it “difficult to imagine” that any failure by Australia to fulfill its treaty obligations would not, by virtue of that fact alone, establish an issue of “international concern” satisfying any such limit on the exercise of national legislative authority); *Koowarta*, 153 C.L.R. at 229 (Mason, J.) (stressing that “it is important that the Commonwealth should retain its full capacity through the external affairs power to represent Australia, to commit it to participation in these developments when appropriate and to give effect to obligations thereby undertaken”); id. at 259 (Brennan, J.) (concluding that “to subject an aspect of the internal legal order to treaty obligation stamps the subject of the obligation with the character of an external affair” (citing authorities)); Geraldine Chin, *Constitutional Law: Technological Change and the Australian Constitution*, 24 Melbourne U. L. Rev. 609, 637 (2000) (noting that in *Tasmanian Dam Case*, “the majority was influenced by their view that the external affairs power was conferred to enable the Commonwealth to play its part in an evolving international order”). But cf. *Koowarta* 153 C.L.R. at 254 (Brennan, J.) (cautioning, in opinion supporting national authority, that “[a]n inability on the part of the Commonwealth to legislate in performance of some treaty obligation is not a constitutional imperative”). On balance, that value appears to have outweighed the submission by minority opinions that the Constitution’s federal character required a contrary conclusion. See *Tasmanian Dam Case*, 158 C.L.R. at 99, 106–07 (Gibbs, C.J.); id. at 198 (Wilson, J.); see generally id. at 254–59 (Deane, J.) (noting that national legislative authority is subject to the Constitution, and could not be exercised in a fashion inconsistent with the states’ continued existence, capacity to function, or right to be free of discriminatory attacks, but nonetheless had to be construed in keeping with the intention of facilitating Australian international relations); *Koowarta*, 153 C.L.R. at 225–31 (Mason, J.) (same).

247. The leading Canadian decision is still the *Labour Conventions* case, in which the Privy Council concluded that the distribution of power for treaty implementation had to adhere to the federal principles governing the distribution of legislative authority in general. *Attorney-General for Canada v. Attorney-General for Ontario (Labour Conventions)*, 1937 A.C. 326, 351–52 (P.C.); see id. at 352 (stating that “the Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution that gave it birth”). That result is somewhat inconsistent with the U.S. and Australian views, among others. Lord Atkin’s opinion stressed, however, that the decision did not leave Canada “incompetent to legislate in performance of treaty obligations,” since the “totality” of Canadian legislative powers permitted the national government and the provinces to cooperatively satisfy any treaty obligations Canada might assume, id. at 353–54—an assumption which, if borne out, might also satisfy the interpretive approach urged in this Article.

More important, *Labour Conventions* demonstrates that the interpretive obligation is constrained by constitutional and historical conditions. The question in that case of whether the national government’s residual authority permitted it to implement treaty obligations was occasioned by the complete absence of any treaty power—or, more exactly, the inclusion in the Canadian constitution of a treaty power inapplicable to treaties negotiated by Canada in its own right. *British North America Act, 1867*, 30 & 31 Vict., ch. 3, § 132 (Eng.) (“The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the *British Empire*, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.” (emphasis added)). Compare *Labour Conventions*, 1937 A.C. at 349–50 (describing the application of section 132 as “plain” and dictated by precedent, and concluding that while the section’s framers did not contemplate

generalize about federal systems at all.<sup>248</sup>

Equally important, it is unclear whether those nations assuming the interpretive approach regard themselves as being obligated internationally to have done so,<sup>249</sup> or whether they have instead been driven by do-

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independent Canadian treaty-making powers, “it is impossible to strain the section so as to cover the un contemplated event”), with *In re the Regulation and Control of Aeronautics in Canada*, 1932 A.C. 54, 74–78 (P.C.) (upholding legislative authority to implement a treaty principally on the ground that the treaty was of the kind falling within the literal range of section 132). Even that line had not always been toed, see *In re Regulation and Control of Radio Communications in Canada*, 1932 A.C. 304, 312 (P.C.) (reporting that “though agreeing that the [International Radiotelegraph] Convention was not such a treaty as is defined in [section] 132, their Lordships think that it amounts to the same thing”), and the literalist limitation to section 132 espoused in *Labour Conventions* was sharply criticized and sometimes exceeded. See generally Gibran van Ert, *Using Treaties in Canadian Courts*, 2000 Can. Y.B. Int’l L. 3, 63–79 (describing genesis of *Labour Conventions* decision and subsequent criticisms).

The restrictions imposed by the Canadian constitutional text, in any event, help explain the differing results in Canada and Australia. Wallace W. Struthers, “Treaty Implementation . . . Australian Rules”: A Rejoinder, 26 *Ottawa L. Rev.* 305, 309–11 (1994) (citing purpose and language of section 132 as part of larger argument rebutting comparison to Australian treaty jurisprudence); see also John D. Holmes, *An Australian View of the Hours of Labour Case*, 15 *Can. Bar. Rev.* 495, 496–97 (1937) (observing, contemporaneous with *Labour Conventions*, the differences between the Canadian and Australian constitutions); *id.* at 505–07 (attributing differing outcomes in Australian and Canada in part to the latter’s continued subjection to appeals before the Judicial Committee of the Privy Council). But see W. Ivor Jennings, *Dominion Legislation and Treaties*, 15 *Can. Bar. Rev.* 455, 457–63 (1937) (noting ambiguity of section 132 and precedent construing it); N.A.M. Mackenzie, *Canada and the Treaty-Making Power*, 15 *Can. Bar. Rev.* 436, 438–54 (1937) (challenging narrow construction of section 132); Torsten H. Strom & Peter Finkle, *Treaty Implementation: The Canadian Game Needs Australian Rules*, 25 *Ottawa L. Rev.* 39, 56–59 (1993) (arguing in favor of revisiting holding of *Labour Conventions* concerning section 132); *cf.* Trone, *supra* note 154, at 76–85 (describing, and criticizing, exceptional character of Canadian “fragmentation”). In addition, subsequent case law has indicated—inconsistent, at least marginally, with *Labour Conventions*—that whether legislation is implementing a treaty obligation helps determine whether that legislation is warranted under the residual national power “to make laws for the Peace, Order, and good Government of Canada.” *British North America Act*, *supra*, § 91; see Bayefsky, *International Human Rights Law*, *supra* note 244, at 28–30 (discussing cases); Van Ert, *supra*, at 72–76.

248. The examples of Australia and Canada, accordingly, are intended to be illustrative rather than exhaustive. In a recent survey of federal constitutions and treaty implementation, Professor Trone concluded that fragmented implementation authority was not an inherent characteristic of federalism—as the Australian experience most convincingly demonstrates—but that particular limitations, such as those prevalent in Canada, persist in some cases. See Trone, *supra* note 154, at 7; *e.g.*, *id.* at 30–31 (describing divided internal and external authority in Belgium); *id.* at 85–86 (describing longstanding constitutional limitation on treaty implementation in Germany in relation to areas falling within the exclusive competence of the Länder, but noting offsetting obligations of federal comity incumbent upon Länder, and “minimal” impact of limitation in light of a narrowed realm of exclusive Länder competence).

249. Consequently, the precise basis for any such international obligation—whether it would be deemed an entailment of specific treaty undertakings, a rule of customary international law, or a general principle of law—is also difficult to determine. See

mestic considerations—and to the extent that the national interest counsels in favor of maintaining valid international authority, it may be impossible to tell the difference. Such interpretive practices have been perceived, in any event, as creating, or reinforcing, an international obligation. The Bangalore Principles, elaborated in 1988 by an international colloquium of high-level jurists, declared that:

[There is] a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law—whether constitutional, statute or common law—is uncertain or incomplete.

. . . .

It is within the proper nature of the judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.<sup>250</sup>

It remains to be seen, then, whether U.S. constitutional law has adopted, or would be inclined to adopt, a similar approach.

#### B. *Accommodation Under Constitutional Law*

To American lawyers, the idea that international law might try to push domestic law is probably unsurprising. But suggestions that international law might actually insinuate itself into the U.S. Constitution, particularly those provisions governing relations among domestic institutions, would surely be resisted. International law may be “part of our law,” to be applied by U.S. courts whenever “questions of right depending upon it are duly presented,”<sup>251</sup> but those questions generally do not include what the Supreme Court instructively terms “*Our Federalism*.”<sup>252</sup> Transient in-

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Brownlie, *Principles*, supra note 218, at 31–56 (distinguishing among traditional sources of international law); *id.* at 18–19 (noting that “[w]hat is clear is the inappropriateness of rigid categorization of the sources”).

250. The Bangalore Principles on the Domestic Application of International Human Rights Norms, Principle 7, reprinted in 14 *Commonwealth L. Bull.* 1196, 1197 (1988).

251. *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (“When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (“[T]he Court is bound by the law of nations which is a part of the law of the land [until Congress says otherwise.]”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 450–56 (1964) (White, J., dissenting) (“Principles of international law have been applied in our courts to resolve controversies not merely because they provide a convenient rule for decision but because they represent a consensus among civilized nations on the proper ordering of relations between nations and the citizens thereof.” (internal citations omitted)).

252. *Printz v. United States*, 521 U.S. 898, 957 (1997) (emphasis added). The independence of American federalism from other federalisms was highlighted in an exchange between Justice Breyer, who in dissent suggested that European perspectives on commandeering might be pertinent, and Justice Scalia, who responded that “our federalism is not Europe’s.” Compare *id.* at 976–77 (Breyer, J., dissenting), with *id.* at 921

cursions are permitted, of course. International law may furnish a rule of decision where federal law otherwise would not.<sup>253</sup> Self-executing treaties and (probably) customarily international law preempt inconsistent state law.<sup>254</sup> Most relevant for immediate purposes, U.S. courts (usually) try to interpret statutes in conformity with treaty and other international obligations.<sup>255</sup> But *constitutional* law, in the American system, is a different kettle of fish,<sup>256</sup> and in U.S. courts even run-of-the-mill federal statutes—

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n.11 (Scalia, J., plurality opinion). See generally Daniel Halberstam, Comparative Federalism and the Issue of Commandeering, in *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU* 213, 213–51 (Kalypso Nicolaidis & Robert Howse eds., 2001) (examining comparative commandeering practices in the United States, Germany, and the European Union, and concluding that their functions differ significantly).

253. Thus, in replying to the contention that there was no federal law permitting the Supreme Court to assume jurisdiction over and resolve a dispute between two states over riparian rights, the Court replied:

The clear language of the Constitution vests in this court the power to settle those disputes. We have exercised that power in a variety of instances, determining in the several instances the justice of the dispute. Nor is our jurisdiction ousted, even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal.

Kansas v. Colorado, 206 U.S. 46, 97 (1907) (citing *The Paquete Habana*).

254. See Henkin, International Law, supra note 207, at 1555 (indicating that customary law enjoys the status of federal law). But see supra note 231 (noting increasingly controversial status of customary international law in U.S. discourse).

255. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”). That doctrine has sometimes been invoked to dramatic effect. See, e.g., *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1471 (S.D.N.Y. 1988) (construing Anti-Terrorism Act of 1987 as not requiring closing of the PLO Mission to the United Nations, contrary to the statute’s text, due to absence of clear expression that Congress intended to violate the Headquarters Agreement). The *Charming Betsy* doctrine does not, however, have any clear doctrinal or functional basis, nor any particular application to treaty law or constitutional construction, and thus is difficult to rely on here. See generally Curtis A. Bradley, The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law, 86 *Geo. L.J.* 479 (1998) (describing varying rationales, but defending a version of the canon on separation of powers grounds). But see, e.g., Edward T. Swaine, The Local Law of Global Antitrust, 43 *Wm. & Mary L. Rev.* 627, 713–19 (2001) (defending canon’s broad application to avoid inconsistencies between state authority under federal statutes and customary international law).

256. See *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (plurality opinion) (“The United States is entirely a creature of the Constitution. Its power and authority have no other source.”); Restatement (Third), supra note 22, § 115(3) (“A rule of international law or a provision of an international agreement of the United States will not be given effect as law in the United States if it is inconsistent with the United States Constitution.”); id. § 302(2) (“No provision of an agreement may contravene any of the prohibitions or limitations of the Constitution applicable to the exercise of authority by the United States.”). This superiority of constitutional law to treaties is not entirely explicit. See U.S. Const., art. VI, cl. 2 (providing in relevant part that “[t]his 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 . . .”).

including those protecting state interests—may erase any undesired implications from international law.<sup>257</sup> While Supreme Court justices occasionally preach the need to pay attention to the legal world outside U.S. borders, the Court's case law seemingly limits international law's potential relevance to the new federalism.

The only important doctrinal exception consists of cases suggesting that international law might somehow be relevant to interpreting the Constitution.<sup>258</sup> There have been hints of such an approach in decisions interpreting the First Amendment<sup>259</sup> and the Fourth Amendment.<sup>260</sup>

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257. See, e.g., Restatement (Third), *supra* note 22, §§ 111, 115 (stating that “[a]n act of Congress supercedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot fairly be reconciled”); Henkin, *Foreign Affairs*, *supra* note 2, at 211 (“At the end of the twentieth century, the power of Congress to enact laws that are inconsistent with U.S. treaty obligations, and the equality of treaties and statutes in domestic U.S. law, appear to be firmly established.”).

258. Doctrine is perhaps especially salient here, notwithstanding its inconsistencies, because there is very little text on which one might rely. That is not universally conceded. Justice Blackmun, among others, has placed emphasis on suggestive language in the Declaration of Independence. See Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 *Yale L.J.* 39, 39 (1994) (“The Declaration of Independence opens with the following memorable passage: ‘When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature’s God entitle them, a *decent Respect to the Opinions of Mankind* requires that they should declare the causes which impel them to the Separation.’” (quoting The Declaration of Independence para. 1 (U.S. 1776) (emphasis in original))); *id.* at 40, 45, 48, 49 (invoking language, in support of argument for relevance of international law to U.S. Constitution). Professor Stephens, moreover, has drawn attention to Congress’s power to “define and punish . . . Offenses against the Law of Nations,” U.S. Const. art. I, § 8, cl. 10, but appears to be of the view that this authority requires congressional implementation. See Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses Against the Law of Nations*, 42 *Wm. & Mary L. Rev.* 447, 536–40 (2000).

259. See *Finzer v. Barry*, 798 F.2d 1450, 1463 (D.C. Cir. 1986) (“The obligations of the United States under international law, reaffirmed by treaty, do not, of course, supersede the first amendment. Neither, however, has it ever been suggested that the first amendment is incompatible with the United States’ most basic obligations under the law of nations. The two must be accommodated . . . [F]irst amendment freedoms [are given] the widest scope possible consistent with the law of nations.”), *rev’d in part and aff’d in part sub nom.* *Boos v. Barry*, 485 U.S. 312, 324 (1988) (“[T]he fact that an interest is recognized in international law does not automatically render that interest ‘compelling’ for purposes of First Amendment analysis. We need not decide today whether, or to what extent, the dictates of international law could ever require that First Amendment analysis be adjusted to accommodate the interests of foreign officials.”). See generally Jordan J. Paust, *Rereading The First Amendment in Light of Treaties Proscribing Incitement to Racial Discrimination or Hostility*, 43 *Rutgers L. Rev.* 565 (1991).

260. See *United States v. Williams*, 617 F.2d 1063, 1089 (5th Cir. 1980) (“The historical and international acceptance of the reasonable suspicion standard as a touchstone for judging searches at sea confirms its aptness. . . . Although the approbation of international law is a factor suggesting that a search or seizure is reasonable within the

But there have been mixed signals in Eighth Amendment case law, which sometimes cites (or disregards, as the case may be) international law and world opinion as a kind of makeweight.<sup>261</sup> There are very few cases bearing directly on the treaty power.<sup>262</sup> In the most significant example, *Foster v. Neilson*, the Court construed the Supremacy Clause to permit non-self-executing treaties—notwithstanding text indicating that treaties were to be the law of the land—principally in order to accommodate international treaty practice.<sup>263</sup>

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meaning of the fourth amendment, a search or seizure that violates international law may yet be both constitutional and permissible under the laws of the United States.”).

261. These decisions have tended to conflate international law, comparative law, and foreign expressions of sentiment. Compare, e.g., *Atkins v. Virginia*, 122 S. Ct. 2242, 2249–50 n.21 (2002) (“[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”), *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (holding unconstitutional the execution of persons younger than 16 years old in part based on foreign laws prohibiting execution of juveniles, two human rights treaties signed by United States but not yet ratified, and one inapplicable human rights treaty signed and ratified by United States), *Enmund v. Florida*, 458 U.S. 782, 796–97 n.22 (1982) (noting that felony murder doctrine “has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe”), *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (claiming that “the climate of international opinion concerning the acceptability of a particular punishment” is “not irrelevant” to resolving issues under the Eighth Amendment), and *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958) (citing near-universal bar on denationalization as criminal punishment), with *Stanford v. Kentucky*, 492 U.S. 361, 369 & n.1 (1989) (not directly addressing claims that international law prohibits the execution of 16- or 17-year-olds, but rejecting foreign practices as irrelevant to inquiry into “evolving standards of decency”). Thus, for example, in an extrajudicial lecture, Justice Blackmun claimed that “[i]nternational law can and should inform the interpretation of various clauses of the Constitution, notably the Due Process Clause and the Eighth Amendment prohibition against cruel and unusual punishments.” Blackmun, *supra* note 258, at 45. But while his discussion, which cited several of the cases noted above, specifically referenced various indicia of international “opinions” and “practices,” he did not identify anything that would be regarded as a source of international law. *Id.* at 45–49.

262. Several are rather limited in scope. See, e.g., *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 107 (1923) (reciting argument by appellants that “[t]he courts will never give a construction to a statute contrary to international law or the accepted custom and usage of civilized nations, when it is possible reasonably to construe it in any other manner. The same rule, a fortiori, should apply to the construction of a provision in the Constitution” (citations omitted)); *id.* at 122–26 (citing international law in concluding that the Eighteenth Amendment excludes domestic merchant vessels outside American territorial waters, but includes foreign merchant vessels within territorial waters); cf. Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 *Alb. L. Rev.* 1237, 1247–49 (1998) (arguing that the treaty power, as with other constitutional provisions bearing on foreign relations, reflects an implicit understanding that the Constitution would be interpreted so as to bind the United States domestically, but not so as to violate international obligations).

263. 27 U.S. (2 Pet.) 253, 314 (1829) (“[W]hen the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”). Professor Vázquez has

It is thus difficult to say, in the abstract, whether the Supreme Court would favor an interpretive approach to reconciling the new federalism doctrines with international law.<sup>264</sup> *Foster* employed international law in a manner that *expanded* the states' provenance, and the Court may be less inclined to use international law interpretively when the result would trench upon state prerogatives.<sup>265</sup> On the other hand, in contrast to *Foster*, the Court cannot claim to have found the new federalism doctrines at issue in the text of the Constitution.<sup>266</sup> The Court's bases for intervening, instead, are the more general conceits that the Constitution envi-

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distinguished the category of treaties contemplated by *Foster* from two other types of non-self-executing treaties—those treaties that are unconstitutional or nonjusticiable—on the ground that while the latter two categories “turn[] on an interpretation of the Constitution,” *Foster*'s category “turned on an interpretation of the treaty.” Vázquez, *Laughing at Treaties*, supra note 33, at 2181–82. That distinction makes sense if one focuses solely on the kind of case-by-case inquiry in which a court might be engaged. But as Professor Vázquez clearly recognizes, *Foster* is like other non-self-execution decisions insofar as it carves an exemption from the Supremacy Clause, in my view because of the need to facilitate internationally recognized treaty practices. See *id.* at 2174 (“With respect to certain treaties, in other words, the treaty-makers have arguably purported to countermand the ordinary operation of the Supremacy Clause. The doctrine as reflected in these declarations is clearly in tension with the Supremacy Clause's text.”).

264. Compare Wright, *Control*, supra note 2, at 174–75 (“Apart from political questions courts are bound by plain terms of the Constitution, by treaties, by acts of Congress, and by executive orders under authority thereof, in spite of principles of international law and earlier treaties. They, however, attempt to interpret such documents in accord with international law, frequently with success, and they refuse to apply state constitutions and statutes in conflict with treaty.”), Julian P. Boyd, *The Expanding Treaty Power*, 6 N.C. L. Rev. 428, 433–34 (1928) (arguing that the absence of conflict between the constitutional separation of powers and the treaty power “is not due to the congruity of the treaty power with the principle of division of powers, but rather is an obviation of the difficulties of that impossible system by extra-legal developments dependent entirely upon courtesy, expediency, ‘constitutional understandings’ on the part of and between the various departments, and their high regard for the sanctity of international contracts”), and Quincy Wright, *Conflicts of International Law with National Laws and Ordinances*, 11 *Am. J. Int'l L.* 1, 5 (1917) (claiming that, though the Constitution binds American courts in instances of conflict with international law, “[i]t has, however, been generally interpreted in harmony with international law”), with Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 *Sup. Ct. Rev.* 295, 307–08, 322–26 (considering prospects for using international law as interpretive tool dubious, in light of death penalty jurisprudence).

265. Professor Brilmayer makes a similar point about *Sun Oil Co. v. Wortman*, 486 U.S. 717, 724 (1988), in which Justice Scalia uncharacteristically invoked international law as supporting the ability of a forum state to apply its own statute of limitations to revive otherwise stale claims. As she notes, “international law was relevant only for showing what states were entitled to do, not what they were forbidden to do, under the Full Faith and Credit clause.” Brilmayer, supra note 264, at 317.

266. See, e.g., *Alden v. Maine*, 527 U.S. 706, 713 (1999) (observing that “Eleventh Amendment immunity” is “something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment”); *Printz v. United States*, 521 U.S. 898, 923 n.13 (1997) (noting, in defense of anticommandeering principle, that “[i]t is not at all unusual for our resolution of a significant constitutional question to rest upon reasonable implications”).

sions a national government of limited and enumerated powers,<sup>267</sup> and that states enjoy “a residuary and inviolable sovereignty.”<sup>268</sup> These themselves are no better than interpretive nostrums, and plainly as subject to judicial limitation as they are to judicial enforcement.<sup>269</sup> Penumbra, structural constitutional doctrine, in other words, may be more vulnerable to other sources of law.<sup>270</sup>

The key to resolving this conundrum, I would argue, lies in the path shared by *Missouri v. Holland* with the new federalism doctrines. As explained below, each of the emerging limits emphasizes the availability of constitutional alternatives for achieving national ends. Following this functional approach<sup>271</sup> to federal constraints on the treaty power suggests two interpretive preferences: on the one hand, a respect for permitting the pursuit of treaties as a species of international law; on the other, a regard for identified state prerogatives save where those prerogatives must be overridden. The former preference, at least, is in keeping with the interpretive approach commended by international law, and is confined to the kind of structural questions in which that approach is least problematic from the constitutional point of view. But as shown below,

267. See, e.g., *United States v. Lopez*, 514 U.S. 549, 552 (1995); *New York v. United States*, 505 U.S. 144, 156 (1992).

268. *Printz*, 521 U.S. at 919 (quoting *The Federalist* No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)). As Professor Flaherty has observed, these doctrinal approaches can overlap, and appeared to do so in *New York*. See Flaherty, *supra* note 88, at 1285. For skeptical reactions to both enumeration and state autonomy, see, e.g., Barry Friedman, *Valuing Federalism*, 82 *Minn. L. Rev.* 317, 328–65 (1997) (describing judicially-approved expansions of federal authority, and inroads into state authority); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 *Mich. L. Rev.* 813, 822–55 (1998) (criticizing rationale for anticommandeering principles, but defending result).

269. Edward S. Corwin, *The Passing of Dual Federalism*, 36 *Va. L. Rev.* 1, 5 (1950) (commenting, prematurely, that “the operation of the ‘enumerated powers’ concept as a canon of constitutional interpretation has been curtailed on all sides”). The use of presumptions is often subtle, and rarely exogenous to the rest of constitutional analysis. See, e.g., *New York*, 505 U.S. at 210 (Stevens, J., concurring in part and dissenting in part) (suggesting, in light of history of the Articles of Confederation, that the Constitution be read as having “enhanced, rather than diminished, the power of the Federal Government”).

270. Cf. Gregory P. Magarian, *Toward Political Safeguards of Self-Determination*, 46 *Vill. L. Rev.* 1219, 1223 (2001) (explaining differential search for “some value of constitutional magnitude” in defining and limiting federalism on ground “that the constitutional ‘feature’ of federalism lacks the textual security of constitutional ‘provisions’ like the First Amendment and, to a lesser extent, the Due Process Clause”).

271. I recognize that functionalism has a variety of connotations. Here I mean an approach—revealed in the case law, rather than an independent theory of constitutional interpretation—that is attuned to the set of constitutional relationships between national and federal institutions and their respective purposes. Cf. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 *Cornell L. Rev.* 488, 489 (1987) (“[A] functional approach . . . stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened.”).

respecting *both* these preferences does not lead to any immediate, determinate result. In particular, it is hard to say whether the constitutional alternatives to proscribed federal action in the domestic context are meaningfully less satisfactory in the treaty context, leaving it unclear whether extending the new federalism into that context is contraindicated by any interpretive principle—at least prior to examining the relatively novel alternatives addressed in Part III.

1. *Substantive Limits: Revisiting Missouri v. Holland.* — Whether they otherwise have merit or not, most proposals to reconcile *Missouri v. Holland* with the new federalism—by requiring that a treaty have an “external” or “international” object, that it be bona fide, or that it be intended to advance the national interest—pose little threat to the effectuation of the treaty power. Such criteria would be satisfied, by design, in the vast majority of cases in which a treaty might be employed; those rare exceptions would be peripheral to the underlying objectives of the treaty power. Where their application might be open to doubt, the decision as to whether they are satisfied would almost certainly be confined to the discretion of the national political branches.<sup>272</sup>

But suggestions that *Missouri v. Holland* should be overturned, and the treaty power confined by the same subject-matter limitations applicable to the exercise of Congress’s domestic authority, plainly stand on a separate footing. *Lopez*-type limitations may be pertinent infrequently, perhaps especially in matters of foreign relations,<sup>273</sup> but where applicable they operate as a substantial limit on federal authority.<sup>274</sup> In some respects *Lopez* might have even more bite in relation to the treaty power. Professor Bradley’s proposal, as noted previously, might leave the United States with a gap between its international treaty obligations and its ability to implement them,<sup>275</sup> and that gap may be relatively more difficult for

272. See *supra* text accompanying notes 57, 59–64.

273. See *supra* text accompanying notes 54–64. The test for whether an activity “substantially affects” foreign commerce may be administered just as in the interstate context, assuming the same threshold is employed. See *United States v. Lopez*, 514 U.S. 549, 559 (1995). But the power to regulate the “channels” of interstate commerce, *id.* at 558, if transposed to the foreign commerce context, may well license a wider range of authority in conducting treaty-type relations with international organizations and foreign governments. But see *Gibbs v. Babbitt*, 214 F.3d 483, 490–91 (4th Cir. 2000) (defining the term “channel of interstate commerce” to refer to “navigable rivers, lakes, and canals of the United States; the interstate railroad track system; the interstate highway system; . . . interstate telephone and telegraph lines; air traffic routes; television and radio broadcast frequencies” (quoting *United States v. Miles*, 122 F.3d 235, 245 (5th Cir. 1997))).

274. There are alternative mechanisms, like conditional spending, that may be significant limitations on *Lopez* itself. See, e.g., Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 *Colum. L. Rev.* 1911, 1914 (1995) (arguing that the Court should reexamine Spending Clause doctrine for consistency with *Lopez*).

275. See Bradley, *Treaty Power II*, *supra* note 14, at 100 (suggesting that “[t]he best contemporary construction [of the treaty power] was one that would allow the treatymakers the ability to conclude treaties on any subject but would limit their ability to create supreme federal law to the scope of Congress’s power to do so”).

the government to fill. Faced with a decision invalidating purely domestic legislation, Congress may be able to overcome it by enacting a variant, or perhaps by building a better record to justify the original assertion of jurisdiction.<sup>276</sup> Either tack seems less effective in the treaty context, since post-agreement latitude may depend upon the acquiescence of the other parties—and any post-invalidation, autonomous alteration of implementing legislation will more likely appear superficial or simply inconsistent with the treaty’s terms.<sup>277</sup>

Having said that, the significance of these practical difficulties with translating *Lopez* to the treaty context is difficult to determine. If the national government is indeed supposed to be a creature of limited authority, shouldn’t the treaty power enjoy boundaries just like any other? Appeals to the nature of the treaty power are less conclusive than might be expected. There is abundant evidence, acknowledged in the case law, that the grant of the treaty power in Article II and the supremacy of treaties indicated in Article VI was intended to avoid the embarrassment and potential disaster inherent in treaty breaches.<sup>278</sup> But the principal solu-

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276. In *Lopez*, congressional findings were conspicuous by their absence, creating the impression that Congress might justify a similar or identical exercise of Commerce Clause authority based on a different legislative record. *Lopez*, 514 U.S. at 563 (concluding that “to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here”); *id.* at 563 n.4 (noting subsequently enacted legislation including “congressional findings regarding the effects of firearm possession in and around schools upon interstate and foreign commerce”); see Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 922(q), 110 Stat. 3009, 3069–70 (codified at 18 U.S.C. § 922(q)(2)(a) (2000)) (amending the Gun Free School Zones Act, after *Lopez*, to restrict its application to “a firearm that has moved in or that otherwise affects interstate or foreign commerce”). This caused some to wonder whether Congress might simply become skillful at manufacturing the kind of findings that would satisfy the Court. E.g., Adler & Kreimer, *supra* note 87, at 136 (cautioning that over time, if doctrine remains stable, “congressional aides [may] discover a repertoire of standard techniques that meet the formal requirements imposed by the Court, and begin to employ those techniques as a matter of course. Once the forms are safely in the word processor, federalism becomes a matter of an aide calling up the appropriate language”). But *Morrison* suggested that the Court would at the very least scrutinize the kinds of arguments Congress might construct. See *United States v. Morrison*, 529 U.S. 598, 615 (2000) (“In these cases, Congress’ findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution’s enumeration of powers.”).

277. If so, Professor Bradley’s observation that his proposal “would not interfere substantially with the treaty power” because “it would leave the political branches with substantial flexibility to conclude and implement international agreements,” may unduly ignore the relative difficulty of recovering from adverse decisions. Bradley, *Treaty Power I*, *supra* note 14, at 460–61.

278. See, e.g., *United States v. Pink*, 315 U.S. 203, 232 (1942) (“Here, we are dealing with an exclusive federal function. If state laws and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted. These are delicate matters. If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer

tion, surely, is for the national government simply to avoid entering into treaties that it may not be able to keep.

One problem with relying on self discipline is that, following *Holland*, it is especially difficult for U.S. negotiators to anticipate precisely what the constitutional limits (if any) are. A graver flaw is that the treaty power was also intended to permit the United States to negotiate treaties on favorable terms,<sup>279</sup> and the new federalism may compromise that objective. Sometimes conceding ground to the states will diminish the U.S. ability to negotiate for benefits from its treaty partners.<sup>280</sup> U.S. bargaining power is less likely to be materially affected where the United States is regarded as an indispensable treaty partner, or in a multilateral setting

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if a State created difficulties with a foreign power.”); *Head Money Cases*, 112 U.S. 580, 598 (1884) (“A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war.”); *Hauenstein v. Lynham*, 100 U.S. 483, 488–89 (1879) (“If a law of a State contrary to a treaty is not void, but voidable only, by a repeal or nullification by a State legislature, this certain consequence follows—that the will of a small part of the United States may control or defeat the will of the whole.” (quoting *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1796))). Nothing in these cases necessarily indicates, however, that the unmediated enforcement of treaty obligations was desired. Cf. *Bradley & Goldsmith*, *Conditional Consent*, supra note 33, at 448–49 (arguing that historical evidence concerning Supremacy Clause “shows only that the Framers wished to give the national government the power to prevent treaty violations by U.S. states if they so desired”).

279. See, e.g., *United States v. California*, 332 U.S. 19, 35 (1947) (“What this Government does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations. The very oil about which the state and nation here contend might well become the subject of international dispute and settlement.” (citation omitted)); *Clark v. Allen*, 331 U.S. 503, 517 (1947) (describing the “forbidden domain of negotiating with a foreign country”); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (“That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government.”).

280. See *Opeskin*, supra note 195, at 1–33 (describing how foreign states resist attempts to carve exemptions for federal systems, or acquiesce only in order to secure the necessary degree of participation); *Trone*, supra note 154, at 16–20 (describing international resistance); see, e.g., supra note 72 and accompanying text (noting Canadian refusal to open provincial purchasing in light of dissatisfaction with U.S. subnational concessions).

It is possible, on the other hand, that the Constitution may *strengthen* the U.S. hand by allowing it to claim that it is unable to concede on matters where it simply prefers not to do so. As I have argued elsewhere, however, there are other instruments for maintaining this kind of two-level game, like the Senate, that are far more supple than the ungainly device of federalism limits—and truer, not incidentally, to the original constitutional scheme. See *Swaine*, *Negotiating Federalism*, supra note 2, at 1242–45. Relying on constitutional vagaries may also be hazardous, to the extent that it encourages the authoritative determination by courts—a concern that may have motivated in part the U.S. reluctance to rely overmuch on federalism limits in the *Mexican Nationals* litigation. See supra note 221.

where the impact on shared treaty terms is insignificant. Even then, and putting foreign interests aside, the U.S. position will likely engender concessions of similar scope that it will have to endure.<sup>281</sup> Finally, there may be non-concessionary costs, such as where the United States is agnostic regarding the underlying state prerogative but would prefer to avoid the diplomatic costs of vindicating them,<sup>282</sup> or where it is hostile to the asserted state prerogative.<sup>283</sup> Unless there is a perfect overlap between national and state interests, or the United States is otherwise able to maximize its treaty returns notwithstanding the constraint of state constitutional entitlements, those entitlements are likely to impair the treaty power. The Australian perspective on this point may be particularly instructive: although Australia was long a stalwart alongside the United States in protecting states' rights in international negotiations, it

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281. Federal state clauses rarely apply solely to the United States, and achieving a sufficient coalition of interests may require agreeing to an exemption broader than one (or perhaps any) would individually require. See Opeskin, *supra* note 195, at 7, 13–16 (noting disputes among federal states as to appropriate terms for federal state clauses); Memorandum to Ministers (Aus.) (No. 97-01), Principles and Procedures for Commonwealth-State Consultation on Treaties ¶ 8.1 (1997), available at [http://www.premiers.nsw.gov.au/pubs\\_dload\\_part4/prem\\_circs\\_memos/prem\\_memos/1997/m97-01.htm](http://www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_memos/prem_memos/1997/m97-01.htm) (on file with the *Columbia Law Review*) [hereinafter Memorandum to Ministers] (noting Australia's experience that "a federal clause tailored to the needs of one federation will be unacceptable to other federations"). Even where agreement is reached, application may be a source of continuing headaches. See, e.g., *supra* note 170 (describing disputes between the United States and Canada relating to the interpretation of GATT Article XXIV:12). More broadly, federal state clauses risk legitimating other nations' self-exemption on different grounds, exceptions that may be inconsistent with U.S. interests.

Where constitutional concessions are sought after the fact, such as through RUDs, the negotiating dynamic is of course different. Even there, though, an exemption of similar scope would generally have to be accorded to any other federal state. See, e.g., Vienna Convention on the Law of Treaties, *supra* note 159, 1155 U.N.T.S. at 337, 8 I.L.M. at 688 (noting reciprocity of reservations).

282. See Opeskin, *supra* note 195, at 7 (noting negotiating frictions created by limitations imposed by federal structure); cf. Memorandum to Ministers, *supra* note 281, ¶ 8.1 ("The Commonwealth believes that instructing an Australian delegation to press for a federal clause only diverts its resources from more important tasks.").

283. The national government might, hypothetically, regard discriminatory state government procurement policies as inconsistent with the welfare of local and out-of-state residents, endorse the restriction of state capital punishment practices, prefer that states be directly ordered to notify foreign nationals of their right to contact their countries' diplomatic representatives, or favor the reduction in bothersome state appropriations of intellectual property. (For discussion of congressional proposals to restore state responsibility for intellectual property violations in the wake of recent Eleventh Amendment decisions, see Berman et al., *supra* note 10, at 1039–40, 1051–1114, 1130–72.) Its opposition might, of course, be due to its reluctance to effectively make a concession in the state's stead—for example, accommodating the anticommandeering principle by assuming direct responsibility for enacting and executing the implementing legislation, or paying for state compliance through spending incentives.

has renounced its practice of pursuing federal state clauses due largely to the costs they imposed on treaty negotiations.<sup>284</sup>

The United States is not Australia, of course, and it may be argued that the need to preserve the ability to negotiate effectively is simply truncated by the need to respect constitutional limits on national authority, just as the desirability of national regulation may be truncated by the limitations on the Commerce Clause. But the case law reflects an external and an internal limit to this logic. First, the objective in establishing the treaty power was not merely to provide the national government with *any* (encumbered) means of entering into agreements, but instead to provide an authority equal to its negotiating partners. Justice Holmes was especially clear that it “it is not lightly to be assumed that, in matters requiring national action, ‘a power which must belong to and somewhere reside in every civilized government’ is not to be found.”<sup>285</sup>

Second, there has been a steadfast insistence that the treaty power is indispensable to resolving some problems, because—distinctively—the international solutions they demand cannot constitutionally be achieved by the states. In *Holland*, as previously noted, Justice Holmes relied heavily not only on the (perhaps unconvincing) significance of the national interest at stake<sup>286</sup> and the need for international cooperation,<sup>287</sup> but

284. Memorandum to Ministers, *supra* note 281, ¶ 8.1. That policy change has survived, a change in ruling parties. See Opeskin, *supra* note 195, at 15–16; accord Brian R. Opeskin & Donald R. Rothwell, *The Impact of Treaties on Australian Federalism*, 27 *Case W. Res. J. Int'l L.* 1, 18–20 (1995).

285. *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (citing *Andrews v. Andrews*, 188 U.S. 14, 33 (1903)). This objective tied in with a great theme struck by contemporary commentary on the treaty power: the Framers perceived that the constitutional weaknesses under the Articles of Confederation had not only made the United States an inferior of its negotiating partners from Europe, but had actually permitted it to be exploited. See, e.g., *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445–46 (1827) (Marshall, C.J.) (“The oppressed and degraded state of commerce, previous to the adoption of the constitution, can scarcely be forgotten. It was regulated by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions, were rendered impotent, by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent, as to render that power in a great degree useless.”). See generally Swaine, *Negotiating Federalism*, *supra* note 2, at 1201–10 (recounting Framers’ concerns about weakening effect on federal authority caused by separate state action in international arena). The comparative construction of U.S. negotiating authority is also implicit in dicta referring to the treaty power as “extend[ing] to all proper subjects of negotiation between our government and the governments of other nations.” *Geofroy v. Riggs*, 133 U.S. 258, 266 (1890).

286. *Holland*, 252 U.S. at 435 (“Here a national interest of very nearly the first magnitude is involved.”)

287. *Id.* at 435 (asserting that the national interest “can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein”). This contention was arguably bound up with the problem that Congress might not possess adequate domestic authority to address the problem on its own. *Id.* at 433 (“It is obvious that there may be matters of the sharpest

also on the inability of the states to go it alone.<sup>288</sup> Continuing the logic of the passage quoted above, Holmes masterfully drew on precedent implying indispensable *state* power to suggest that the treaty power, too, should be read expansively where the states would be inadequate: “What was said in [*Andrews v. Andrews* (1903)] with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act.”<sup>289</sup> *Holland* thus instances an interpretative presumption for the treaty power—we should prefer interpretations permitting U.S. federalism to be reconciled with the national government’s ability to negotiate and adhere to treaties—based on the insight that the state-based alternative to the treaty power is inadequate.

The new Commerce Clause cases follow similar reasoning to a nominally different result. In both *Lopez* and *Morrison*, the Court’s rejection of a creeping Commerce Clause authority was premised in part on its reading of textual limits on the enumerated power. But the Court also perceived that dual federalism required that some matters be left to the states—and, implicitly but unmistakably, that the states were capable of regulating the matters in question. The traditional exercise of state authority, in this view, was worth respecting not only for tradition’s sake, but also because it demonstrated that the states could take over precisely where the national government was forced to stop.<sup>290</sup>

With the treaty power, in contrast, the Court appears to have been under no illusion that the states would be able to approximate the benefits of international resolution. The basic imperative, then, is easily captured. As Quincy Wright wrote even before *Missouri v. Holland*,

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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 . . .”).

288. *Id.* at 435 (“But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act.”); see also *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1879) (“If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to ‘enter into any treaty, alliance, or confederation.’” (quoting U.S. Const. art. I, § 10)); Golove, *Treaty-Making and the Nation*, *supra* note 14, at 1262 n.634 (noting emphasis of this point in earlier decisions and pleadings in the *Holland* litigation). Notably, the Court did not address the possibility that a state might negotiate a compact with Great Britain.

289. *Holland*, 252 U.S. at 433 (citing *Andrews*, 188 U.S. at 33).

290. See *United States v. Morrison*, 529 U.S. 598, 618 (2000) (“The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.” (citations omitted)); see also *supra* text accompanying note 47 (noting emphasis on dual sovereignty, and the division between the local and the national, in *Lopez* and *Morrison*).

*A conflict between the Constitution and international law is not to be presumed.* What is demanded by international law must be also by the Constitution in order that the fundamental object of the latter may be attained. International law may offer a definite sanction for the fulfillment of treaties, and were the Constitution to oppose obstacles to their fulfillment, the result might be disaster for the whole country and a complete nonfulfillment of the fundamental objects stated in the preamble, to “promote the general welfare, etc.”<sup>291</sup>

Faced with a clear conflict between translating domestic subject-matter limits and the power to make international treaties, then, the logic of the new federalism suggests even greater caution than might be anticipated. It is worth exploring the degree to which other components of the new federalism, while posing a more imminent risk to the treaty power, are likewise sensitive to and contingent upon the availability of constitutional alternatives.

2. *Procedural Limits: Anticommandeering.* — The cases establishing the anticommandeering principle emphasized that commandeering was not the only tool for enlisting the states. Some alternatives inhered in the Court’s understanding of what constitutes commandeering. In *New York v. United States*, the Court suggested that legislation imposing the same duties on states and private individuals might not be regarded as commandeering.<sup>292</sup> The Court subsequently indicated in *Reno v. Condon* that regulating a state’s self-regarding activities, as opposed to affecting its regulation of private parties, is more like a conventional demand for compliance with federal law than it is like commandeering<sup>293</sup>—though the law

291. Quincy Wright, *Treaties and the Constitutional Separation of Powers*, 12 *Am. J. Int’l L.* 64, 84 n.90 (1918) (emphasis added); see also Kuhn, *supra* note 76, at 184–85 (emphasizing importance of central government’s unrestricted authority in exercise of its international power).

292. See *New York v. United States*, 505 U.S. 144, 160 (1992) (distinguishing prior cases dealing with generally applicable laws, “as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties”); see also *Printz v. United States*, 521 U.S. 898, 960 (1997) (Stevens, J., dissenting) (claiming that “nothing in the majority’s holding calls into question the three mechanisms for constructing such programs that *New York* expressly approved,” including action “as a part of a program that affects States and private parties alike”).

There is some confusion, however, as to whether the general applicability of a regulation amounts to a defense, or if the lack of general applicability would instead comprise a distinct kind of unconstitutionality. In *Reno v. Condon*, 528 U.S. 141, 151 (2000), the Court upheld the Driver’s Privacy Protection Act of 1994 (DPPA) against a challenge based on the anticommandeering principle, observing that the states were being regulated as the owners of databases, not being directed in their sovereign capacity to regulate their citizens. South Carolina argued that the DPPA failed the constitutional requirement that states could only be regulated by generally applicable statutes that regulated private parties likewise. The Court responded that even if such a principle were valid, it was satisfied by the DPPA. *Id.*

293. *Condon*, 528 U.S. at 150–51. The decision relied on *South Carolina v. Baker*, which had similarly distinguished between a law that “regulate[d] state activities” rather than “seek[ing] to control or influence the manner in which States regulate private parties,”

in question was also generally applicable, and hence not problematic under *New York's* suggested approach. Requiring the states to adopt TRIPs-compatible remedies would, on this analysis, constitute commandeering, but subjecting the states to TRIPs-based rules concerning their use of intellectual property generally would not.<sup>294</sup> It is less clear whether directing states, and only states, in activities like government procurement would be problematic, or whether such a law might be permissible only if generally applicable.<sup>295</sup>

Even where the state is being directed in its sovereign capacity, the commandeering principle is subject to categorical exceptions. The Court stressed, first of all, that Congress may properly enlist the states by providing federal funds only on the condition that the state adopt a regulatory program.<sup>296</sup> The conditions attached to the funds must relate somehow to the purposes of the federal spending, among other things, but that requirement would be satisfied in the ordinary case by subsidizing state compliance.<sup>297</sup> In addition, *New York* represented that the national government could present states with a choice between “regulating [an] activity according to federal standards or having state law pre-empted by federal regulation.”<sup>298</sup> These same exceptions would be available, it

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since “[s]uch ‘commandeering’ is . . . an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.” 485 U.S. 505, 514–15 (1988). For a pre-*Condon* argument for focusing on the acts demanded of the state, rather than the parties subject to the federal rule, see Ellen D. Katz, *State Judges, State Officers, and Federal Commands After Seminole Tribe and Printz*, 1998 Wis. L. Rev. 1465, 1499–1500.

294. See TRIPs, *supra* note 10, art. 31 (regulating the unauthorized use of intellectual property both by state governments and by third parties authorized by national and state governments).

295. It is also unclear how to address circumstances in which state compliance would require distinctive steps to be taken, such as if a law (or treaty) required parties to adopt and adhere to self-governing guidelines that for a state would entail formal rulemaking.

296. *New York*, 505 U.S. at 167. The national government could, for example, adopt a program withholding federal highway funds unless a state has adopted a federally-determined minimum drinking age, see *South Dakota v. Dole*, 483 U.S. 203, 205 (1987), or reward the states for reaching particular regulatory milestones, see *New York*, 505 U.S. at 171–72.

297. See *New York*, 505 U.S. at 167, 171–72; *Dole*, 483 U.S. at 207–08 & n.3. The spending power must also be exercised in pursuit of the general welfare, and the conditions imposed must be unambiguous and free of any independent constitutional infirmity. *New York*, 505 U.S. at 171–72; *Dole*, 483 U.S. at 207–08.

298. *New York*, 505 U.S. at 167. The national government may, for example, allow the states to choose between observing federal standards in obtaining “local or regional self-sufficiency” in hazardous waste disposal, or having their residents subjected to federal law allowing other “states and regions to deny [them] access” to other sites, see *id.* at 173–74, or between submitting a conforming mining program or having the “full regulatory burden” borne by the federal government. *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981).

appears, to cure what would otherwise be defective under *Printz*.<sup>299</sup>

Although the Court stressed the “formalist” nature of the anticommandeering principle in disregarding claims that commandeering was especially valuable under the circumstances at hand,<sup>300</sup> these exceptions seem to be of a different character. Though it is hard to defend the Court’s linedrawing based on any particular sovereignty-oriented rationale,<sup>301</sup> the Court did provide two functional explanations for the exceptions it cited. The first, and most explicit, was that “encouraging a State to conform to federal policy choices” permitted “the residents of the State [to] retain the ultimate decision as to whether or not the State will comply” and maintained the accountability of state officials to those residents.<sup>302</sup> Where states consented, the Court suggested, both national and state interests could advantageously be promoted,<sup>303</sup> and the ability

299. See *Printz v. United States*, 521 U.S. 898, 936 (1997) (O’Connor, J., concurring); *id.* at 960 (Stevens, J., dissenting) (“[N]othing in the majority’s holding calls into question the three mechanisms for constructing such programs that *New York* expressly approved. Congress may require the States to implement its programs as a condition of federal spending, in order to avoid the threat of unilateral federal action in the area, or as a part of a program that affects States and private parties alike.”); see also Caminker, *Printz*, *supra* note 84, at 242–43 (discussing application of inducement strategies to *Printz*); Jackson, *Federalism*, *supra* note 85, at 2211–12 (considering *Printz* in the context of discussing Congress’s “tools to pressure state and local governments to go along with national policy”).

300. See *Printz*, 521 U.S. at 933; *New York*, 505 U.S. at 187. For like depictions in the commentary, see, e.g., Kathleen M. Sullivan, Comment, *Dueling Sovereignities: U.S. Term Limits, Inc. v. Thornton*, 109 Harv. L. Rev. 78, 97 (1995) (invoking *New York* as a “classically formalist” exemplar).

301. See, e.g., Hills, *supra* note 268, at 817–18 (querying “why federal demands for state or local services should be regarded as more of an intrusion on state sovereignty than simple federal preemption of state or local law,” and “even if one could explain why commandeering is especially threatening to sovereignty, why are state and local governments protected only from unconditional federal demands for regulatory services but not from *conditional* demands”).

302. *New York*, 505 U.S. at 168–69.

303. The relevant kind of consent, it should be stressed, did not include conventional political bargains. In *New York*, the Court pondered but dismissed the argument that *New York* had assented to and benefited from the challenged scheme, stating sweepingly that “[w]here Congress exceeds its authority relative to the States . . . the departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials.” *Id.* at 182. But as *New York* and *Printz* also made clear, the consent of state officials to unconstitutional conditions was very different than their participation in constitutional mechanisms that privileged state consent, such as conditional spending and conditional preemption. Such mechanisms, presumably, do not depart from the constitutional plan, and might be viewed as choices presented more to the states as sovereign entities than to their officials of the moment. See *id.* at 167–68 (emphasizing significance of state choice, as opposed to federal command); see also *id.* at 183 (noting, but dismissing, possibility of consent through interstate compact); *Printz*, 521 U.S. at 910–11 (observing, in addressing quotations from *The Federalist* seemingly anticipating that state officials would assist the federal government, that “none of these statements necessarily implies—what is the critical point here—that Congress could impose these responsibilities *without the consent of the States*”); see also *infra* text accompanying notes 470–472 (discussing use of compacts).

to pursue what Justice White called “local solutions to local problems” maintained,<sup>304</sup> without recourse to the heavy hand of unconditional federal mandates.

A second, more basic explanation was that preserving such alternatives was important because they made the anticommandeering principle tolerable. While *Printz* may have seemed more absolutist in temper,<sup>305</sup> the *New York* decision upon which it partly relied pointedly reassured that denying the power to commandeer

is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State’s policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests.<sup>306</sup>

This explanation resonates with the reasoning of *Missouri v. Holland*, warranting the inquiry by some commentators into the ease with which these alternative methods translate to treaties—even if their conclusion that the commandeering principle cannot be extended does not necessa-

304. *New York*, 505 U.S. at 210 (White, J., concurring in part and dissenting in part).

305. *Printz* specifically rejected the invitation to weigh U.S. interests against the relatively small imposition on states. See *Printz*, 521 U.S. at 932 (“[W]here, as here, it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a ‘balancing’ analysis is inappropriate. It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.”); see also *id.* at 923–24 (rejecting invocation of Necessary and Proper Clause). This has led many commentators to remark on its categorical or antipragmatic nature. See, e.g., Jackson, *Federalism*, supra note 85, at 2213 (concluding that “*Printz*’s far more categorical ban is . . . in tension with th[e] earlier, more pragmatic methodology” in other federalism doctrines); Vázquez, *Breard*, supra note 96, at 1323 (“[T]he Court in *Printz* made it clear that federal commandeering of state officials is invalid even if such commandeering is clearly a more efficient means of accomplishing the desired end than direct federal enforcement.”); Carter, supra note 80, at 619 (noting objection by *Printz* majority to balancing). But the Court’s resistance to balancing in individual cases is not inconsistent with its sensitivity to the general availability of alternative mechanisms. Cf. *Printz*, 521 U.S. at 936 (O’Connor, J., concurring) (stressing availability of alternative mechanisms); *id.* at 960 (Stevens, J., dissenting) (same); Carter, supra note 80, at 623 (relying on Justice O’Connor’s reading of the majority opinion to conclude that “[t]he fact that other means of achieving federal ends were available in *Printz*—and with regard to federal statutes enacted under the Commerce Clause generally—was a consideration in setting the bright line rule at zero commandeering”).

306. *New York*, 505 U.S. at 166; see also *id.* at 188 (“The Constitution permits both the Federal Government and the States to enact legislation regarding the disposal of low level radioactive waste. The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders. While there may be many constitutional methods of achieving regional self-sufficiency in radioactive waste disposal, the method Congress has chosen is not one of them.”).

rily follow.<sup>307</sup> The evidence for this strong position deserves review. There are arguably distinct disadvantages to pursuing commandeering's alternatives in the treaty context: the prospect that states may breach their non-coerced bargains with the United States, for example, may be more significant when foreign nations are involved.<sup>308</sup> Even so, state disobedience would still be possible even if the national government *possessed* the power to commandeer, and it may conceivably be more of a risk when the federal government forces state compliance without their assent.

The argument for treaty exceptionalism fares better when it turns to the mechanics of commandeering's alternatives. It can be argued, for one, that their relative virtues are underserved in the treaty context. Conditional preemption and conditional spending lose their allure if the regulatory baseline has been unalterably set by treaty.<sup>309</sup> Conditional preemption may be wholly irrelevant, moreover, when the principal regulatory target is the discharge of public duties, as is the case with many treaties. It has been suggested, for example, that the Vienna Convention on Consular Relations may be redeemed as conditional preemption, if

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307. For the most thorough discussion, see Carter, *supra* note 80, at 609–18 (considering, and rejecting, viability of commandeering alternatives in relation to the treaty power); *id.* at 618–25 (arguing, notwithstanding *Printz*, for relevance of pragmatic assessment of alternative instruments). See also Weisburd, *supra* note 88, at 921–23 (arguing that the limited alternatives to exercising the treaty power, complete with the authority to commandeer state officials, distinguish treaty context from that considered in *Printz*); Note, *supra* note 54, at 2500 (arguing that because “[t]he national interest requires that the federal government have a means of entering into international agreements that are exempt from these federalism limitations, at least when state sovereignty would seriously imperil the nation’s foreign affairs objectives,” treaties (but not congressional-executive agreements) should be exempted from *Printz* and related limits); cf. Vázquez, *Breard*, *supra* note 96, at 1319–20 (asserting that “[i]f commandeering were defined broadly, as distinguished from both encouragement and preemption, then the anticommandeering principle could not plausibly be considered applicable to exercises of the treaty power, as it would condemn numerous treaties that the Supreme Court has upheld”); *id.* at 1350 (suggesting that without understanding the scope of the anticommandeering principle, “it is impossible to reach firm conclusions about *Printz*’s applicability to the treaty power”). But see Knowles, *supra* note 81, at 766 (asserting that alternative avenues for federal regulation diminish the significance of applying the anticommandeering principle in the treaty context).

308. See Carter, *supra* note 80, at 612. Professor Vázquez alludes more generally to the possibility of national violations occasioned by the refusal of states to *accept* federal money in the first place, see Vázquez, *Breard*, *supra* note 96, at 1325, but presumably that refusal could be accounted for in the terms of the treaty.

309. Professor Hills, for example, has defended the distinctive ban on commandeering on the ground that alternatives like conditional preemption permit states to credibly threaten to withhold participation, with the ultimate payoff being that Congress is forced to compromise its objectives and tailor its program to the states—thus throwing state sovereignty a bone and tending to deter the aggressive exploitation of states by the federal government. See Hills, *supra* note 268, at 866–71; Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 *Tulsa L.J.* 11, 35–37 (2000) (extending and replying to Hills’s argument). But that kind of adaptation is less available in the case of treaties, to the extent that that Congress would be confined by the treaty template.

read to invite the states' choice between providing the specified notification or refraining from arresting the foreign national in the first place.<sup>310</sup> But *New York* assumes that a state's refusal to implement conditional national standards would not generate any burdens on the "state as sovereign,"<sup>311</sup> and would instead entail the direct federal regulation of the "private activity" of state residents<sup>312</sup>—an assumption inapplicable to a state's law enforcement activities, its use of intellectual property, or its public procurement policy, and essentially all activities presently implicating the treaty power.<sup>313</sup>

Similarly, the treaty power is arguably the least likely vehicle for recognizing an additional exception for merely "ministerial" burdens. *Printz* distinguished without resolving statutes requiring "only the provision of information to the Federal Government," on the ground that they did not force state officials to actually administer a federal program;<sup>314</sup> Justice O'Connor's concurrence applauded the Court for refraining from deciding "whether . . . purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are . . . invalid."<sup>315</sup> Such a distinction might, in theory, redeem notification provisions like those involved in consular conven-

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310. See Vázquez, *Breard*, supra note 96, at 1319–20, 1322–29. Professor Vázquez's clever argument demonstrates the difficulty of delimiting the acceptable bounds of conditional preemption, but it would be unlikely to persuade a court. For one, I doubt that the conditional preemption analysis of *New York*, addressed to state legislatures, translates so readily to field-level decisionmaking by state officials (here, whether to detain, or not to detain, a particular foreign national). But even if it does, the conditional preemption addressed in *New York* concerned threats to regulate an area "unless the states regulate *that very area* first," and probably excludes national threats to make the area essentially unregulable. Carter, supra note 80, at 617–18.

311. See *New York*, 505 U.S. at 174 ("The affected States are not compelled by Congress to regulate, because any burden caused by a State's refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign.").

312. *Id.* at 173–74 ("Where federal regulation of private activity is within the scope of the Commerce Clause, we have recognized the ability of Congress to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.").

313. Janet Carter also argues that conditional preemption is less compatible with the treaty power because treaty obligations are relatively specific, and less likely to attract states to administer the national program. Carter, supra note 80, at 615–17. I am not certain of the basis for that assertion: many (even, I would guess, most) commentators would suggest that treaty obligations are ordinarily less specific than their domestic counterparts. See, e.g., Bradley, *Treaty Power II*, supra note 14, at 110 (suggesting instead that "treaty commitments—particularly in modern, multilateral treaties—are often vague and aspirational").

314. *Printz v. United States*, 521 U.S. 898, 918 (1997).

315. *Id.* at 936 (O'Connor, J., concurring). Her opinion cited the example of 42 U.S.C. § 5779(a), which "requir[ed] state and local law enforcement agencies to report cases of missing children to the Department of Justice." *Id.*

tions.<sup>316</sup> But even were the distinction tenable in the domestic context,<sup>317</sup> extending it to such treaties—that is, moving from the majority’s category of statutes providing information “to the Federal Government” to Justice O’Connor’s category of any “purely ministerial reporting requirements,” and including ministerial reports to foreign officials—would present additional issues. Directives from the federal government requiring state officials to report to their foreign counterparts might conceivably be regarded as falling outside the federal bargain, particularly given the Framers’ anticipation that states would have no diplomatic function whatsoever.<sup>318</sup> Such directives might also be regarded as an affront to the “dignity” of the states, though the Court’s linedrawing on this front has been even less successful.<sup>319</sup>

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316. See, e.g., *supra* text accompanying notes 7, 109–115 (discussing Vienna Convention on Consular Relations); 2 Charles Cheney Hyde, *International Law* 1401 (2d ed. 1945) (indicating that various conventions “have exacted the performance of specified administrative acts by local officials” and citing the examples of the Convention Defining the Rights, Immunities, and Privileges of Consuls, Feb. 8, 1868, U.S.-Italy, art. XVI, 15 Stat. 605, 612 (providing that in the event of an intestate national of the other signatory, “the competent local authorities shall inform the consuls or consular agents of the nation to which the deceased belongs”), reprinted in 9 *Bevans*, *supra* note 98, at 70, 75, superseded by Convention Concerning the Rights, Privileges and Immunities of Consular Officers, May 8, 1878, U.S.-Italy, art. XVI, 20 Stat. 725, 732, reprinted in 9 *Bevans*, *supra* note 98, at 91, 96, and Convention Respecting Consuls and Trade-marks, Dec. 11, 1871, U.S.-F.R.G., art. X, 17 Stat. 921, 926 (providing that upon death of an intestate national, “the competent authorities shall at once inform the nearest consular officer of the nation to which the deceased belongs”), reprinted in 8 *Bevans*, *supra* note 98, at 121, 125, succeeded by Treaty of Friendship, Commerce and Consular Rights, Dec. 8, 1923, U.S.-F.R.G., art. XXIV, 44 Stat. 2132, 2153, reprinted in 8 *Bevans*, *supra* note 98, at 153, 165–66).

While it is remotely conceivable that such obligations might be reconstrued as something less than obligatory, see *Printz*, 521 U.S. at 916–17 (indicating that presidential authorization to “utilize the service” of state officers, under penalty of misdemeanor for failure to follow presidential directions, might not be intended to compel service), they appear to have been understood as mandatory. See Letter from Alvey A. Adee, Acting Secretary of State, to the Governors of the States, June 27, 1907, in 1 U.S. Dep’t of State, *Foreign Relations of the United States* 53, 53–54 (1910) (appending treaty requirement that “competent local authorities shall” inform Austro-Hungarian consular officers upon death of intestate national, together with Austro-Hungarian complaints that this “duty” had been breached, and requesting that “its stipulations . . . be complied with”). The better argument, anticipated by Professor Tushnet, might be that the Court would regard differently any provisions with this sort of historical pedigree. See Tushnet, *Federalism*, *supra* note 98, at 866–67.

317. But see Tushnet, *Federalism*, *supra* note 98, at 863–66 (discussing functional similarity between information-gathering and notification requirements and commandeering *simple*).

318. See *supra* note 2 and accompanying text; *infra* notes 402–404 and accompanying text.

319. See *supra* note 125 and accompanying text; cf. *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1874–75 n.11 (2002) (“One, in fact, could argue that allowing a private party to haul a State in front of . . . an administrative tribunal constitutes a greater insult to a State’s dignity than requiring a State to appear in an Article III court presided over by a judge with life tenure nominated by the President of the United States and confirmed by the United States Senate.”).

Doctrinal technicalities aside, the basic concern is that commandeering's alternatives may simply not work as well for treaties. For example, uncertainty as to whether states will accept conditioned moneys and the associated obligations, or agree to preemption, may impair U.S. bargaining with other countries. There are similar planning problems with purely domestic applications,<sup>320</sup> but they are arguably magnified when dealing with third-party expectations. At the same time, any bargaining-centered objection may be tempered by the increasing prevalence of multilateral treaties, the terms of which may be far less affected by the peculiarities of the odd federal government than would be the case in a classic bilateral context.

It is hard to calculate the total effect of these relative differences,<sup>321</sup> and even harder to know what would constitute failure. The objective of *Printz* and *New York*, in their original context, seems to have been relatively modest: to identify *some* noncoercive means by which the federal government might promote the national interest.<sup>322</sup> Applying this approach to the treaty power, then, may require not only the assessment of whether the previously specified techniques would work equally well, but also a further inquiry into what the treaty power might reasonably be thought to achieve.

3. *Remedial Limits: State Sovereign Immunity.* — Some of the alternatives to commandeering may apply equally to state sovereign immunity. For one, the states may be encouraged to consent to the waiver of their immunity through the exercise of the spending power.<sup>323</sup> In addition, the federal government may at least arguably extract waivers by employing conditional preemption—at least so long as *New York's* limitation of that technique to the regulation of private parties does not pertain equally in the sovereign immunity setting.<sup>324</sup> State sovereign immunity

320. For example, the federal government's confidence in its ability to achieve programmatic ends may suffer because it cannot know whether its incentives will entice a sufficient number of participants.

321. One might argue against extending commandeering to the treaty power, I suppose, based less on any putative distinction than on the ground that such an extension would be intolerable as an incremental or cumulative matter. Conditional spending, for example, is an expensive alternative; similarly, one might perhaps imagine hiring federal officials to discharge domestic obligations, but adding international functions might be backbreaking. It appears unlikely, however, that any such argument would appeal to the Court. See *supra* note 305 (noting aversion to balancing in *Printz*).

322. Commandeering's alternatives were surely not envisioned as its equivalent in all respects. Moreover, the Court has never indicated that they were intended to allow the federal government to achieve everything it might through commandeering, nor have its decisions provided a measure of how much the federal government must be able to achieve.

323. See *supra* notes 296–298 and accompanying text; see also Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 Sup. Ct. Rev. 1, 60–61 (describing “draconian” alternatives).

324. See *supra* notes 311–313 and accompanying text. For suggestions that conditional preemption may be so employed, see Young, *supra* note 323, at 61–62.

doctrine also has its own, arcane set of loopholes. Foreign governments, like private parties, may seek relief for ongoing infringements,<sup>325</sup> obtain purely prospective, *Ex parte Young* relief,<sup>326</sup> or pursue damages from state officials in their individual capacities.<sup>327</sup> Equally significant, the federal government itself may sue state governments for damages,<sup>328</sup> or encourage the states to consent to suit by employing the spending power.<sup>329</sup>

Recent cases have essentially abandoned any effort to find a common element distinguishing these exceptions from the measures deemed inconsistent with state sovereign immunity.<sup>330</sup> Instead, the Court has indicated that whatever the provenance of these exceptions, their present value is functional: states not only remain legally obligated in principle to adhere to federal law, but even the Court's broadening construction of state sovereign immunity left open "ample means" for enforcing federal obligations like those imposed by treaties.<sup>331</sup> These exceptions, indeed, bear a symbiotic relationship with immunity's expansion. In arguing that immunity in state courts had been implicit, the Court in *Alden* asserted that "[h]ad we not understood the States to retain a constitutional immunity from suit in their own courts, the need for the *Ex parte Young* rule

325. See *Milliken v. Bradley*, 433 U.S. 267, 288–90 (1977) (ruling that requiring state defendants to pay costs of eliminating continuing inequality in school system does not violate Eleventh Amendment).

326. See *Alden v. Maine*, 527 U.S. 706, 757 (1999) (citing *Ex parte Young*, 209 U.S. 123 (1908)).

327. See *id.* (citing *Scheuer v. Rhodes*, 416 U.S. 232, 237–38 (1974); *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 462 (1945)).

328. See *id.* at 755 (citing *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328–29 (1934) (noting that the Eleventh Amendment does not bar suits by the United States or by other states)).

329. See *id.* (citing *South Dakota v. Dole*, 483 U.S. 203 (1987)).

330. See, e.g., Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 *Notre Dame L. Rev.* 859, 860 (2000) (arguing that the "existence of . . . alternative remedies suggests that the protections of the Eleventh Amendment are . . . requirements of form rather than substance"). In the alternative, the Court has sought to promote a unified vision of sovereign immunity itself, in so doing falling prey to what Professor Jackson has called "seductions of coherence." Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 *Rutgers L.J.* 691, 691 (2000).

331. *Alden*, 527 U.S. at 757 ("The principle of sovereign immunity as reflected in our jurisprudence strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States. Established rules provide ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause. That we have, during the first 210 years of our constitutional history, found it unnecessary to decide the question presented here suggests a federal power to subject nonconsenting States to private suits in their own courts is unnecessary to uphold the Constitution and valid federal statutes as the supreme law." (citations omitted)); *id.* at 755 ("Sovereign immunity, moreover, does not bar all judicial review of state compliance with the Constitution and valid federal law. Rather, certain limits are implicit in the constitutional principle of state sovereign immunity."); see also *id.* at 754–57 (detailing limits).

would have been less pressing, and the rule would not have formed so essential a part of our sovereign immunity doctrine.”<sup>332</sup>

As with the anticommandeering principle, it can be argued that the relatively limited value in the treaty context of the “ample” alternatives to state liability forged in domestic contexts means that state sovereign immunity doctrine should take a different shape.<sup>333</sup> The array of remedies is likely no broader. To be sure, Professors Berman, Reese, and Young have suggested that one mechanism, suits by the United States, may actually be *more* effective in the treaty context at avoiding the Eleventh Amendment’s strictures. *Principality of Monaco* sharply distinguished between suits by the federal government and suits by foreign governments, reasoning that state consent to the former was implicit in the constitutional scheme.<sup>334</sup> Congress could, then, authorize U.S. actions contesting state violations of U.S. treaties,<sup>335</sup> perhaps entrusting the United

332. *Id.* at 748.

333. See, e.g., Menell, *supra* note 135, at 1452, 1458, 1459–61 (suggesting that “hodge podge of potential remedies” against states that survive recent sovereign immunity decisions warrant exceptional treatment of congressional waivers implementing intellectual property treaty obligations).

334. See *supra* note 134 and accompanying text. Other explanations involved the relative dignity of permitting suits by the superior or coequal sovereigns, the need to permit a judicial alternative to intergovernmental conflict within the Union, and a mutual appreciation for the need for intersovereign cooperation. For an excellent discussion of the case law, see Evan H. Caminker, *State Immunity Waivers for Suits by the United States*, 98 Mich. L. Rev. 92, 101–13 (1999) [hereinafter *Caminker, State Immunity Waivers*].

335. The United States has been permitted to maintain suits when its only interest is in the vindication of federal law. *Sanitary Dist. v. United States*, 266 U.S. 405, 425–26 (1925) (concluding that the United States “has a standing in this suit not only to remove obstruction to interstate and foreign commerce . . . but also to carry out treaty obligations to a foreign power bordering upon some of the Lakes concerned, and, it may be, also on the footing of an ultimate sovereign interest in the Lakes”); Jonathan R. Siegel, *Congress’s Power to Authorize Suits Against States*, 68 Geo. Wash. L. Rev. 44, 67 (1999) (stating that federal government may bring suit against states that espouse claims of private parties who have been injured by state’s violation of federal law); Berman et al., *supra* note 10, at 1116 (emphasizing that federal government can bring suit to “vindicate its sovereign interest in the enforcement of federal law”); Caminker, *State Immunity Waivers*, *supra* note 334, at 114–15 (arguing that, under the broadest conception of government interest, federal government can bring suits against states to advance personal interests of citizens). *Sanitary District* did not involve state defendants or their municipal equivalents, and although other cases have, they do not directly raise Eleventh Amendment issues. See, e.g., *United States v. County of Arlington, Va.*, 669 F.2d 925, 928–29 (4th Cir. 1982) (rejecting argument that United States needed to join foreign government, given U.S. claims of interest in “protect[ing] the sovereign rights and interests of the United States,” “prevent[ing] embarrassment of relations between the United States and foreign nations,” and “enforc[ing] the laws of the United States”); *United States v. City of Glen Cove*, 322 F. Supp. 149, 152–53 (E.D.N.Y. 1971) (finding that United States has “vital interest in the conduct of foreign affairs and the fulfillment of treaty obligations,” and so has standing despite absence of pecuniary interest in outcome of case), *aff’d per curiam*, 450 F.2d 884 (2d Cir. 1971).

As Professor Siegel notes, while proceeding without statutory authorization has been expressly countenanced, it arguably may be sustained only where the United States has an

States to recover damages,<sup>336</sup> and might even try assigning the interests in suit to the parties directly suffering from the breach, so as to permit them to sue in the national government's stead.<sup>337</sup> Professor Berman and his colleagues suggest that TRIPs and similar international agreements may be "uniquely viable" candidates for redress by U.S. suits because the number of breach cases "may be sufficiently small to minimize resource concerns," and "the political incentives to provide a remedy may be particularly high."<sup>338</sup> But however appealing the case for a hand-picked treaty, these scale advantages would be lost if U.S. suits were the universal solution for treaty-related sovereign immunity issues, and the ability of the

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interest that would suffice to confer standing on a private party. See Siegel, *supra*, at 68 n.162 (describing, without resolving, controversy). Compare *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 285–87 (1888) (indicating that where "it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought," specific statutory authorization for suit must be provided), with *Sanitary Dist.*, 266 U.S. at 426 ("The Attorney General by virtue of his office may bring this proceeding and no statute is necessary to authorize the suit."). Even on this view, the potential liability of the United States for reparations may under some circumstances be sufficient to permit suit even in the absence of congressional authorization.

336. Existing statutory schemes like the Fair Labor Standards Act permit the United States to sue the states in order to recover wages owed employees. The Supreme Court has noted the possibility in dicta, see *Alden*, 527 U.S. at 759–60 (distinguishing between "a suit by the United States on behalf of the employees and a suit by the employees," and stating that "the States have consented to suits of the first kind"); *Employees of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 285–86 (1973) (noting statutory power of the Secretary of Labor to recover wages for state employees), and lower courts have rejected Eleventh Amendment challenges to suits by the Secretary of Labor against states. See, e.g., *Marshall v. A & M Consol. Indep. Sch. Dist.*, 605 F.2d 186, 188–90 (5th Cir. 1979). This suggests that the United States may be able to espouse the interests of those damaged by state treaty breaches, though it may be questioned whether a congressional scheme of such breadth would be viewed as indulgently. Compare Siegel, *supra* note 335, at 67–70 (espousing espousal theory), with Caminker, *supra* note 334, at 118–19 (noting principles under which FLSA-type espousal might be maintained, but noting that "[p]erhaps, upon further reflection, the Court would conclude that the states' immunity from 'nominal interest' suits brought by sister states should extend to analogous suits brought by the United States as well, the unique presence of an intangible regulatory interest or other intangible interests notwithstanding").

337. Compare Siegel, *supra* note 335, at 73–94 (describing "mechanisms that Congress could use to encourage and facilitate the exercise of the federal government's power to espouse private claims against states"), with Berman et al., *supra* note 10, at 1117–20 (concluding that *qui tam* mechanism for circumventing state sovereign immunity, at least outside of circumstances in which the United States had its own pecuniary interest, is of "doubtful constitutionality"), and Caminker, *State Immunity Waivers*, *supra* note 334, at 94 n.11 & *passim* (indicating that *qui tam* exception should not be construed so broadly as "to swallow the rule").

338. Berman et al., *supra* note 10, at 1194; cf. Siegel, *supra* note 335, at 73 (noting, in general, that "[l]ack of resources, partiality toward states, or disagreement with particular lawsuits could lead federal officials not to sue, rendering the remedial mechanism ineffective"); *id.* at 73–103 (elaborating); Berman et al., *supra* note 10, at 1115–21 (describing limits to employing U.S. suits as an alternative means of enforcing intellectual property rights in general).

United States to effectively espouse the interests of foreign nations would become even more dubious.<sup>339</sup>

The graver problem is that courts have been insensitive to marginal encroachments on remedial alternatives. The Supreme Court has not been shy about narrowing the exceptions even as other decisions widen the application of sovereign immunity—suggesting that the inferiority of alternative remedies in the treaty context might not be a deterrent. The winnowing of *Ex Parte Young* has perhaps been the most notable,<sup>340</sup> but the alternative of vesting jurisdiction in a legislative (or international) tribunal is also far less promising after *Alden* and *Federal Maritime Commission* deracinated any forum-allocation interpretation of the Court's case law.<sup>341</sup> And courts have thus far shown little reluctance in applying those narrowing constructions to the treaty power as well. Lower courts have

339. The United States undoubtedly has an incentive to avoid foreign disputes, and may be buoyed by domestic interest groups as well. Berman et al., *supra* note 10, at 1194 & n.713. But see *id.* at 1194 n.713 (observing that “to the extent [the] burden of state regulation falls on interests outside the state it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected” (quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767 n.2 (1945))). But the fact remains that for many treaties domestic enforcement is more of an obligation suffered—the unwanted half of a trade—than something in which the national government has a sovereign and self-sustaining interest. Past experience, certainly, suggests little basis for confidence in its adequacy. Both U.S. and foreign officials were deeply dissatisfied with the pre-Foreign Sovereign Immunities Act system for entrusting the determination of their immunity to the State and Justice Departments, and while suits by the United States would not involve the same issues about interfering with the judicial function, the political and logistical complications would remain. See Goldsmith, *supra* note 5, at 1708–10; Swaine, *Negotiating Federalism*, *supra* note 2, at 1257–58. However remote, entrusting to executive discretion the enforcement of interests arising under U.S. treaty obligation also raises the possibility that the exercise of that discretion will give rise to complaints about discriminatory observance of U.S. treaty obligations.

340. See *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) (holding that a tribe's action to enjoin state officials from continuing to exercise jurisdiction over lands claimed by the tribe was “functional equivalent” of a quiet title action against the state, and thus ineligible for *Ex Parte Young* exception to Eleventh Amendment sovereign immunity); *id.* at 270–80 (opinion of Kennedy, J., joined by Rehnquist, C.J.) (characterizing *Ex Parte Young* doctrine as dependent either on the absence of a state forum or on an interpretation of federal law, and urging case-by-case balancing and accommodation of state interests in maintaining immunity); *Seminole Tribe v. Florida*, 517 U.S. 44, 73–76 (1996) (holding *Ex Parte Young* inapplicable where Congress had established a detailed remedial scheme, and otherwise-permissible prospective relief would exceed scheme's limitations); Vicki C. Jackson, *Seminole Tribe*, the Eleventh Amendment, and the Potential Evisceration of *Ex Parte Young*, 72 N.Y.U. L. Rev. 495 (1997); Carlos Manuel Vázquez, *Night And Day: Coeur d'Alene, Beard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 *Geo. L.J.* 1 (1998) [hereinafter Vázquez, *Night and Day*].

341. See Vázquez, *Sovereign Immunity*, *supra* note 152, at 1933 (“In *Alden* . . . the Court directly addressed the forum-allocation view and definitively rejected it.”). But see Marc D. Falkoff, Note, *Abrogating State Sovereign Immunity in Legislative Courts*, 101 *Colum. L. Rev.* 853 (2001) (arguing that notwithstanding *Alden*, Congress could abrogate state sovereign immunity from suits in legislative courts established in the executive branch).

applied the dwindling exception for prospective relief to the Vienna Convention on Consular Relations, albeit with attendant criticism.<sup>342</sup> Treaty cases have been in the vanguard of those reading narrowly the exception for ongoing violations.<sup>343</sup>

These developments illustrate a problem touched on in connection with the anticommandeering principle. While the Court has communicated that *some* viable remedy must be provided, it has not provided any clear account of what adequate remediation is, making it difficult to assess whether the array of alternatives available in the treaty context are adequate.<sup>344</sup> Indeed, while state sovereign immunity doctrine has exhibited concern with maintaining adequate means of enforcing federal law, the Court has simultaneously professed concern about permitting indirect attacks on state sovereign immunity, and thus is unlikely to validate through that doctrine's exceptions its total eclipse.<sup>345</sup>

4. *Summary: The New Federalism's Borders.* — The objectives of international and constitutional doctrine, at bottom, are not so very far apart. International law obliges nations to explore the limits of their constitutional structure to comply with treaties. Constitutional doctrine, for its part, has sometimes deferred to international law, and such deference seems incorporated by the very terms of the new federalism. As explained above, the Court's cases inherit *Missouri v. Holland's* concern for

342. See *Republic of Paraguay v. Allen*, 134 F.3d 622, 628–29 (4th Cir. 1998) (citing *Idaho v. Coeur d'Alene Tribe of Idaho* in holding that suit ultimately seeking the voiding of a final sentence and conviction was genuinely retrospective, rather than prospective, in nature); *United Mexican States v. Woods*, 126 F.3d 1220, 1223–24 (9th Cir. 1997) (rejecting argument that treaty-based challenges to conviction and sentence give rise to prospective relief under *Ex parte Young*). One critic argued that “[w]hen two courts of appeals conclude that a court order halting an execution scheduled to take place in the future is retrospective relief barred by the Eleventh Amendment, and the Supreme Court finds nothing wrong with that conclusion, something is awry.” Vázquez, *Night and Day*, supra note 340, at 6.

343. See *Breard v. Greene*, 523 U.S. 371, 377–78 (1998) (per curiam) (distinguishing *Milliken* based on supposed absence of a causal link, reasoning that “[t]he failure to notify the Paraguayan Consul occurred long ago and has no continuing effect”); *Republic of Paraguay*, 134 F.3d at 628 (requiring, for *Milliken* purposes, that the violation be ongoing at the time the action is filed). But see Paust, *Breard*, supra note 132, at 695 (describing reasoning in *Breard* and similar lower court decisions as “bizarre”).

344. Professor Bandes makes somewhat the same point in addressing what she terms the “supremacy strain” of Eleventh Amendment theory, emphasized by Professor Vázquez, and in doing so draws on earlier responses in the purely domestic context. See Bandes, supra note 130, at 750–51 (citing Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 *Notre Dame L. Rev.* 953, 986–87 (2000)). But see Vázquez, *Treaties*, supra note 78, at 718 (emphasizing doctrinal preoccupation with providing the “necessary judicial means to assure compliance” with federal obligation).

345. E.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1875 (2002) (“Moreover, it would be quite strange to prohibit Congress from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings . . . but permit the use of those same Article I powers to create court-like administrative tribunals where sovereign immunity does not apply.” (citation omitted)).

allowing the effective expression of powers entrusted to the federal government, while at the same time regarding federal authority touching on state prerogatives most skeptically when it appears unnecessary in light of other constitutional mechanisms. The underlying tension should be familiar to those conversant with the ambivalence of the Necessary and Proper Clause.<sup>346</sup> But it is also not wholly alien to international law: just as international obligations and the respect foreign sovereigns are owed under them ought not be compromised by national constitutions where an alternative tack is available, the obligations owed *state* sovereigns under the constitutional scheme ought be respected when it is not necessary for the national government to trammel them.

Because the strength of the Court's commitment to developing workable constitutional alternatives is uncertain in degree, and the relative utility of the previously acknowledged alternatives in the treaty context (and otherwise) remains obscure, it is unclear whether the Court would regard emerging and potential difficulties in U.S. treaty administration as a basis for staunching the new federalism. But the interpretive approach commended by international and constitutional doctrine also requires exploring whether *other* constitutional alternatives exist, or might be teased from the Constitution in order to accommodate the interplay of international law and federalism. The new federalism cases suggest that particular attention should be paid to means by which the states may be said to constitutionally consent (as they did in implicitly consenting to immunity-threatening suits by sister states or by the United States),<sup>347</sup> or where the alternative itself incorporates state consent (as where a state accepts conditional spending or preemption).<sup>348</sup> Part III attempts to resuscitate one such means.

### III. MARRYING TREATIES WITH AMERICAN FEDERALISM

Like a vampire, or any other horror-movie monster destined for sequels, the controversies of foreign relations federalism have a habit of arising, expiring, and then popping up again just when their adversaries

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346. See U.S. Const. art. I, § 8 (providing Congress with the authority “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof”). Compare *Printz v. United States*, 521 U.S. 898, 923 (1997) (rejecting Necessary and Proper Clause as basis for redeeming the power to commandeer state officials, and describing it as “the last, best hope of those who defend ultra vires congressional action”), with *New York v. United States*, 505 U.S. 144, 158–59 (1992) (citing Necessary and Proper Clause in explaining broad powers of Congress, including under the Commerce and Spending Clauses); compare also *Hills*, supra note 268, at 938–44 (suggesting that anticommandeering rule might be reconceived based on the Necessary and Proper Clause), with Halberstam, supra note 252, at 222 & n.31 (noting “considerable tension” between *Hills*'s argument and *McCulloch v. Maryland*).

347. See supra note 134 and accompanying text (discussing *Principality of Monaco*).

348. See supra notes 296–298 and accompanying text (discussing anticommandeering principle and its exceptions).

have relaxed.<sup>349</sup> The disputed role of states in conducting foreign relations, for example, bloomed during the Civil War, during the Cold War, and again during recent discussion of the Massachusetts law on Burma.<sup>350</sup> The states' authority to legislate free from treaty usurpation, likewise, played a role in other incidents involving the treatment of Asian immigrants by the western states, the groundswell of opposition in the 1950s to human rights treaties, and recent trade legislation.<sup>351</sup>

Each generation also has a habit of reviving potential solutions,<sup>352</sup> and though the anticommandeering principle and state sovereign immunity are newly prominent parts of the controversy, the old controversies provided the germ of an idea for their peaceful resolution. During the 1920s, a small and ineffectual campaign to reconcile American federalism with U.S. treaty objectives highlighted the potential use of foreign compacts between the states and foreign nations. If significantly modified, and assured interpretive space by a presumption in favor of facilitating the conclusion and observance of treaties, such a proposal has the potential to substantially ameliorate the new federalism's constraints on the treaty power.

#### A. *Wigmore's Solution*

John Henry Wigmore is surely best known for his evidence treatise.<sup>353</sup> But his range of interests was remarkably broad,<sup>354</sup> and he was active his entire career in the areas of comparative and international law.<sup>355</sup> Just prior to World War I he turned his attentions in earnest to

349. Speaking of controversies like those involving the treaty power, Professor Golove put the point in somewhat more adult terms: "Unable to synthesize opposing precepts, we visit and revisit certain issues in an endless cycle. Each generation marches forward heedless, and sometimes only dimly aware, of how many times the battle has already been fought. Even the peace of exhaustion achieves only a temporary respite." Golove, *Treaty-Making and the Nation*, supra note 14, at 1076-77.

350. For a brief guide to each controversy, see Swaine, *Negotiating Federalism*, supra note 2, at 1218-20 (discussing Negro Seamen controversy); id. at 1143-45 (Cold War controversies); id. at 1132-33 (Massachusetts-Burma controversy).

351. See Golove, *Treaty-Making and the Nation*, supra note 14, at 1246-54 (describing collision between treaty power and California, Oregon, and Washington legislation); id. at 1273-78 (Bricker Amendment); id. at 1306-08 (NAFTA and the WTO).

352. See, e.g., David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. Pa. L. Rev. 487, 487-546 (1999) (resuscitating Thomas J. Cooley's conception of a structured right to local self-government).

353. See John Henry Wigmore, *Evidence in Trials at Common Law* (4th ed. 1961 & Supp. 2002) (1904). One of the addresses at his memorial service described it as, by consensus, "the greatest Anglo-American lawbook that ever saw the light." John Henry Wigmore, 38 Ill. L. Rev. 1, 2 (1943) (remarks of Robert W. Millar).

354. See John Henry Wigmore, supra note 254, at 1-2 (remarks of Robert W. Millar); id. at 12, 13 (remarks of Charles P. Megan).

355. Dean Wigmore began his academic career teaching in Japan, see *The Columbia Encyclopedia* 3077 (6th ed. 2000), and his first book was concerned with comparative election law, see John H. Wigmore, *The Australian Ballot System as Embodied in the Legislation of Various Countries* (2d ed. 1889). For examples of later work, see John H.

the problems confronting America as a federal system attempting to participate in world affairs, particularly those relating to the unification of private law. In Wigmore's view, the U.S. federal system made it "a self-inflicted cripple" in foreign relations.<sup>356</sup> National legislative authority was too narrow, and a more expansive treaty power "doubtful," being properly limited to (truly) interstate matters.<sup>357</sup> In this respect, it appeared, Wigmore agreed with the view taken by U.S. representatives to several international conferences that the United States was hamstrung by its Constitution.<sup>358</sup>

The only solution (and Wigmore plainly conceived it as partial, and a temporary expedient) was for the federal government to make treaties addressing the conflict of laws, and otherwise for Congress to give advance consent that a state "may make a compact with one or more foreign powers" on specified subjects like commercial paper—on "terms to be independently determined by that state."<sup>359</sup> Then when a relevant international conference arose, the states would send their own delegates, participate in negotiations, and return to present their respective legislatures with drafts for ratification. Ratification by even a few states would "induce, and in some cases . . . compel" others to follow suit.<sup>360</sup>

Wigmore made much the same case in a 1921 committee report he drafted for the National Conference of Commissioners on Uniform State Laws.<sup>361</sup> The salient intervening development, of course, was the Su-

Wigmore, *A Guide to American International Law and Practice* (1943); John Henry Wigmore, *A Panorama of the World's Legal Systems* (3 vols. 1928); John H. Wigmore, *The Congress of Comparative Law*, 23 *A.B.A. J.* 783 (1937) (reporting as chairman of the committee of delegates, International and Comparative Law Section, ABA).

356. John H. Wigmore, *Problems of World-Legislation and America's Share Therein*, 4 *Va. L. Rev.* 423, 423 (1917) [hereinafter *Wigmore, Problems*]; accord John H. Wigmore, *The International Assimilation of Law—Its Needs and Its Possibilities from an American Standpoint*, 10 *Ill. L. Rev.* 385, 393–95 (1916) [hereinafter *Wigmore, International Assimilation*].

357. See *Wigmore, Problems*, supra note 356, at 431; see also *Wigmore, International Assimilation*, supra note 356, at 395–96.

358. See *Wigmore, Problems*, supra note 356, at 430–31. Wigmore cited what he termed the "humiliating" (but in his view, substantively accurate) confession of an American delegate to the 1912 Hague Conference on commercial paper that the "Federal Government has no authority to legislate regarding bills of exchange." *Id.* at 431. For other examples, see Kurt H. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 *U. Pa. L. Rev.* 323, 323–34 (1954).

359. *Wigmore, Problems*, supra note 356, at 433; see also *Wigmore, International Assimilation*, supra note 356, at 396–97.

360. *Wigmore, Problems*, supra note 356, at 433. Wigmore's earlier writing did not emphasize the leadership of a few states, and there is no indication that he perceived it necessary to limit participation.

361. Report of the Committee on Inter-State Compacts, in *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Thirty-First Annual Meeting* 299 (1921) [hereinafter 1921 Report]. The 1921 report distinguished between accords negotiated in an international conference and those subject to bilateral negotiations. As to the former, the mechanics had been changed slightly—congressional

preme Court's 1920 decision in *Missouri v. Holland*. Wigmore and his committee remained convinced, however, that the treaty power would suffice. First, the report reckoned, political considerations would inhibit the State Department from addressing any field traditionally regarded as belonging to the states. Second, continuing doubts attending the treaty power's scope would impair its use, since in diplomatic negotiations with conflicting national interests, "what counts is *known and unquestioned power*. And the only way for the Federal negotiators to possess such powers is to receive them by State Compacts."<sup>362</sup>

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consent was to be secured after the conclusion of any convention, and matters initiated by a call by the Secretary of State to appoint delegates, preferably after being prompted by one or more governors—and certain details added, like the manner in which states would coordinate representations at the convention and the assertion that a consented-to and ratified convention would be regarded as the law of the state. *Id.* at 346–47. By such means, it was thought, a half dozen of the larger states could reach agreement on matters like commercial arbitration, judgments and execution, foreign corporations, or commercial paper. *Id.* at 346.

The procedure for bilateral negotiations, on the other hand, was comparatively simple: confronted with a disagreement between the United States and another nation on which the federal government appeared to lack constitutional authority, two or more states would authorize their governors to sign any treaty that the President would negotiate through the Secretary of State, and would then be bound by the treaty upon ratifying it. *Id.* at 347–48.

362. *Id.* at 348. Wigmore made the same points in a belated exchange regarding his earlier article, but added examples of each phenomenon. See John H. Wigmore, A Comment on Mr. Lee's Suggestions, 23 *Ill. L. Rev.* 734, 734–36 (1929) [hereinafter Wigmore, A Comment].

Subsequent events bore out his concerns about State Department preferences, and perhaps even their genuine doubts about constitutionality, but offered less support for foreign concerns—at least in the field of private international law. After World War I, American nation-states created an International Commission of Jurists to draft a Code of Private International Law. In successive meetings, U.S. representatives dithered over whether the United States could, or should, adopt the proposed code, given issues as to the federal government's jurisdiction. The code's drafter, a distinguished Cuban jurist, challenged (with specific counterexamples) any suggestion that the federal government lacked the authority under the treaty power, but ultimately to no avail. The United States ultimately abstained, stating:

The Delegation of the United States of America regrets very much that it is unable at the present time to approve the Code . . . as in view of the Constitution of the United States of America, the relations among the States members of the Union and the powers and functions of the Federal Government, it finds it very difficult to do so. The Government of the United States of America firmly maintains its intention not to dissociate itself from Latin America, and therefore . . . will make use of the privilege extended by this article in order that, after carefully studying the Code in all its provisions, it may be enabled to adhere to at least a large portion thereof. For these reasons, the Delegation of the United States of America reserves its vote in the hope, as has been stated, of adhering partly or to a considerable number of the Code's provisions.

Sixth International Conference of American States, 1928, in *The International Conferences of American States, 1889–1928*, at 371 (James Brown Scott ed., 1931). The U.S. position was discussed skeptically at the next meeting of the American Society of International Law. See 23 *Am. Soc'y Int'l L. Proc.* 33, 33–54 (1929). For an extended discussion of the code's negotiation, see Nadelmann, *supra* note 358, at 335–39.

Wigmore's proposal received little attention for a decade,<sup>363</sup> then was quietly discarded. After his proposal was mentioned at the 1929 annual conference of the American Society of International Law, one discussant noted that after *Holland* the treaty power was more substantial than had been reckoned,<sup>364</sup> and another cited the danger of diversity that might result if individual states entered into compacts.<sup>365</sup> A third carefully distanced himself from Wigmore's proposal, advocating that the United States could instead "lay[ ] down principles of private international law with the understanding that they would make an effort in good faith to obtain suitable legislation in the individual states carrying out the principles of the convention."<sup>366</sup> But no one advocated Wigmore's position. By 1932, another committee reporting to the National Conference of Commissioners on Uniform State Laws had discarded it too.<sup>367</sup>

Wigmore's campaign never revived—foreign compacts have rarely been used, with perhaps the last such agreement formally recognized by Congress in 1957<sup>368</sup>—and to the extent his campaign is remembered it is not altogether fondly.<sup>369</sup> Its failure is attributable to two features, one

363. He alluded to this in responding to a critic. See Wigmore, A Comment, *supra* note 362, at 734 (expressing gratitude that the subject "has at last come to receive encouraging attention").

364. 23 Am. Soc'y Int'l L. Proc. 33, 39–40 (1929) (remarks of Quincy Wright). Professor Wright acknowledged, however, that political limitations might still hamper the Senate. He proposed a method by which the United States would state, within a treaty text, that the treaty would not apply within any state until the President had so declared, "thus leaving the President free to withhold such declaration until the legislature of a particular State had brought its legislation into conformity with the convention." *Id.* at 40. According to Wright, such a strategy was not constitutionally required, but would facilitate Senate approval. *Id.*

365. *Id.* at 39 (remarks of Howard T. Kingsbury).

366. *Id.* at 38 (remarks of Arthur K. Kuhn).

367. Report of the Committee on Uniform Act for Compacts and Agreements Between the States, in 1932 Handbook of the National Conference of Commissioners on Uniform State Laws 280, 292–94. The report indicated that "[t]he conception . . . [was] a significant one, but one which has as yet failed to achieve more than academic distinction": The treaty power had been opened up by *Holland*, but political obstacles were now at the fore, including both a regard for state prerogatives and a disdain for the civil law enthusiasms of uniform legislation. *Id.*

368. See Act of Aug. 14, 1957, Pub. L. No. 85-145, 71 Stat. 367 (providing consent for New York to enter into agreement with Canada to operate bridge between Buffalo and Fort Erie, Ontario) (repealing Act of July 27, 1956, ch. 574, § 715, 70 Stat. 701 (amending H.R.J. Res. 315, 73d Cong., 48 Stat. 662 (1934))); see also Northeastern Interstate Forest Fire Protection Compact, Pub. L. No. 81-129, 63 Stat. 271 (1949), amended by Act of May 13, 1852, ch. 267, 66 Stat. 71 (authorizing participation by Canada), reprinted as amended in N.Y. Env'tl. Conserv. Law § 9-1123 (McKinney 1997) (reflecting 1963 and 1972 amendments). See generally Peter R. Jennetten, Note, State Environmental Agreements with Foreign Powers: The Compact Clause and the Foreign Affairs Power of the States, 8 Geo. Int'l Env'tl. L. Rev. 141, 163–72 (1995) (describing compacts with and without congressional consent).

369. See Golove, Treaty-Making and the Nation, *supra* note 14, at 1241 n.550 (describing committee proposal as a "radical suggestion" which "is nevertheless a powerful reminder of the difficulties into which the states' rights view inevitably leads").

historically determined and the other less so. First, the doctrinal necessity of resorting to compacts was unclear in the wake of *Missouri v. Holland*, which suggested that politics, rather than the Constitution, was the dominant constraint on the exercise of the treaty power. For the reasons discussed in Part I, that is no longer so obvious.

Second, and equally important, Wigmore's proposed use of compacts was intended to address a relatively primitive need—that for *any* means by which the United States could participate in world affairs—without particular heed to optimizing the national interest. In this respect, the cure may have seemed worse than the disease, particularly for those assuming that the national government's problem was primarily one of will. Sending states to conduct negotiations on their own behalf plainly posed high risks. Assuming the negotiating process was not wholly ineffectual, and produced neither a diplomatic imbroglio nor an agreement setting back the collective interest, the result would have multiplied the ratification process—and at the cost of displacing the United States at the bargaining table.<sup>370</sup>

The most proximate descendants of Wigmore, indeed, are those arguing overtly for enabling state participation as an end in itself.<sup>371</sup> Such arguments have considerable normative appeal, and perhaps strike the right balance between local and national interests. But their prescriptions address a different need than Wigmore perceived, and likewise skirt the focus here: that is, whether the new federalism doctrines genuinely constrain the national government in its exercise of treaty power. As the next section demonstrates, state autonomy is not a central or even intrinsic feature of the power to enter into foreign compacts, at least as that has been construed by the Supreme Court. Case law needed to evolve, and the proposal needed to be tweaked, but there is promise to Wigmore's mechanism after all.

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370. For a contemporary example of the pitfalls, consider the process leading to the conclusion of the 1999 Pacific Salmon Agreement with Canada, in which the United States, for political and legal reasons, gave a place at the negotiating table to several states. See David A. Colson, *The Impact of Federalism and Border Issues on Canada-U.S. Relations: Pacific Salmon Treaty*, 27 *Can.-U.S. L.J.* 259, 262–65 (2001); Donald McRae, *The Negotiation of the 1999 Pacific Salmon Agreement*, 27 *Can.-U.S. L.J.* 267, 269–72 (2001).

371. See, e.g., Jennetten, *supra* note 368, at 173 (“This note advocates a reading of the case law that maximizes the states’ power to conclude binding agreements with foreign powers and presents examples and policy arguments to support this position. States should continue to exercise their inherent powers to negotiate and conclude covenants with foreign powers.”); Powell, *supra* note 27, at 252 (describing dialogic approach as “prescriptive in that it encourages state and local participation even where none exists and posits a constitutional analysis about this participation”); *id.* at 254 (indicating preference for “localizing” international human rights law as a supplement to federal activity); Spiro, *The States and International Human Rights*, *supra* note 18, at 587–88 (arguing that assigning international human rights responsibilities to political subdivisions would “raise subnational consciousness of the nature and gravity of international law in general”); *cf.* Resnik, *supra* note 19 (urging consideration of interstate compacts as tool for reinventing federalism to address global issues).

## B. Reviving Foreign Compacts

1. *Compacts as a Vehicle for State Authority.* — While the initial campaign for foreign compacts was stalling, then-Professor Felix Frankfurter and Professor James M. Landis published an influential article extolling the use of interstate compacts to resolve the conflicts arising from dual federalism.<sup>372</sup> Amid a turgid classification of compacts and description of their utility for electric power development,<sup>373</sup> the article's celebration of the "imaginative adaptation of the compact idea" to "[t]he overwhelming difficulties confronting modern society" proved infectious,<sup>374</sup> and came to stand for the proposition that compacts were themselves adjustable instruments for interstate "adjustment."<sup>375</sup>

Their position that states had abundant authority for such exercises required several glosses on the Compact Clause, including some that had already been tendered by the Supreme Court. It was agreed, for example, that there was no self-evident explanation for the Constitution's distinction between "agreements" or "compacts" (compacts, for short), which are permitted to states subject to congressional consent, and "treaties," "alliances," or "confederations" (treaties, for short), which are flatly prohibited.<sup>376</sup> As the Supreme Court confessed later, the meaning of any such distinction was lost to the ages: not only was the Framers' understanding uncertain,<sup>377</sup> but perhaps the most influential approximation,

372. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 *Yale L.J.* 685 (1925). Their article in fact acknowledged the Wigmore committee's study. *Id.* at 691 & n.26.

373. See *id.* at 696–708 (providing typology of compacts); *id.* at 708–29 (discussing compacts for electric power development). The article was followed by an appendix of compacts that was nearly as long as the main text.

374. *Id.* at 729. See generally Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 67 *Mo. L. Rev.* (forthcoming 2003) (unpublished draft on file with author) (citing above-quoted passages, and explaining how Frankfurter and Landis "furnished the intellectual apparatus—and the soothing rhetoric of cooperation, flexibility, and localism—that later generations of scholars and judges would put to that purpose").

375. *Seattle Master Builders v. Pac. N.W. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1364 (9th Cir. 1986) ("An unusual feature of a compact does not make it invalid. A leading article by Professors Frankfurter and Landis sets the tone for the modern use of compacts. It encourages new uses.").

376. Frankfurter & Landis, *supra* note 372, at 695 n.37. Compare U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the consent of Congress . . . enter into any agreement or compact with another state or with a foreign power."), with *id.* art. I, § 10, cl. 1 (prohibiting states from entering into any treaty, alliance, or confederation). As noted below, the Supreme Court has abandoned any pretense to the exact use of these terms, and long ago began to treat the terms within each category as synonyms. See *Virginia v. Tennessee*, 148 U.S. 503, 520 (1893) (noting that "we do not perceive any difference in the meaning" of compact or agreement, "except that the word 'compact' is generally used with reference to more formal and serious engagements than is usually implied in the term 'agreement'").

377. As explained in *Multistate Tax Commission*,

The Framers clearly perceived compacts and agreements as differing from treaties. The records of the Constitutional Convention, however, are barren of any clue as to the precise contours of the agreements and compacts governed by

that given by Justice Story's *Commentaries on the Constitution*,<sup>378</sup> has been misunderstood by the courts at least since the Supreme Court's dicta in the 1893 decision in *Virginia v. Tennessee*.<sup>379</sup> Given that precedent—and, Frankfurter and Landis argued, the political sensitivity of the question<sup>380</sup>—the distinction between permissible compacts and impermissible treaties was one the states could negotiate with Congress.<sup>381</sup>

the Compact Clause. This suggests that the Framers used the words "treaty," "compact," and "agreement" as terms of art, for which no explanation was required and with which we are unfamiliar. Further evidence that the Framers ascribed precise meanings to these words appears in contemporary commentary.

Whatever distinct meanings the Framers attributed to the terms in Art. I, § 10, those meanings were soon lost.

*United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 460–63 (1978).

378. Justice Story regarded the term "treaties" to mean military or political accords wholly denied the states, as opposed to "mere private rights of sovereignty" or "internal regulations" for bordering states. 3 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1395–1397 (Fred B. Rothman & Co. 1991) (1833). Justice Story's view was but one, and others were available to the Framers. Vattel, for example, is supposed to have distinguished treaties as made "either for perpetuity or for a considerable period" and "agreements, conventions, and pactions," which "are perfected in their execution once for all." *Multistate Tax Comm'n*, 434 U.S. at 462 n.12 (quoting Vattel, and arguing that Vattel and the Framers distinguished compacts less on temporal grounds than as dispositive agreements, transferring rights as in boundary settlements and cessions, as opposed to nondispositive agreements like treaties); cf. Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?*, 3 U. Chi. L. Rev. 453, 457–64 (1936) (describing views of Vattel and others potentially influencing the Framers).

379. As noted previously, Justice Story denominated certain accords as political in character in order to identify those agreements as "treaties" absolutely prohibited to the states under the Treaty Clause. See *supra* note 378. But as recounted in *Multistate Tax Commission*, the Supreme Court of Georgia, followed by the U.S. Supreme Court in *Virginia v. Tennessee*, misunderstood Justice Story to be describing political accords that would require congressional approval under the Compact Clause—and thereby, indirectly, identifying the complementary class of accords that required no approval at all. *Multistate Tax Comm'n*, 434 U.S. at 459–72 (tracing development of jurisprudence); see also *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893) (relying upon Story's discussion of federal treaty powers in concluding that congressional permission under the Compact Clause is only necessary when interstate agreements "may encroach upon or interfere with the just supremacy of the United States"); *Union Branch R.R. Co. v. E. Tenn. & G.R. Co.*, 14 Ga. 327, 339 (1853) (holding that Compact Clause governed only those agreements "which might limit, or infringe upon a full and complete execution by the General Government, of the powers intended to be delegated by the Federal Constitution").

380. Frankfurter & Landis, *supra* note 372, at 695 n.37 ("There is no self-executing test differentiating 'compact' from 'treaty.' The attempt [by Justice Story and others to develop an analytical classification] is bound to go shipwreck for we are in a field in which political judgment is, to say the least, one of the important factors." (citation omitted)).

381. See Henkin, *Foreign Affairs*, *supra* note 2, at 153 ("[T]he different constitutional treatment of the two categories of agreement has lost all practical significance. It is difficult to believe that Congress would withhold consent from an agreement of which it approved because it deemed the agreement to be a treaty and therefore forbidden, or that the courts would invalidate on that ground an agreement to which Congress consented."). This is consistent, too, with the customary deference paid by courts to the potential distinction between treaties and congressional-executive agreements, which would be founded on much the same textual basis. Cf. Detlev F. Vagts, *Editorial Comments*, *The*

Some kinds of agreements, moreover, were held to fall below the threshold requiring congressional approval—namely those, as the Court came to clarify, that did not increase the political power of the states or threaten to “encroach upon or interfere with the just supremacy of the United States.”<sup>382</sup> To the Court, the relatively narrow national interest in monitoring state activity, combined with the impossibility of supervising everything, meant that the Compact Clause “could not be read literally.”<sup>383</sup>

Finally, not only was Congress entrusted with the distinction between permissible compacts and impermissible treaties, but it also deserved great latitude in the means by which it exercised authority over compacts.<sup>384</sup> The Court held, for example, that congressional consent to a compact need not be explicit, but could be inferred from action consis-

Exclusive Treaty Power Revisited, 89 Am. J. Int’l L. 40, 40–41 (1995) (concluding that appropriate division between treaties and congressional-executive agreements is nonjusticiable because, in part, the textual distinction between kinds of agreements that might be derived from Article I, Section 8 is not sufficiently plain).

382. See also *Multistate Tax Comm’n*, 434 U.S. at 471 (reaffirming holding that “application of the Compact Clause is limited to agreements that are “directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States’” (quoting *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976) (quoting *Virginia v. Tennessee*, 148 U.S. at 519))); *Virginia v. Tennessee*, 148 U.S. at 519 (in dicta); see also *Wharton v. Wise*, 153 U.S. 155, 168 (1894) (explaining, in dicta, that “[t]he terms “agreement” or “compact” taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control” (quoting *Virginia v. Tennessee*, 148 U.S. at 517–18)).

Frankfurter and Landis did not speak to the wisdom of this test, but Michael Greve has argued that they would firmly have opposed it, given their emphasis on congressional consent as a means for protecting the national interest. See Greve, *supra* note 374, at 8 & n.23. The cheap answer is that Frankfurter and Landis stressed Congress’s role in distinguishing between prohibited treaties and the “permissive class” of compacts, and in exercising its consent authority over compacts, but they did not suggest that Congress was concerned with agreements that might be deemed to fall outside the Compact Clause altogether. See Frankfurter & Landis, *supra* note 372, at 694–95. What is more, their occupation with agreements that affected the “national interest,” *id.* at 695, is not dissimilar to the test espoused in *Virginia v. Tennessee*. Indeed, they let pass without criticism instances in which the states had fashioned arrangements without securing congressional consent. See *id.* at 749–54.

383. See *Multistate Tax Comm’n*, 434 U.S. at 459–60.

384. See *Green v. Biddle*, 21 U.S. (8 Wheat.) 69, 85–86 (1823) (observing that “the constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon according to the ordinary rules of law, and of right reason”); Frankfurter & Landis, *supra* note 372, at 695 (concluding that “Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions”).

tent with an intention to consent,<sup>385</sup> and that consent may precede or follow a compact's formation.<sup>386</sup> By according Congress considerable flexibility, the Court in effect ensured that Congress could in turn show flexibility toward the states, enabling their use of novel and far-reaching compacts.<sup>387</sup>

2. *Compacts as an Enumerated Power.* — As Frankfurter and Landis would have hoped, these developments have increased the available means by which states can operate, and this continues to be the Compact Clause's most important influence: where federal action has failed, or would perturb the states, compacts may afford them a mechanism for achieving preferred solutions.<sup>388</sup> Frankfurter and Landis also insisted, however, on the authority of the national government. Not only was Congress the appropriate arbiter of the distinction between prohibited treaties and permissible compacts, they argued,

[b]ut even the permissive agreements may affect the interests of States other than those parties to the agreement: the national,

385. See *Virginia v. Tennessee*, 148 U.S. at 522 (“The approval by Congress of the compact entered into between the states upon their ratification of the action of their commissioners is fairly implied from its subsequent legislation and proceedings.”); *Virginia v. West Virginia*, 78 U.S. (11 Wall.) 39, 59–60 (1870) (inferring that Congressional statute admitting Virginia to the Union implies consent to pre-existing boundary agreement between Virginia and West Virginia).

386. *Virginia v. Tennessee*, 148 U.S. at 521 (“The Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied.”); see also *Poole v. Lessee of Fleeger*, 36 U.S. 185, 209–10 (1837) (upholding a compact between Kentucky and Tennessee that was consented to by Congress after the states reached agreement); *Green*, 21 U.S. (8 Wheat.) at 85–87 (upholding a compact between Kentucky and Virginia that Congress only consented to after the fact, and then only indirectly, in the course of recognizing Kentucky as a state). But see *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) (stating, in dicta, that “[u]nder the Compact Clause States cannot form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity” (citation omitted)).

387. Such flexibility was particularly forthcoming when it came to areas traditionally under state control. See *De Veau v. Braisted*, 363 U.S. 144, 154 (1960) (Frankfurter, J., plurality op. joined by Clark, Whittaker, & Stewart, JJ.) (concluding, in reviewing preemption issue arising in connection with the New York Waterfront Commission Act, that “it is of great significance that in approving the compact Congress did not merely remain silent regarding supplementary legislation by the States. Congress expressly gave its consent to such implementing legislation not formally part of the compact. This provision in the consent by Congress to a compact is so extraordinary as to be unique in the history of compacts. . . . It is instructive that this unique provision has occurred in connection with approval of a compact dealing with the prevention of crime where, because of the peculiarly local nature of the problem, the inference is strongest that local policies are not to be thwarted”).

388. The recently litigated 1998 Multistate Agreement on tobacco litigation (MSA) might fit either description. Greve, *supra* note 374, at 83–90 (describing genesis of MSA); see *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 359–60 (4th Cir. 2002) (concluding that MSA was not a compact requiring congressional consent); see also Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 Fla. L. Rev. 1, 10–11 (1997) (asserting that “threatened federal action spurs most compacts”).

and not merely a regional, interest may be involved. Therefore, Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions. The Framers then astutely created a mechanism for legal control over affairs that are projected beyond State lines and yet may not call for, nor be capable of, national treatment. They allowed interstate adjustments but duly safeguarded the national interest.<sup>389</sup>

This counsel—including the need for national control of matters not strictly subject to national law—was heeded by the Court,<sup>390</sup> and helps explain why the gulf between Wigmore’s position, on the one hand, and the Court’s, on the other, is not so very great. The only bounds the Court appears inclined to enforce, recall, involve the *lower* threshold for compacts: between subcompacts, if you will, which do not merit national attention, and compacts tending to increase state political power or otherwise interfere with U.S. authority, which require congressional consent. But any absolute ceiling on compacts—that is, whether a compact can go so far that it can no longer be deemed a compact at all—appears to have been vested in the sound discretion of Congress. Even the lower threshold is judicially enforced only on a one-way basis, to avoid the risk of state usurpation; if Congress wishes to consent to a lesser arrangement that would not, according to the case law, fall among those requiring consent, it is nonetheless a compact under the Compact Clause.<sup>391</sup> Under existing case law and contemporary practice, the “treaties” proscribed to the states

389. Frankfurter & Landis, *supra* note 372, at 695.

390. See *Cuyler v. Adams*, 449 U.S. 433, 439–40 (1981) (“The requirement of congressional consent is at the heart of the Compact Clause. By vesting in Congress the power to grant or withhold consent, or to condition consent on the States’ compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority.” (citing Frankfurter & Landis, *supra* note 372, at 694–95)); see also *Virginia v. West Virginia*, 246 U.S. 565, 601 (1918) (“The vesting in Congress of complete power to control agreements between states, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, clearly rested upon the conception that Congress as the repository, not only of legislative power, but of primary authority to maintain armies and declare war, speaking for all the states and for their protection, was concerned with such agreements, and therefore was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the federal power.”).

391. Put differently, a compact’s potential excesses pose a judicial question as to whether congressional consent is necessary, but not whether the states are judicially foreclosed from going so far. See *supra* text accompanying notes 376–383. The authority this invests in Congress was particularly evident in *Cuyler*, 449 U.S. at 440–41. As Professor Tribe has commented:

*Cuyler* . . . stands for the proposition that, if Congress enacts some kind of consent legislation, the Court will defer to Congress’ political judgment that it is in the interest of the Union that the resulting interstate arrangement be deemed a federally-approved compact and will simply ignore the *Multistate Tax Commission* test. But if Congress has been silent or has actively disapproved, the Court will then examine the challenged agreement on its own terms, in accord with the

by the Compact Clause effectively comprise those pacts to which Congress has not consented, and “compacts” are anything to which it *has* consented.<sup>392</sup>

Congress’s power of consent, indeed, permits it far more authority than a veto, and includes the power to *condition* consent.<sup>393</sup> Congress has employed that power to insist on federal participation in compact negotiations,<sup>394</sup> to delegate to the executive branch the authority so that it may approve the compact and terminate it,<sup>395</sup> to require federal participation

Court’s own precedents, to determine whether the Compact Clause . . . makes the absence of prior or subsequent congressional approval fatal.

1 Tribe, *Constitutional Law* (3d ed.), supra note 54, at 1240–41; see also Hasday, supra note 388, at 17 (explaining that “*Cuyler* held that every interstate agreement concerning ‘an appropriate subject for congressional legislation’ becomes a compact upon congressional consent, regardless of whether such consent was constitutionally necessary”).

It bears note, however, that compacts, like treaties, may offend extrinsic constitutional principles. See *Texas v. New Mexico*, 462 U.S. 554, 564 (1983) (noting that “unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms”).

392. Although the process of arriving at this view has clearly been flawed—as the Court confessed in *Multistate Tax Commission*—it has two virtues that deserve mention. First, the emphasis on congressional consent as the relevant or even sole safeguard arguably recovers an approach predating the misreading of Justice Story. See *Rhode Island v. Massachusetts*, 37 U.S. 657, 725 (1838) (“If congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the constitution.”); *Poole v. Lessee of Fleeger*, 36 U.S. 185, 209 (1837) (Story, J.) (describing right to compact as one “expressly recognised by the constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of congress”). Second, this approach treats the class of prohibited pacts as precisely those of greatest concern at the founding—namely, agreements in which the states would appear to be functioning independently as would sovereign nations. In this context, in any event, the Supreme Court has regarded literalism as a vice. See *United States Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 459–60 (1978) (critically appraising argument for overturning precedent as “provid[ing] no effective alternative other than a literal reading of the Compact Clause”).

393. *Cuyler*, 449 U.S. at 439–40 (noting that Framers gave Congress “the power to grant or withhold consent, or to condition consent on the States’ compliance with specified conditions”); *James v. Dravo Contracting Co.*, 302 U.S. 134, 148 (1937) (“The Constitution provides that no State without the consent of Congress shall enter into a compact with another State. It can hardly be doubted that in giving consent Congress may impose conditions.”).

394. Kevin J. Heron, *The Interstate Compact in Transition: From Cooperative State Action to Congressionally Coerced Agreements*, 60 *St. John’s L. Rev.* 1, 18 (1985) (citing examples).

395. See 7 U.S.C. § 7256 (2000) (conditioning congressional consent to, and implementation of, the Northeast Dairy Interstate Compact upon finding by the Secretary of Agriculture that implementation “is in the compelling public interest of the Compact region”); *id.* § 7256 (providing that Congress’s consent “shall terminate concurrent with the Secretary’s implementation” of reforms to the federal milk-pricing scheme); see *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1471–72 (D.C. Cir. 1998) (describing provisions); *id.* at 1473–75 (upholding provisions against nondelegation challenge).

in the administration of the compact,<sup>396</sup> and to require the return to Congress to approve additional parties.<sup>397</sup> Indeed, it would appear that Congress is permitted to stipulate in advance all the compact's significant terms, a principle vindicated by the lower courts in a case involving Landis and Frankfurter's favorite subject.<sup>398</sup>

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396. See *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27–28 (1951) (“The growing interdependence of regional interests, calling for regional adjustments, has brought extensive use of compacts. A compact is more than a supple device for dealing with interests confined within a region. That it is also a means of safeguarding the national interest is well illustrated in the Compact now under review. Not only was congressional consent required, as for all compacts; direct participation by the Federal Government was provided in the President’s appointment of three members of the Compact Commission.”); *Seattle Master Builders Ass’n v. Pac. N.W. Elec. Power & Conservation Council*, 786 F.2d 1359, 1364 (9th Cir. 1986) (citing *Delaware River Basin Compact*, Pub. L. No. 87-328, 75 Stat. 688 (1961)) (noting that “[t]he federal government has even participated as a member of interstate compact agencies”). See generally Frank P. Grad, *Federal-State Compact: A New Experiment in Co-Operative Federalism*, 63 *Colum. L. Rev.* 825, 825 (1963) (analyzing historical development of Delaware River Basin Compact and “the first interstate compact with full federal participation,” and considering implications); Louis W. Koenig, *Federal and State Cooperation Under the Constitution*, 36 *Mich. L. Rev.* 752, 764–65 (1938) (describing mechanisms for maintaining federal control over compact administration). A 1980 opinion by the Office of Legal Counsel reasons that given the negative implications of the Compact Clause, which specifies state-state and foreign power-state but not federal state agreements, and in light of separation of powers concerns, agreements between an executive branch entity and a state or states do not fall within the Compact Clause. See 4B U.S. Op. Off. Legal Counsel 828, 830 (1980). That opinion does not attempt to assess the weight of contrary practice, and seems insensitive to the possibility that a compact involving the federal government and several states may create a right in one state to compel the other’s compliance. See *infra* text accompanying notes 458–464 (discussing binding nature of compact obligations).

397. *Northeastern Interstate Forest Fire Protection Compact*, pmb. & art. II, Pub. L. No. 129, 63 Stat. 271, 271–72 (1949); see Pub. L. No. 340, 66 Stat. 71 (1952) (authorizing participation by Canada).

398. See *Seattle Master Builders Ass’n*, 786 F.2d at 1364 (upholding constitutionality of Pacific Northwest Electric Power Planning and Conservation Act (NPPA) compact against challenge based in part on prior congressional approval, and explaining that “Congress also may grant its consent conditional upon the states’ compliance with specified terms”). *Contra Heron*, *supra* note 394, at 19–25 (disputing that Congress has authority to write “each and every term” of an interstate compact, and citing as constitutionally objectionable the example of the NPPA).

Several courts have indicated doubt, however, as to whether Congress has the power “to alter, amend, or repeal” compacts. See *United States v. Tobin*, 306 F.2d 270, 272–73 (D.C. Cir. 1962) (avoiding resolving issue, but indicating skepticism); *Mineo v. Port Auth. of N.Y. & N.J.*, 779 F.2d 939, 948 (3d Cir. 1985) (also bypassing issue, but noting “only that the power of Congress to ‘alter, amend or repeal’ is not currently part of the federal tradition”). But cf. *Riverside Irrigation Dist. v. Andrews*, 568 F. Supp. 583, 590 (D. Colo. 1983) (opining that “congress cannot unilaterally reserve the right to amend or repeal an interstate compact,” but noting that does not mean “that approving a compact limits congress’s authority later to enact federal laws” (citing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 433 (1855) (“The question here is, whether or not the compact can operate as a restriction upon the power of congress under the constitution to regulate commerce among the several States? Clearly not. Otherwise congress and two States would possess the power to modify and alter the constitution itself.”))).

The nationalist dimension of this power can easily be grasped. Advocates of using the Compact Clause to advance state-based solutions have noted its anomalous placement within Article I, Section 10, which principally denies the states various powers.<sup>399</sup> It is perhaps less anomalous to recognize congressional consent to compacts as tantamount to an enumerated power, permitting the national government to legislate where circumstances otherwise would not permit.<sup>400</sup>

3. *Foreign Compacts and National Authority.* — Wigmore's proposed use of foreign compacts appeared, on its face, to pose substantial risk of interfering with the national interest, particularly given the assumption (based, understandably enough, on the constitutional text) that state pursuit of foreign compacts would be evaluated by precisely the same constitutional standards as interstate compacts.<sup>401</sup> But according to Supreme Court precedent, certain additional protections apply to foreign compacts. First, beginning with Chief Justice Taney's tour de force in *Holmes v. Jennison*, the Supreme Court has read the Constitution as proscribing such negotiations in the absence of national supervision<sup>402</sup>—even though

399. See Frankfurter & Landis, *supra* note 372, at 691 n.25 ("By putting this authority for State action in a section dealing with restrictions upon the States, the significance of what was granted has probably been considerably minimized.").

400. See *Virginia v. West Virginia*, 246 U.S. 565, 602 (1918) (explaining that "the lawful exertion of its authority by Congress to compel compliance with the obligation resulting from the contract between the two States which it approved is not circumscribed by the powers reserved to the States"). The states, to be sure, are Congress's indispensable legislative and executive partners in this enterprise—but so too is the President for the bulk of Congress's Article I powers. See, e.g., *INS v. Chadha*, 462 U.S. 919, 946 (1983).

401. See Swaine, *Negotiating Federalism*, *supra* note 2, at 1223–24 n.337 (citing examples and counterexamples).

402. 39 U.S. (14 Pet.) 540, 572 (1840) (Taney, C.J.) (finding that the Framers' desire "to cut off all connection or communication between a state and a foreign power" requires giving the broadest possible construction to the term "agreement"); *id.* at 574 (describing the Framers' intention that "there would be no occasion for negotiation or intercourse between the state authorities and a foreign government"); *id.* at 575–76 (claiming that "[e]very part of [the Constitution] shows, that our whole foreign intercourse was intended to be committed to the hands of the general government," it being "one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities").

Chief Justice Taney's opinion was joined by three of the seven remaining justices sitting (with the remaining justices issuing individual opinions), and was perceived as the most authoritative expression of the Court's view. See Swaine, *Negotiating Federalism*, *supra* note 2, at 1228 n.351. It also remains good law. See, e.g., *United States v. Rauscher*, 119 U.S. 407, 414 (1886) ("[T]here can be little doubt of the soundness of the opinion of Chief Justice Taney."); Swaine, *Negotiating Federalism*, *supra* note 2, at 1224–36 (reviewing case law); Letter from Duncan B. Hollis, Attorney-Adviser, U.S. Dep't of State, Office of Treaty Affairs, to Nicolas Dimic, First Secretary, Embassy of Canada (Jan. 13, 2000), available at <http://www.state.gov/documents/organization/6579.doc> (on file with the *Columbia Law Review*) (explaining that "individual states have no authority to negotiate or conclude international agreements," broadly construed). Difficult issues remain as to what constitutes negotiation and when it begins, but a state's deliberate attempt to forge a compact with a foreign power would be uncontroversially proscribed.

precedent suggests that there is no such bar in pursuing interstate compacts.<sup>403</sup> Second, in contrast to the case-by-case approach followed with respect to interstate compacts, foreign compacts appear *always* to pose a sufficient risk to federal supremacy to warrant congressional consent.<sup>404</sup> That position has not always been respected,<sup>405</sup> but the deviations have enjoyed no constitutional sanction.<sup>406</sup>

These reins upon the states, however, are once again entrusted to the national political branches. As with interstate compacts, Congress appears to exercise unreviewable discretion over the approval of their foreign brethren.<sup>407</sup> As an empirical matter, Professor Henkin has ob-

403. See *supra* note 386 (citing cases illustrating state latitude to form compacts prior to obtaining congressional consent).

404. This appears to be the basis by which the Court reconciled Chief Justice Taney's opinion in *Holmes with Virginia v. Tennessee*, 148 U.S. 503, 520 (1893). See *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 465 n.15 (1978) (finding decisions "not inconsistent" given Chief Justice Taney's view "that the State's agreement would be constitutional only if made under the supervision of the United States"); Henkin, *Foreign Affairs*, *supra* note 2, at 154–55 ("All the Justices [in *Holmes*] seemed agreed that a clear compact or agreement on that subject between Vermont and Canada would have required Congressional consent. But neither Taney's essay nor any of the other opinions suggests that the subject or the particular disposition of it made any difference: an agreement between a state and a foreign authority on any subject is forbidden unless Congress consents.").

There remain difficult questions concerning whether an arrangement constitutes a compact in the first place, given the absence of any formal test. This was evident in *Holmes* itself, where Justice Catron broke with the Chief Justice on the question of whether the arrangement with Canada constituted an "agreement or compact" under the Compact Clause, see *Holmes*, 39 U.S. (14 Pet.) at 595–96, 598 (Catron, J., dissenting), and the others shared his misgivings, see *id.* at 579, 584 (Thompson, J., dissenting) (disputing the view of the Vermont-Canada arrangement as a "compact"); *id.* at 588 (Barbour, J., dissenting) (same). Still, a clear majority seemed to subscribe to the view that where a foreign compact was genuinely at issue, states would require prior congressional consent. The margins of compact definition, in any event, have no bearing on the analysis here.

405. Swaine, *Negotiating Federalism*, *supra* note 2, at 1229 n.354 (citing deviations in practice); see also Jennetten, *supra* note 368, at 164–72 (same).

406. See Swaine, *Negotiating Federalism*, *supra* note 2, at 1229–30. The Great Lakes Commission, formed by a compact in 1955, is an interesting illustration. During congressional proceedings, the State Department successfully lobbied against permitting the participation of Canadian provinces. Afterward, relations appear nonetheless to have been established. *Id.* at 1230 n.355. But in a supplementary agreement signed in 2001, the governors of the Great Lakes states and two premiers of Canadian provinces implicitly recognized the need for formal congressional authorization before any of their arrangements could be regarded as binding. See *The Great Lakes Charter Annex: A Supplementary Agreement to the Great Lakes Charter*, directive 1, June 18, 2001, available at <http://www.cglg.org/1pdfs/Annex2001.pdf> (on file with the *Columbia Law Review*) (calling for the preparation of "a Basin-wide binding agreement(s), such as an interstate compact and such other agreements, protocols or other arrangements between the States and Provinces as may be necessary to create the binding agreement(s)"); Gary Ballesteros, *Great Lakes Water Exports and Diversions: Annex 2001 and the Looming Environmental Battle*, 32 *Env'tl. L. Rep.* 10,611, 10,613–14 (2002) (noting provision).

407. See *Restatement (Third)*, *supra* note 22, § 302 cmt. f ("What distinguishes a treaty, which a State cannot make at all, from an agreement or compact, which it can make

served, “[n]o agreement between a state and a foreign power has been successfully challenged on the ground that it is a treaty which the state was forbidden to make.”<sup>408</sup>

One reason for this permissive approach, though, may be that foreign compacts and their equivalents have so infrequently been employed, and expanding the frequency and extent of their use would surely put the track record to its test. Employing Congress’s consent authority with large-scale, multistate compacts should make no difference to the federalism analysis,<sup>409</sup> but it may raise separation of powers issues. First, permitting Congress to consent to foreign compacts with widespread state participation arguably usurps the President’s treaty function, since the President has no constitutionally guaranteed role in approving compacts. But even the President’s power to negotiate treaties may be subject to direct or indirect legislative control,<sup>410</sup> and in practice the President’s role in approving compacts has been honored as in ordinary legislation.<sup>411</sup> Second, full-fledged pursuit of foreign compacts might also di-

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with Congressional consent, has not been determined. That would probably be deemed a political decision. Hence, if Congress consented to a State agreement with a foreign power, courts would not be likely to find that it was a ‘treaty’ for which Congressional consent was unavailing.”).

408. Henkin, *Foreign Affairs*, supra note 2, at 152.

409. The next Section considers in detail the limits arguably imposed by the new federalism. For immediate purposes, however, it suffices to note that the mere fact that many states are involved is not of decisive influence in Compact Clause terms. See *Multistate Tax Comm’n*, 434 U.S. at 471–72 (rejecting suggested distinction between bilateral compacts, which might fall outside the Compact Clause when they do not increase the relative political power in the states, and multilateral compacts, which always require congressional consent); Tribe, *Taking Text and Structure Seriously*, supra note 22, at 1271 n.172 (assuming that “Congress can approve the states’ agreements with foreign nations—presumably even an agreement involving all 50 states”). It also may not genuinely worsen the potential for disruption. To the contrary, the potential challenge to national authority posed by multistate compacts might resemble a bell curve, insofar as participation by all fifty states would more closely simulate national action. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 *Tex. L. Rev.* 1321, 1443 (2001) (“Forbidding states from entering into ‘treaties’—even with Congress’s consent—suggests that the Founders regarded such agreements as simply too important to be undertaken by fewer than all the states.”).

410. See Henkin, *Foreign Affairs*, supra note 2, at 177–84 (describing potential reach of Senate’s power of advice and consent); Swaine, *Negotiating Federalism*, supra note 2, at 1162–65 (same); see also Henkin, *Foreign Affairs*, supra note 2, at 194–96 (noting practical relevance of congressional powers); id. at 92 n.‡ (observing that “[i]n a large sense, all the legislative power of Congress may be concurrent with the President’s Treaty Power, since the President can make a treaty on matters as to which Congress may legislate”).

411. See Note, *Charting No Man’s Land: Applying Jurisdictional and Choice Of Law Doctrines to Interstate Compacts*, 111 *Harv. L. Rev.* 1991, 1993–94 n. 19 (1998) [hereinafter Note, *Charting No Man’s Land*] (citing Frederick L. Zimmermann & Mitchell Wendell, *The Interstate Compact Since 1925*, at 94 (1951)); see also, e.g., *Holt Cargo Sys., Inc. v. Delaware River Port Auth.*, 165 F.3d 242, 243 n.1 (3d Cir. 1999) (noting that compact creating Delaware River Port Authority was “signed into law by Congress and the President under the Interstate Compact Clause”). The terms of an individual compact may also provide for presidential participation. See, e.g., *West Virginia ex rel. Dyer v. Sims*, 341

lute the Senate's treaty authority in favor of broader participation by the Congress as a whole. Although the Senate's exclusive hold on treaty authority succumbed long ago to the rise of congressional-executive agreements<sup>412</sup> and to the dwindling prevalence of self-executing treaties, combining a loss in Senate influence with a (theoretical) loss of presidential authority arguably poses a more serious challenge to the national allocation and division of foreign affairs authority.

But the creative mechanisms for national control invited, and even encouraged, by the Supreme Court's case law suggest ways to harmonize foreign compacts with these horizontal limits to national authority.<sup>413</sup> The least exceptionable mechanism would involve employing the treaty power itself.<sup>414</sup> Congress might consent, for example, to a compact echoing the terms of a duly negotiated and ratified treaty. Likewise, a treaty

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U.S. 22, 27–28 (1951) (noting that compact terms provided for the President to appoint members of the compact commission). As Professor Tribe has previously noted, however, situating the power of international agreement in Article I would appear to give Congress the power to override the President's veto. Tribe, *Taking Text and Structure Seriously*, supra note 22, at 1252–58.

412. As noted above, there is now a consensus that treaties and congressional-executive agreements are in practice “interchangeable” at the discretion of the national political branches. See supra note 22. As also noted, though, many find that consensus seriously flawed in principle, and the separation of powers objection is one of many made to interchangeability—thus far unsuccessfully. See, e.g., Clark, supra note 409, at 1440–41 (reviewing both positions); Tribe, *Taking Text and Structure Seriously*, supra note 22, at 1273 (arguing that “[t]he procedure mandated by the Treaty Clause, like the Senate consent requirement for appointments of principal officers, cannot be abdicated by the Senate”); cf. supra note 31 and accompanying text (discussing Senate's vestigial role in protecting state interests).

413. This approach, as elaborated in the text, differs significantly from that recently espoused by Robert Anderson, who takes the view that treaties are constitutional only where foreign powers have bargained for U.S. performance under the treaty—rendering those treaties “contractual,” rather than legislative, in character. See Anderson, supra note 26, at 234–36. Because his argument is originalist in nature, it does not generally seek to explain contemporary case law or practice involving the treaty power, the Compact Clause, or federalism. Cf. *id.* at 239 (conceding that the contractual approach may be perceived as a “dramatic reorientation”). But see, e.g., *id.* at 200, 201 (explaining consistency of contractual approach with *United States v. Belmont*, 301 U.S. 324 (1937)); *id.* at 240–41 (explaining fortuitous consistency with anticommandeering principle). As Mr. Anderson acknowledges, the contractual approach depends upon a different understanding of the legal character of treaties than is taken under international law, *id.* at 234–36, while appearing to reserve the question of whether treaties lacking domestic effect due to their legislative character might nevertheless be enforceable on the international plane. *Id.* at 249. Most important, for immediate purposes, his understanding that treaties and compacts are rivalrous in character leads him to argue that foreign compacts may be used (and may only be used) in circumstances where a treaty could not, *id.* at 245–47—a position reflecting a much starker division between the federal powers over treaties and legislation, and between federal and state powers.

414. Combining congressional-executive agreements with compacts presents a somewhat closer question in theory, given that the Senate's supermajority role would be diminished to the approval of congressional-executive agreements by a simple majority. But this seems indistinguishable from the underlying problems posed by interchangeability, which have never persuaded the judiciary.

might expressly contemplate a follow-on interstate compact, contemporaneously authorized by Congress, by which interested states would acquiesce in the treaty's terms.<sup>415</sup> Neither route would appear to encroach unconstitutionally on Congress's authority,<sup>416</sup> nor would it compromise the Senate's role in treaties; Congress would be asked merely to follow the Senate's lead, and the Senate would presumably still be at liberty to use its power of advice and consent to insist that the states be entirely exempted. But where the Senate does not exercise that authority, there seems to be no residual basis in the separation of powers for constraining the exercise of national authority.

### C. *Compacts and the New Federalism: Dissolving Constraints*

The compact thus offers more than just a means by which states may fill gaps in federal authority: compacts are also a potentially substantial source of national authority, given the safeguards limiting independent state authority and vesting Congress with apparently unfettered supervisory powers. To be sure, they entail vesting substantial responsibility and a small measure of autonomy in the states as well. But their true potential lies in their potential synergies with traditional forms of international agreement—and in surmounting the obstacles posed by the new federalism.

A hybrid treaty-compact device might take any of several forms. In a bilateral setting, the United States might negotiate terms that, in addition to providing for ordinary national implementation, would obligate Congress to consent to a foreign compact containing the same or equivalent terms and involving the several states. The treaty terms (and the consent legislation) might provide an explicit incentive to the states to commit themselves to the compact—for example, that the foreign nation would be entitled to deny the benefits of the treaty to American states failing to subscribe and adhere to the compact, or that the United States would agree not to espouse such states' claims. The United States might subscribe in a similar fashion to a multilateral treaty, and capture its states' obligations either in the form of a negotiated treaty clause or unilaterally through a RUD; the entailed compact might, for practical reasons, best

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415. It is also conceivable that employing the treaty power might itself constitute constitutionally sufficient consent, such that no further congressional action would be required. Henkin, *Foreign Affairs*, supra note 2, at 423 n.10 (suggesting that “[c]onsent to state agreements can probably be given by treaty as well as by Congress”). But resolving that question, while potentially improving the versatility of the approach commended here, is not necessary in order to address the larger questions raised.

416. Though it has sometimes been suggested that the Senate cannot use the treaty power to obligate the House of Representatives, the houses long ago appear to have established a *modus vivendi* according to which Congress takes treaty-imposed responsibilities seriously. See, e.g., supra note 207–208 (noting issues connected with, inter alia, spending legislation).

be coordinated as an interstate compact, depending upon the number of foreign parties.<sup>417</sup>

The compact would in turn set out the substantive treaty terms for the consenting states, translating as strictly necessary any particulars for adaptation to the states—or, to the extent desirable, extending to the states a greater degree of latitude in approximating the treaty, with a corresponding risk that the United States would incur international liability even if the states kept their part of the bargain.<sup>418</sup> The compact could, in addition, set out the rules of the road for subscribing to the compact,<sup>419</sup> withdrawing,<sup>420</sup> and interpreting and enforcing its obligations.<sup>421</sup> Finally, the compact could, where appropriate, establish a compact agency to administer its provisions, or the United States might itself become a party.<sup>422</sup>

Any of these variations would be constitutional novelties to some degree, but the core of the treaty-compact device is not unprecedented. The best example may be a 1984 treaty with Canada relating to the Ross Dam.<sup>423</sup> The International Joint Commission, a binational body estab-

417. For ease of reference, I will refer to all such treaty-subordinated compacts as “foreign” compacts, save where necessary to make a distinction.

418. Consent legislation might, in the alternative, simply establish a duty to negotiate in good faith toward a compact. See, e.g., *Ponca Tribe v. Oklahoma*, 37 F.3d 1422, 1432–36 (10th Cir. 1994) (upholding, against Tenth Amendment challenge, provision of Indian Gaming Regulatory Act requiring states to negotiate in good faith with Indian tribes toward a state-tribal gaming compact, or face the imposition of terms developed by Secretary of the Interior), vacated 517 U.S. 1129 (1996) (granting certiorari, vacating, and remanding for reconsideration in light of *Seminole Tribe v. Florida*), rev’d on other grounds, 89 F.3d 690 (10th Cir. 1996). But there may be difficulty in directly enforcing any such obligation, as opposed to denying reciprocal benefits. See *Ponca Tribe*, 37 F.3d at 1436–37 (holding that courts lack the authority under *Ex parte Young* to compel state governors to negotiate in good faith).

419. Care may be necessary, for example, to ensure—for the sake of foreign states, more than for the responsible states themselves—that the form of state authorization actually provided is sufficient to bind legally the state under its own law. See, e.g., *Saratoga County Chamber of Commerce v. Pataki*, 740 N.Y.S.2d 733, 735–37 (App. Div. 2002) (holding that New York governor’s execution of a compact conforming to the Indian Gaming Regulatory Act violated the separation of powers under the New York state constitution); McCrudden, *supra* note 72, at 25–26, 26 n.124 (noting uncertainty as to whether Massachusetts’s consent to be bound by the Agreement on Government Procurement was enforceable).

420. The terms for withdrawing could, presumably, be made to simulate the procedure available to national signatories. Cf. *infra* notes 458–464 and accompanying text (describing binding nature of compacts, and inability of states to exit unilaterally).

421. See *infra* text accompanying notes 438–442, 456–464 (describing legal status of compacts); *infra* text accompanying notes 478–485 (describing waiver of state sovereign immunity).

422. See generally *supra* note 396 (noting prior examples, and controversy regarding the legal status of such instruments).

423. Treaty Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend d’Orielle River, Apr. 2, 1984, U.S.-Can., T.I.A.S. No. 11,088 [hereinafter *Ross Dam Treaty*].

lished pursuant to another treaty,<sup>424</sup> had ordered that Seattle and British Columbia reach agreement respecting water levels associated with the Ross Dam, but the resulting agreement was effectively voided by British Columbia in 1972. In furtherance of the Commission's order and continued jurisdiction over the controversy, the United States and Canada entered into formal treaty discussions in parallel to the Commission-directed discussions between Seattle and British Columbia. The result was a treaty authorizing and guaranteeing a separate British Columbia-Seattle Agreement, annexed to the treaty. The agreement established terms by which British Columbia was to provide Seattle with the electricity that would have been yielded by raising the Ross Dam (and to obtain the right to flood land owned by Seattle in order to generate additional power), in exchange for Seattle's agreement not to raise the dam and its payment to the province of an amount equal to the costs it would have incurred by raising the dam, and authorizes Seattle to proceed with raising the dam in the event of breach.<sup>425</sup> The treaty, correspondingly, permits Seattle to take such action notwithstanding any contrary provision of U.S. law,<sup>426</sup> authorizes Seattle and British Columbia to take the other actions specified in their agreement,<sup>427</sup> reconciles the agreement and treaty with other bilateral commitments,<sup>428</sup> and permits modification of the agreement only with the permission of the United States and Canada.<sup>429</sup> Finally, the treaty makes the United States and Canada the guarantors of any debts incurred by Seattle and British Columbia, respectively,<sup>430</sup> and a separate indemnification agreement provides that Seattle will indemnify the United States for any money paid to Canada on Seattle's behalf.<sup>431</sup>

The Ross Dam treaty merges a treaty with a compact-like device<sup>432</sup> as a means of asserting national control over a matter implicating subnational authority,<sup>433</sup> with Seattle's incentive deriving from its own self-in-

424. Treaty Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448.

425. See Ross Dam Treaty, *supra* note 423, annex § 9 (British Columbia-Seattle Agreement). The agreement licenses Seattle to raise the Ross Dam should British Columbia fail to provide the agreed power, and would in that event require the province to return a specified portion of the moneys paid by Seattle. *Id.* For a succinct summary of the background, the agreement, and the treaty, see Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 78 Am. J. Int'l L. 884, 885-88 (1984).

426. Ross Dam Treaty, *supra* note 423, art. II.

427. *Id.* art. III.

428. *Id.* art. VI.

429. *Id.* art. VII.

430. *Id.* art. IV.

431. The indemnification agreement also makes the United States responsible for faithfully conveying any money it receives from Canada for Seattle's benefit. Leich, *supra* note 425, at 888.

432. No compact was necessary, presumably, because Seattle, rather than the State of Washington, was a party.

433. See Letter from Duncan B. Hollis, *supra* note 402, at 3 (describing negotiations as an occasion on which "the Federal Government [stepped] in where a state or other sub-

terest in the resolution and the pressure exerted by the ongoing International Joint Commission proceedings. Other instruments have involved more direct arm-twisting by the federal government. In order to implement the Pacific Salmon Treaty of 1985,<sup>434</sup> which required the assistance of Alaska, Oregon, Washington, and various Native American tribes,<sup>435</sup> the United States directed by statute that any action or inaction by a state or tribe jeopardizing treaty compliance would entitle the federal government to adopt preemptive regulations.<sup>436</sup> As other domestic statutes create a like obligation to bargain toward compacts or risk preemption,<sup>437</sup> it seems in some respects a short step toward a treaty-compact device that combines these features.

The difficulty, though, lies in determining whether any such device would resolve the emerging obstacles posed by the new federalism—which may in turn prove critical to understanding whether extending federalism restrictions to the international sphere is infeasible. This is legal *terra incognita*, and I should stress that existing doctrine, while generally supportive of such techniques, does not provide determinate answers. Nevertheless, given compacts' potential for resolving problems created by the new federalism, I conclude below that it is incumbent upon the

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national governmental entity is negotiating an agreement or an arrangement that should be addressed at the federal level and/or be subject to international law"); *id.* (describing treaty as "provid[ing] the necessary legal bases" for the British Columbia-Seattle Agreement).

434. Treaty Concerning Pacific Salmon, Jan. 28, 1985, U.S.-Can., T.I.A.S. No. 11,091, amended by Agreement Relating to and Amending Annexes I and IV of the Treaty Concerning Pacific Salmon, June 30, 1999, U.S.-Can.

435. As one indication, the treaty created a Pacific Salmon Commission, the U.S. section of which consists of representatives of Alaska, Oregon, Washington, the "Treaty Tribes," and the United States. See 16 U.S.C. §§ 3631, 3632(a) (2000).

436. 16 U.S.C. § 3635 provides, in relevant part:

If any State or treaty Indian tribe has taken any action, or omitted to take any action, the results of which place the United States in jeopardy of not fulfilling its international obligations under the Treaty, or any fishery regime or Fraser River Panel regulation adopted thereunder, the Secretary shall inform the State or tribe of the manner in which the action or inaction places the United States in jeopardy of not fulfilling its international obligations under the Treaty, of any remedial action which would relieve this concern, and of the intention to promulgate Federal regulations if such remedial actions are not undertaken within fifteen days unless an earlier action is required to avoid violation of United States Treaty obligations.

*Id.*

437. See Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(A)(i) (2000) (providing that "[t]he United States district courts shall have jurisdiction over . . . any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith"); *Ponca Tribe v. Oklahoma*, 37 F.3d 1422, 1432-36 (10th Cir. 1994) (upholding provisions against Tenth Amendment challenge), vacated by 517 U.S. 1129 (granting certiorari, vacating, and remanding for reconsideration in light of *Seminole Tribe v. Florida*), rev'd on other grounds, 89 F.3d 690 (10th Cir. 1996).

United States to explore their potential for overcoming the limitations imposed by the new federalism, both as a matter of international law and as a consequence of the method commended by those decisions themselves.

1. *Substantive Limits: Revisiting Missouri v. Holland.* — The resilience of *Missouri v. Holland* is due at least in part to the difficulty of achieving national ends in the event subject-matter limits were imposed, and it may not immediately be evident how a treaty-compact device might improve matters. The precise legal status of compacts under U.S. law remains obscure,<sup>438</sup> but the Supreme Court provided a measure of clarity by endorsing, after years of equivocation, the “law of the Union” approach, according to which compacts receiving congressional consent are regarded as federal law.<sup>439</sup> In *Cuyler v. Adams*, the Court even went somewhat further, indicating that consent transformed into federal law even those pacts not requiring approval under the Compact Clause.<sup>440</sup> Both steps were criticized as transforming, as if by “judicial alchemy,” state law into federal law.<sup>441</sup> Even *Cuyler’s* nationalizing approach, however, conceded that a

438. See, e.g., *Del. River Port Auth. v. Fraternal Order of Police*, 135 F. Supp. 2d 596, 602 n.7 (E.D. Pa. 2001) (noting that courts “have not been careful to explain when they are applying federal or state law, or both, and why they have chosen a state or a federal rule,” and citing instances in which courts purported to apply federal law but in fact relied on state law).

439. *Cuyler v. Adams*, 449 U.S. 433, 438 & n.7 (1981) (tracing development of doctrine); see *Del. River Joint Toll Bridge Comm’n v. Colburn*, 310 U.S. 419, 427–428 (1940); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 565–66 (1851).

440. See 449 U.S. at 440 (“Congressional consent is not required for interstate agreements that fall outside the scope of the Compact Clause. Where an agreement is not ‘directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States,’ it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent. . . . But where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States’ agreement into federal law under the Compact Clause.” (citations omitted)). Subsequent dicta arguably undermined this principle. See *Carchman v. Nash*, 473 U.S. 716, 719 (1985) (citing *Cuyler* for the proposition that the Interstate Agreement on Detainers “is a congressionally sanctioned interstate compact *within the Compact Clause* . . . and thus is a federal law subject to federal construction” (emphasis added)). Lower court decisions nonetheless followed *Cuyler* in distinguishing between the status of a pact under the Compact Clause and the conditions under which a compact could become federal law. See, e.g., *Ghana v. Pearce*, 159 F.3d 1206, 1208 (9th Cir. 1998) (holding that “[a] state compact is transformed into federal law . . . when (1) it falls within the scope of the Constitution’s Compact Clause, (2) it has received congressional consent, and (3) its subject matter is appropriate for congressional legislation” (emphasis added)); *Stewart v. McManus*, 924 F.2d 138, 142 (8th Cir. 1991) (concluding that Interstate Corrections Compact was not transformed into federal law because it “was neither an appropriate matter for federal legislation nor approved by Congress”).

441. *Cuyler*, 449 U.S. at 450–51 (Rehnquist, J., joined by Burger, C.J., & Stewart, J., dissenting); see, e.g., Hasday, *supra* note 388, at 17–18 (arguing for minimal characterization of interstate agreements as compacts in light of permanency concerns,

compact might become federal law only if the matter lay within Congress's legislative power.<sup>442</sup> This bodes ill for treaty-based compacts, of course, should *Missouri v. Holland* be compromised—for example, by differentiating between a treaty's ability to bind the United States internationally and the domestic effect of the treaty or any related legislation.<sup>443</sup>

It does not necessarily follow, however, that such compacts fall outside the Compact Clause, let alone lack the status of law—especially when the analysis is buttressed by the interpretive preference for permitting the means to satisfy treaty obligations.<sup>444</sup> Nothing in the Constitution suggests that compacts are to be considered as such only if they fall within the scope of Congress's legislative authority.<sup>445</sup> To the contrary, the Court's precedent indicates that compacts requiring consent are those “tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United

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and cautioning that the decision in *Cuyler* “may do much to countermand any democratically-inspired attempt to limit the use of compacting as much as possible”). For earlier criticism of the “law of the Union” approach adopted in *Cuyler*, see David E. Engdahl, Construction of Interstate Compacts: A Questionable Federal Question, 51 Va. L. Rev. 987, 1013–26 (1965) (noting that “the [law of the Union] doctrine is not only analytically unsound but also vicious in its implications and effects”).

Justice Frankfurter argued that while construing a compact consented to by Congress amounted to a federal question, it was not one “requir[ing] a federal answer by way of a blanket, nationwide substantive doctrine,” and instead urged a contractual approach. See *Petty v. Tenn.-Mo. Bridge Comm'n*, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting).

442. *Cuyler*, 449 U.S. at 440 (stating, as predicate for regarding a compact as federal law, that “the subject matter of that agreement is an appropriate subject for congressional legislation”). Notwithstanding *Cuyler*, numerous lower court decisions omit any inquiry into the question of congressional authority, perhaps because it seemed so evident in the particular case. See, e.g., *County of Boyd v. United States Ecology, Inc.*, 48 F.3d 359, 361 (8th Cir. 1995) (“An interstate compact is a creature of federal law.”); accord *Entergy Ark., Inc. v. Nebraska*, 68 F. Supp. 2d 1104, 1108 (D. Neb. 1999) (holding summarily that “[t]he Compact is a federal law”).

443. See *supra* text accompanying notes 54–68.

444. One might argue, too, that foreign compacts are fit for the ministrations of federal common law, though I do not separately explore this possibility. Cf. Note, Charting No Man's Land, *supra* note 411, at 2006 (“[T]urning to state law will not always be an appropriate solution. There will be times when national uniformity is important. For example, in cases in which similar compacts in different regions will interact substantially with federal programs or agencies, adopting the applicable state laws for each compact would hinder national administration. In such cases, concerns about national uniformity are more salient, and a single rule of federal common law may be necessary.”).

445. In *Texas v. New Mexico*, 462 U.S. 554, 564 (1983), admittedly, the Supreme Court quoted *Cuyler* to the effect that “congressional consent transforms an interstate compact within this Clause into a law of the United States,” adding that, consequently, “unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.” *Id.* at 564. It was enough in that case to have concluded that the compact in question was binding federal law, and any other intimation is susceptible to misinterpretation. *Cuyler* emphasized that only consented-to compacts within congressional authority become federal law; the Court did not suggest, however, that congressional consent in other circumstances was unconstitutional.

States”<sup>446</sup>—which seems to encompass activities that interfere with U.S. authority without necessarily being subject to federal legislative control.<sup>447</sup> Congressional consent under such circumstances represents its judgment that state efforts will not interfere with the national interest, not an illegitimate attempt covertly to extend federal law.<sup>448</sup>

Including as compacts devices not within Congress’s legislative power is also consistent with traditionally broad construction given the Compact Clause. Interstate compacts (including, explicitly or implicitly, those falling within the Compact Clause) have long been extolled as permitting national solutions when Congress would otherwise have been helpless.<sup>449</sup> Indeed, some of the most common types, such as those ad-

446. *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893); accord *United States Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 471–72 (1978) (citing to *Virginia v. Tennessee*); *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976) (same); *Wharton v. Wise*, 153 U.S. 155, 168–70 (1894) (same).

447. See *Virginia v. Tennessee*, 148 U.S. at 518 (distinguishing between compacts “to which the United States can have no possible objection or have any interest in interfering with,” and those “which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control”). The Office of Legal Counsel, admittedly, appears to have taken the position that congressional competence is a precondition for consent. 4B U.S. Op. Off. Legal Counsel 828, 830–31 (1980) (citing *Wharton v. Wise*, 153 U.S. 155, 171 (1894)). But the case it cited for that proposition said nothing of the sort. In the cited portion of *Wharton v. Wise*, 153 U.S. at 171, the Court stressed that the Compact Clause’s limits did not apply retroactively to compacts already in existence, “except so far as their stipulations might affect subjects placed under the control of Congress, such as commerce and the navigation of public waters, which is included under the power to regulate commerce”—the point being that otherwise-exempted compacts would still have to be consistent with, among other things, the dormant Commerce Clause.

448. See *Multistate Tax Comm’n*, 434 U.S. at 485 (White, J., dissenting) (“Congress does not pass upon a submitted compact in the manner of a court of law deciding a question of constitutionality. Rather, the requirement that Congress approve a compact is to obtain its political judgment: Is the agreement likely to interfere with federal activity in the area, is it likely to disadvantage other States to an important extent, is it a matter that would better be left untouched by state and federal regulation?”), cited in *Cuyler v. Adams*, 449 U.S. 433, 440 n.8 (1981); cf. *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1479 (D.C. Cir. 1998) (Rogers, J., concurring) (“Although the drafters [of the Compact Clause] spoke of congressional consent, it is clear that they hoped not just to vindicate the legislative power of Congress, but to protect the power of the entire federal government with the Clause.”).

449. See Charles Warren, *The Supreme Court and Sovereign States* 74–75 (1924) (describing proposed compact concerning anthracite coal mining as “represent[ing] a great advance into a new field of government in this country—the introduction of a capacity for regulation, midway between the Federal power and the State power—the exercise by several states of a power, which could not, as a practical matter, be exercised by one state alone, and which could not be exercised by Congress at all, in view of its restricted authority under the Constitution”); Koenig, *supra* note 396, at 761–62 (proposing that compacts may be suitable for “cooperative state action on a regional basis where states may act, but where the federal government under its constitutional powers may do nothing”); see also *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994) (describing mission of bistate entities as being “to address ‘interests and problems that do not coincide nicely

justing boundaries between the states, have been at the perceived margins of the federal government's unilateral authority.<sup>450</sup> It has not been suggested that all such compacts fall outside the Compact Clause, or that seeking congressional consent under such circumstances has amounted to pervasive error.<sup>451</sup> Instead, the Court has indicated comfort with consent under circumstances in which, as Justice Baldwin once put it, "the subject-matter is not within the jurisdiction of congress, any further than that it is subject to its consent."<sup>452</sup>

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either with the national boundaries or with State lines'— interests that 'may be badly served or not served at all by the ordinary channels of National or State political action'" (quoting *Vincent v. Thursby*, *Interstate Cooperation: A Study of the Interstate Compact* 5 (1953) (quoting National Resources Committee, *Regional Factors in National Planning and Development* 34 (1935))); *Grad*, *supra* note 396, at 854–55 (arguing that Compact Clause entities formed to deal with "broad, region-wide problems" should not be regarded as "an affirmation of a narrow concept of state sovereignty," but rather as "independently functioning parts of a regional polity and of a national union").

450. Congress possesses the power, of course, to admit new states and determine their boundaries. U.S. Const. art. IV, § 3. But its ability to adjust the boundaries of existing states without their consent is a different matter. See *State v. Muncie Pulp Co.*, 104 S.W. 437, 442 (Tenn. 1907) ("Congress had no power to change the boundaries of Tennessee as fixed by it when that state was admitted to the Union in 1796."); see also *Louisiana v. Mississippi*, 202 U.S. 1, 12 (1906) ("[I]t certainly could not have been the intention of Congress to take away from the State of Louisiana any islands or mainland already belonging to it and to give them to the State of Mississippi, as such a proceeding, without the consent of the legislature of the State of Louisiana, would be a violation of [U.S. Const. art. 4, § 3]."); cf. *New Jersey v. New York*, 523 U.S. 767, 810–11 (1998) (holding that judiciary may not readjust boundaries established by Congress).

The solution, ordinarily, has been to adjust such boundaries by way of a compact. Different mechanisms have been employed where a foreign country is involved. In negotiating the northeastern boundary provisions in the Webster-Ashburton Treaty, notably, the national government assented to participation by representatives of Maine and Massachusetts, with Secretary of State Forsyth noting that "the General Government is not competent to negotiate, unless perhaps on grounds of imperious public necessity," any boundary line involving the cession or exchange of state territory "without the consent of the State." Letter from John Forsythe, Secretary of State, to Edward Kend, Governor of Maine (March 1, 1838), reprinted in 4 *Treaties and Other International Acts of the United States of America* 384–85 (Hunter Miller ed., 1931); see also *id.* at 384 (detailing constitutional objections by Maine to existing boundary settlement, and failed agreement between the United States and Maine).

451. Of course, as one district court noted, states may occasionally seek consent out of an abundance of caution, so the mere fact that consent is requested (and granted) does not resolve whether the compact establishes federal law—absent consideration of whether the subject is one appropriate for federal legislation. *Hodgson v. Miss. Dep't of Corr.*, 963 F. Supp. 776, 790 n.11 (E.D. Wis. 1997).

452. *Poole v. Lessee of Fleegee*, 36 U.S. (11 Pet.) 185, 212 (1837) (Baldwin, J., concurring). Justice Baldwin admitted that his opinion, reported in only one version of the *United States Reports*, "may be peculiar." *Id.*; cf. John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 *Wash. U. L.Q.* 137, 150 n.79 (1999) (describing Baldwin's idiosyncrasies, including his frequent dissents). But he has not been in the minority on this issue. See, e.g., *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 26, 27 (1951) (noting only that "[c]ontrol of pollution in interstate streams might, *on occasion*, be an appropriate subject for national legislation," but indicating confidence that consent was required "as for all compacts" (emphasis added)).

Two years before *Missouri v. Holland*, in fact, the Court described the plenary scope of the compact power in terms anticipating those later used for the treaty power. The scope of the Compact Clause, Chief Justice White wrote for a unanimous Court in *Virginia v. West Virginia*, was that of the “complete power to control agreements between States,” innately of interest to Congress, which “was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the federal power.”<sup>453</sup> This in turn implied a “plenary and complete” power to compel compliance with the agreement’s terms, subject to “the general rule that the acts done for its exertion must be relevant and appropriate to the power,” but “not circumscribed by the powers reserved to the States.”<sup>454</sup> Any other result would create a principle that, if extrapolated, would limit the ability of the states to enforce compact obligations against one another, and risk the Union.<sup>455</sup> Although the risk of inter-state dispute may be present to the same degree in foreign compacts only where more than one state is involved, the reasoning is otherwise squarely applicable to Congress’s power over foreign compacts, and arguably provides the domestic warrant for the broad conclusion later adopted in *Holland*.

Assuming these compact principles would not collapse along with any limitation of *Holland*, the question remains what manner of beast these compacts might be. If consented-to compacts outside the scope of Congress’s legislative authority are binding and enforceable compacts, yet not federal law, it may seem natural to suppose that they are state law. But they may be more. State law, to be sure, pervades even those compacts within Congress’s legislative competence, whether it mirrors federal obligations<sup>456</sup> or uniquely determines matters peculiarly of interest to a participating state.<sup>457</sup> Yet even for compacts not giving rise to federal law—perhaps, *particularly* for such compacts—the most fundamental matters are not governed by state regulatory law as it is normally conceived. As with international treaties, the risk is that signatory states would extricate themselves from state law obligations by passing exculpatory legislation. Contemplating that prospect, some courts have suggested that states lack the power to unilaterally change a compact’s terms, finally construe any contested terms, or implement legislation burdening the compact without the concurrence of all members.<sup>458</sup>

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453. *Virginia v. West Virginia*, 246 U.S. 565, 601 (1918).

454. *Id.* at 602 (emphasis added).

455. *Id.*

456. See, e.g., *Reed v. Farley*, 512 U.S. 339, 347 (1994) (concluding that the Interstate Agreement on Detainers was both state law and “a law of the United States as well”).

457. See, e.g., *Del. River Port Auth. v. Fraternal Order of Police*, 135 F. Supp. 2d 596, 601–02 & n.7 (E.D. Pa. 2001) (noting that form of state concurrence is a question of state law, as is “[f]ixing the meaning and applicability of the legislation, i.e., what are the rights granted and the duties imposed by the legislation of each state”).

458. See *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) (rejecting contention that “an agreement solemnly entered into between States by those who alone

The precise bases for these conclusions are not always clear, and they cannot be distinguished with confidence from the ambulatory law of the Union doctrine. But one theory is that states are no more free to disturb their contractual commitments to other compact signatories than they are to impair the contracts of individuals.<sup>459</sup> The law of compacts might also be likened to the law of treaties, creating obligations between parties that may be independent of domestic categories of law.<sup>460</sup> The result, in

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have political authority to speak for a State can be unilaterally nullified,” given that “[a] State cannot be its own ultimate judge in a controversy with a sister State”); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 13 (1823) (Story, J.) (holding that to the extent any Kentucky law narrowed rights or diminished interests conferred by compact, it violated the compact, and “is consequently unconstitutional”); *McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991) (“Having entered into a contract, a participant state may not unilaterally change its terms.”); *Nebraska ex rel. Nelson v. Cent. Interstate Low-Level Radioactive Waste Comm’n*, 902 F. Supp. 1046, 1049 (D. Neb. 1995) (“One member state in a compact cannot unilaterally nullify provisions of the compact or give final meaning to a compact. . . . Except as otherwise explicitly provided for in a compact, the ‘concurrence’ of all signatories to a compact is required to implement legislation which would impose burdens on the compact.” (citations omitted)); see also *King v. Port Auth. of N.Y. & N.J.*, 909 F. Supp. 938, 946 (D.N.J. 1995) (holding, consistent with compact term providing that duties may not be imposed on compact entity without concurrence by both parties, that “the single law of one state may not be applied to a bi-state entity unless the law of all relevant states are identical or the states explicitly articulate that the law should apply”), *aff’d without op.*, 106 F.3d 385 (3d Cir. 1996).

459. See *Green*, 21 U.S. (8 Wheat.) at 92 (Washington, J.) (“[T]he constitution of the United States embraces all contracts, executed or executory, whether between individuals, or between a state and individuals; . . . a State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals.” (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810))); see also *Kentucky v. Indiana*, 281 U.S. 163, 176–77 (1930) (arguing that in compact cases, Supreme Court is responsible for determining compact obligations, just as in cases involving allegations that a state has impaired contracts).

460. See, e.g., *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 725 (1838) (“If congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the constitution, when given, . . . operating with the same effect as a treaty between sovereign powers. That is, that the boundary so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated to all intents and purposes, as the true real boundaries.”); *Poole v. Lessee of Fleegee*, 36 U.S. (11 Pet., Brightly ed.) 185, 212 (1837) (Baldwin, J., concurring) (“The effect of such consent is, that thenceforth, the compact has the same force as if it had been made between states who are not confederated, or between the United States and a foreign state, by a treaty of boundary; or as if there had been no restraining provision in the constitution.”); *Engdahl*, *supra* note 441, at 1020–21 (describing analogy to international law as an alternative to law of the Union approach).

As was emphasized at length in a recent article, treaties, too, are often spoke of in contractual terms. See generally *Anderson*, *supra* note 413, at 201–03, 207–12 (emphasizing contractual theory of treaties). But the point does not seem to have been to distinguish treaties from compacts, as the Court has often treated the terms and concepts as interchangeable. See, e.g., *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938) (“The compact . . . adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations.”); *B. Altman & Co. v. United States*, 224 U.S. 583, 601 (1912) (construing “treaty” in jurisdictional statute to include

either event, is that a compact “takes precedence over statutory law in member states,”<sup>461</sup> and even over state constitutional law.<sup>462</sup> As a consequence, compacts falling within the Compact Clause—even those not lying within Congress’s legislative authority, and therefore failing to qualify as federal law—remain legally binding on members in the absence of mutual rescission<sup>463</sup> or Congress’s withdrawal of consent.<sup>464</sup>

Such compacts may also be enforceable on the international plane. Consistent with its equivocal remove from constitutional matters, international law leaves to national constitutions in the first instance the question of whether subnational entities enjoy the capacity to enter into binding international agreements. At the same time, constitutional input is not necessarily determinative, and the international community apparently reserves the ultimate decision as to how subnational pacts should be regarded.<sup>465</sup> Due to the infrequency with which U.S. foreign compacts

presidential agreements authorized by Congress, reasoning that “a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President . . . [i]s a treaty” for those purposes); *Head Money Cases*, 112 U.S. 580, 598 (1884) (“A treaty is primarily a compact between independent nations.”); *New Jersey v. New York*, 523 U.S. 767, 831 (1998) (Scalia, J., dissenting) (noting parenthetically, in drawing on treaty precedent, that “the Compact here is of course a treaty”).

461. *McComb*, 934 F.2d at 479.

462. *Sims*, 341 U.S. at 28 (noting that, while the West Virginia Supreme Court “is, for exclusively State purposes, the ultimate tribunal in construing the meaning of her Constitution,” the U.S. Supreme Court is “free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States”); *id.* at 35 (Jackson, J., concurring) (“[I]f the compact system is to have vitality and integrity, [West Virginia] may not raise an issue of *ultra vires*, decide it, and release herself from an interstate obligation.”).

463. See *Northeast Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985) (describing one of the “classic indicia of a compact” as the inability “to modify or repeal [the compact] unilaterally”). But see Hasday, *supra* note 388, at 45–46 (noting support for unanimity requirement, but questioning its persuasiveness).

464. Cf. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 433 (1856) (noting that Congress must possess the continuing power to reconsider terms approved in compacts, lest “[C]ongress and two States. . . possess the power to modify and alter the [C]onstitution itself”); see also Emanuel Celler, *Congress, Compacts, and Interstate Authorities*, *Law & Contemp. Probs.*, Winter 1961, at 682, 685 (citing authorities). As Professor Hasday has observed, the resulting permanence of compacts is not without its troubling aspects. See Hasday, *supra* note 388, *passim* (cautiously endorsing compact form if coupled with safeguards for termination and amendment).

465. See Bernier, *supra* note 154, at 30–31 (“If the federal constitution grants [member states] a limited international competence, it does not necessarily mean that they enjoy a corresponding international personality.”); Damrosch et al., *supra* note 231, at 468 (observing that “it is not clear whether the capacity of constituent states to enter into agreements with foreign states is regulated only by the union’s constitutional law”); Shabtai Rosenne, *Developments in the Law of Treaties 1945–1986*, at 30 (1989) (“Agreements between units of one State can usually today be excluded from the scope of the international law of treaties, although, subject to the federal constitution, its principles may well be found to be applicable.”). Matters might well have been different had the Vienna Convention on the Law of Treaties retained a proposed provision that “[i]n a federal State, the capacity of the member states of a federal union to conclude treaties

have been perfected, and to the nominal constitutional prohibition against state “treaties,” there is no settled view as to their international consequence, but an important factor in conferring legitimacy is the consent and control of the national government—which is surely enhanced where the compact tracked terms negotiated and ratified by national representatives.<sup>466</sup>

The likely result, then, is that state obligations under foreign compacts would be enforceable in international law, and the pivotal role of the national government in perfecting such an agreement would make it (at least) responsible for breaches.<sup>467</sup> As with domestic enforcement, this raises a host of intriguing questions, including whether the governing treaty and coordinate foreign compact might, consistent with the U.S. Constitution, opt instead to make the state signatories responsible under international law.<sup>468</sup> Whatever the details, it appears likely that some means, domestic or international, might be devised to enforce state compact commitments—and thereby avoid the “backsliding” feared with merely voluntary arrangements.<sup>469</sup> A prior question, however, involves whether states might constitutionally be encouraged to enter into foreign compacts in the first place.

2. *Procedural Limits: Anticommandeering.* — While the question of how foreign compacts might mediate the potential repeal of *Missouri v. Holland* is highly speculative, the case law giving rise to the anticommandeering principle itself indicates the role that interstate compacts—and, by implication, foreign compacts—might play. In *New York v. United States*, Justice White’s dissent stressed that New York had constructively assented to an interstate compact within the meaning of the Compact

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depends on the federal constitution.” See Kearney & Dalton, *supra* note 223, at 498, 506–08; *supra* note 223 (discussing provision’s development).

466. See Restatement (Third), *supra* note 22, §§ 301 cmt. g, 302 cmt. f (indicating that some foreign compacts entered into by U.S. states may be international agreements within the meaning of international law, but excluding those not requiring congressional consent).

467. See Bernier, *supra* note 154, at 47–51; Paul Reuter, Introduction to the Law of Treaties 114–15 (1995) (“[W]here a federal State very exceptionally allows a *Land* or a canton to conclude certain treaties, this is done with its agreement or under its control, in conditions such that the federal State cannot be regarded as a third party in relation to treaties performed on a portion of its territory.”). But cf. Shabtai Rosenne, Breach of Treaty 58 (1985) (“There is full correlation between capacity to conclude a treaty and responsibility originating in a breach of that treaty-obligation. It is certainly clear that if a component element of a State is admitted as a full contracting party to an international treaty, it, and not its ‘parent State,’ will bear international responsibility for breach.”).

468. See Crawford, *supra* note 193, at 98 (noting that “where the constituent unit of a federation is able to enter into international agreements on its own account, the other party may well have agreed to limit itself to recourse against the constituent unit in the event of a breach,” or “the responsibility of the federal State under a treaty may be limited by the terms of a federal clause in the treaty”); cf. Spiro, The States and International Human Rights, *supra* note 18, at 587–90 (advocating “condominium” responsibility for both central and subnational governments).

469. See Trone, *supra* note 154, at 89–90 (citing examples).

Clause, and was thus estopped from objecting to the “take title” provision being challenged.<sup>470</sup> The majority refused to address “[a]ny estoppel implications that might flow from membership in a compact,” given that New York had not actually joined any compact.<sup>471</sup> But it did not take issue with Justice White’s supposition that such constitutionally authorized consent was different than mere acquiescence in an unconstitutional imposition. While New York officials might be incapable of surrendering their state’s sovereign rights simply by participating in the legislative process, or by accepting the benefits of a federal law or a compact, the state’s official subscription to a compact more closely resembled the acceptance of conditioned federal funding or outright preemption, either of which the Court had held acceptable.<sup>472</sup>

The fact remains, of course, that New York did not agree to that compact, and the premise of voluntary state participation suggests some important, and inherent, limitations to the compact’s utility. Even Justice White would have found it objectionable, presumably, had New York been commanded by federal statute or treaty to participate in a compact. Any such compact would be window dressing for a national command, and it would be a triumph of form over substance if states could be conscripted into entering such pacts.

*New York* suggests, however, that it may be a different matter if states were merely encouraged by the national government to enter into a compact. Imagine, for example, that at the same time the United States ratified the Vienna Convention on Consular Relations, Congress passed a measure providing advance consent to an interstate compact, open to all states, by which they committed themselves either to enact implementing

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470. 505 U.S. 144, 196–99 (1992) (White, J., dissenting). Justice White relied on Justice Jackson’s concurrence in *West Virginia ex rel. Dyer v. Sims*, in which he wrote that: West Virginia officials induced sister States to contract with her and Congress to consent to the Compact. She now attempts to read herself out of this interstate Compact . . . Estoppel is not often to be invoked against a government. But West Virginia assumed a contractual obligation with equals by permission of another government that is sovereign in the field. After Congress and sister States had been induced to alter their positions and bind themselves to terms of a covenant, West Virginia should be estopped from repudiating her act.

*West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 35–36 (1951) (Jackson, J., concurring).

471. *New York*, 505 U.S. at 183.

472. See *supra* notes 296–298 and accompanying text. The Court’s later decision in *Printz v. United States* did not directly consider the issue of compacts, but the result should be the same, particularly given the Court’s emphasis on the similarity of the problem to that resolved in *New York*. *Printz v. United States*, 521 U.S. 898, 926–31 (1997). The historical understanding and constitutional practice recited by the Court were wholly consistent, it stressed, with the notion that the states might consent to assist the national government in the execution of its duties. *Id.* at 910–11. Nor would the use of compacts be tantamount to the sudden acceptance of the notion, rejected by the Framers, of “a central government that would act upon and through the States.” *Id.* at 919. Finally, the compact does not reduce presidential power by permitting Congress to “act as effectively without the President as with him, by simply requiring state officers to execute its laws.” *Id.* at 923.

state legislation tracking the Convention or to have their state officials adhere directly to the treaty. As part of the consent legislation, too, Congress might provide that should a state fail to enter into a compact, foreign treaty signatories would be entitled to treat that state's residents as though they were attributable to non-parties, or perhaps instead provide that the United States would refuse to espouse those residents' claims.<sup>473</sup> Any such approach would probably pass muster under *New York*. States would have a choice: despite being given less latitude than if they were free to draw up their own compact,<sup>474</sup> the option would remain to reject the stipulated terms and carry on as before. And the national government has the authority to do what it would threaten. Conditional preemption would not be permissible if the government had, in fact, had no authority to preempt (though whether such a threat would be effective, or even worth hazarding, may also be doubted).<sup>475</sup> But even were *Missouri v. Holland* overturned, it would surely be open to the national government to *refrain* from regulating a particular activity, as envisioned above; rather than regulating the states, the national government would simply be exposing states to adverse treatment by foreign governments. There is no constitutional prohibition against discriminating among the states, at least not on such an eminently rational basis.<sup>476</sup>

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473. Subject to minor qualifications, see *infra* note 485, it would not make a difference were the compact reconfigured as a foreign compact, as might particularly befit a bilateral treaty.

474. Depending on the negotiating climate, among other things, it may be feasible to stipulate compact terms that do deviate in some regard from those of the treaty, or allow the states discretion in implementing, not unlike EU directives. But I focus here on the most difficult case for the proposed device.

475. *New York*, 505 U.S. at 173–74 (noting that where “federal regulation of private activity is within the scope of the Commerce Clause,” Congress may employ conditional preemption mechanism).

476. Special questions might be raised were the threatened result in tension with uniformity specifically guaranteed in Article I. See U.S. Const. art. I, § 8, cl. 1 (stipulating that “all [congressionally-imposed] Duties, Imposts and Excises shall be uniform throughout the United States”); *id.* art. I, § 8, cl. 4 (providing Congress authority to adopt “an uniform Rule of Naturalization, and Uniform Laws on the subject of Bankruptcies throughout the United States”); *id.* art. I, § 9, cl. 6 (providing in relevant part that “[n]o Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another”); see also *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 163 (1920) (implying duty of uniformity in connection with federal maritime law); *Coyle v. Smith*, 221 U.S. 559, 572–73, 579–80 (1911) (implying “equal footing” doctrine with regard to admission of new states under Article IV, Section 3, Clause 1). Those provisions have not been applied with vigor to conditional means of legislating on domestic matters, see, e.g., Laurence Claus, *Budgetary Federalism in the United States of America*, 50 *Am. J. Comp. L.* 581, 588–92 (2002) (arguing that contrary to *South Dakota v. Dole*, federal spending power must be “common and general,” and not discriminatory in relation to a prohibited criterion), and it is unclear whether they would apply equally to the treaty power or its coordination with compacts. See, e.g., Golove, *Treaty-Making and the Nation*, *supra* note 14, at 1086 n.29 (referencing historical controversy over whether “the treaty context call for a more latitudinarian construction” of the port preference clause); *id.* at 1144 n.266, 1217 & n.470 (mustering additional examples); John O. McGinnis & Michael

The more challenging question is whether the treaty-compact device would be vulnerable as some sort of unconstitutional condition. Even if we assume that compacts are typically consensual in nature, and thus fall outside the core of the anticommandeering doctrine, other threads of the new federalism doctrine—in particular, the law respecting state sovereign immunity, which wrestles with very similar issues concerning consensual tools for abrogation, albeit with respect to the Eleventh rather than the Tenth Amendment<sup>477</sup>—suggest that the Court may be concerned with circumstances in which the state’s range of choices were artificially limited. That issue is best explored together with the remaining barrier posed by the new federalism.

3. *Remedial Limits: State Sovereign Immunity.* — Superficially, at least, the Supreme Court seems to have anticipated and exempted interstate (and, by implication, foreign) compacts from the ever-widening scope of state sovereign immunity. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the Court repealed any exception for constructive waivers of state sovereign immunity.<sup>478</sup> In the same breath, though, the Court pointedly contrasted waivers secured in connection with interstate compacts and conditional spending:

Under the Compact Clause, . . . States *cannot* form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity. So also, Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts. In the present case, however, what Congress threatens if the State refuses to agree to its condition is not the denial of a gift or gratuity, but a

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B. Rappaport, *Our Supermajoritarian Constitution*, 80 *Tex. L. Rev.* 703, 762 (2002) (suggesting that the treaty power, in contrast to federal legislative authority, was not understood by the Constitution’s framers to be “cabin[ed]” by requirements for uniformity like those imposed for bankruptcy laws or laws affecting ports, but that Senate involvement “ensured that support for a treaty was diffused around the country and that no one region could triumph over another”); see also *Coyle*, 221 U.S. at 577–78 (distinguishing, for purposes of “equal footing” doctrine, congressionally sanctioned interstate compacts). Absent any such restriction, or an arguable infringement on fundamental liberties owed each state’s residents, it would seem that the need to encourage states to participate in a bona fide international undertaking by threatening to discriminate among them would satisfy any reasonably appropriate level of scrutiny. Cf. Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 *U. Pa. L. Rev.* 261 (1987) (developing general framework for reviewing geographical discrimination for consistency with equal protection).

477. See Christina Bohannon, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 *N.Y.U. L. Rev.* 273, 324 (2002) (describing approach to unconstitutional conditions in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* as “virtually identical” to that in *New York v. United States*).

478. 527 U.S. 666, 686 (1999).

sanction: exclusion of the State from otherwise permissible activity.<sup>479</sup>

The Court's distinction is entirely in keeping with Compacts Clause precedent. The Court has previously held that the power of consent includes the power to create remedies for breach,<sup>480</sup> and that the judiciary may in fact go so far as to order specific performance of a compact.<sup>481</sup> In *Petty v. Tennessee-Missouri Bridge Commission*,<sup>482</sup> the case specifically contrasted in *College Savings Bank*, the compact under review had been consented to on condition (as the majority read it) that the two states involved waive sovereign immunity. The fact that the states were dependent on congressional consent under the Compact Clause, the Court suggested, licensed Congress to demand amenability to suit in federal court as a condition for the consent.<sup>483</sup> The same reasoning has been applied to compacts post-*College Savings Bank*,<sup>484</sup> and would presumably apply to waivers provided in connection with foreign compacts.<sup>485</sup>

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479. *Id.* at 686–87; see also *MCI Telecomm. Corp. v. Bell Atlantic of Pennsylvania*, 271 F.3d 491, 505 (3d Cir. 2001) (“A fair reading of *College Savings* suggests that Congress may, pursuant to its regulatory power under the Commerce Clause, require a state to waive immunity in order to engage in an activity in which the state may not engage absent congressional approval, or in order to receive a benefit to which the state is not entitled absent a grant or gift from Congress.”).

480. *Virginia v. West Virginia*, 246 U.S. 565, 601 (1918) (“It follows as a necessary implication that the power of Congress to refuse or to assent to a contract between States carried with it the right, if the contract was assented to and hence became operative by the will of Congress, to see to its enforcement.”); see also *id.* at 591 (noting that the judicial power involves the right to enforce the results of “the exertion of such power in controversies between States as the result of the exercise of original jurisdiction conferred upon this court by the Constitution”); *Virginia v. West Virginia*, 78 U.S. (11 Wall.) 39, 55 (1870) (asserting authority over boundary questions entailed by compact, including authority to render decrees affecting territorial limits and state sovereignty).

481. See *Kentucky v. Indiana*, 281 U.S. 163, 178 (1930).

482. 359 U.S. 275 (1959).

483. *Id.* at 281–82 & n.7. Justice Frankfurter, dissenting, agreed in principle, but simply found that the consent's terms did not clearly envision such a waiver, a position entirely in keeping with the Court's subsequent jurisprudence. See *id.* at 283, 285–86 (Frankfurter, J., dissenting) (conceding that “[n]o doubt Congress could have insisted upon a provision waiving immunity from suit in the federal courts as the price of obtaining its consent to the Compact,” but finding that it had not).

484. See *Entergy, Arkansas, Inc. v. Nebraska*, 210 F.3d 887, 896–97 (8th Cir. 2000) (noting that “a state may waive immunity by invoking the jurisdiction of a federal court or by making a ‘clear declaration’ of its intent to submit to such jurisdiction”).

485. For one such example, see *Northeastern Interstate Forest Fire Protection Compact*, *supra* note 368, art. IX, 63 Stat. at 274 (providing that “[a]ll liability that may arise [in assisting another party in providing fire assistance] shall be assumed and borne by the requesting state”). In the event that Congress structured state participation through an interstate compact, it may be argued that the requirement of consent is not inevitable, and that the *Virginia v. Tennessee* test should instead be employed on a case-by-case basis. Where that test for a compact was not satisfied, it might then be argued, congressional consent was not a gratuity. For reasons that may be evident, these conditions are somewhat attenuated, and unlikely ultimately to be satisfied: not only would most compacts founded

But the majority opinion in *College Savings Bank* equivocated in noting that its distinction between gratuities and sanctions would perhaps not hold “when the gift that is threatened to be withheld is substantial enough,”<sup>486</sup> noting that conditional spending cases had indicated that “the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”<sup>487</sup> This nod toward the “coercion” strain of unconstitutional conditions doctrine provides a focus of sorts in an area with considerably varying approaches,<sup>488</sup> but without lending much ultimate clarity. The pertinent question, as others have noted, is whether the state’s choices have been narrowed, which still leaves several possible means of reckoning the *ex ante* baseline.<sup>489</sup>

Under the approach recently proposed by Professor Bohannon, a federal benefit could be used to induce a waiver of sovereign immunity (and, by extension, consent to being commandeered) if the benefit required prior approval by the national government, the benefit was clearly conditional upon waiver, and the state accepted the benefit.<sup>490</sup> The treaty-compact device would fare well under this approach. Unlike the commandeering condemned in *New York v. United States*, where states confronted an illegitimate choice between legislating pursuant to a federal plan or taking title to state-generated hazardous waste (and somehow lost the option of doing neither),<sup>491</sup> states presented with the choice be-

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on treaty relations easily satisfy the *Virginia v. Tennessee* test, but Congress’s perception that consent was appropriate would at least be *prima facie* evidence of that fact.

486. *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687 (1999).

487. *Id.* (quoting *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937))).

488. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 *Harv. L. Rev.* 1413, 1415, 1416–18 (1989) (noting “doctrinal disarray” in existing case law, and widely disparate theories); see also Bohannon, *supra* note 477, at 303–41 (summarizing the Supreme Court’s development of germaneness, utilitarian, coercion, and inalienability permutations of unconstitutional conditions doctrine). I do not explore two of the remaining theories described by Professor Bohannon. One, germaneness, would in my view easily be satisfied by the treaty-compact device, since the condition—waiver of immunity, or consent to being commandeered—would bear a close relationship to the proffered benefit of full participation in the treaty scheme. *Id.* at 311–13. Given this Article’s focus on doctrine, I also do not explore another permutation, the utilitarian theory of unconstitutional conditions, which appears relatively unfounded in the relevant case law. See *id.* at 313–16. Finally, I do not pursue other theories described in the literature that are confessedly at odds with prevailing doctrine. See, e.g., Hills, *supra* note 268, at 921–27 (considering relationship between unconstitutional conditions and conditional preemption).

489. Bohannon, *supra* note 477, at 316–17 (citing Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 *U. Pa. L. Rev.* 1293, 1353–54 (1984)).

490. *Id.* at 326–27. Professor Bohannon also indicated that the benefit must be available “exclusively from the federal government,” but it is not clear what that adds. See *id.* at 323, 326 & n.260.

491. See *New York v. United States*, 505 U.S. 144, 175–76 (1992); Bohannon, *supra* note 477, at 324–25 (noting similarity between *New York* and *College Savings Bank*).

tween opting out or participating in a foreign compact would never, but for the federal government's offer, have had the opportunity to enter into the latter kind of intercourse.<sup>492</sup>

It is unlikely that this inquiry would entirely resolve the matter, since it nearly reduces coerciveness to the distinction between gratuities and sanctions, when *College Savings Bank* suggested that coerciveness might constitute an additional obstacle.<sup>493</sup> Among the available measures, the treaty-compact device probably fares least well against an historical baseline,<sup>494</sup> but even there it depends on which tradition is tapped. The states have traditionally secured the underlying benefits of treaties without having to enter in bargaining with the federal government.<sup>495</sup> What is more, the federal government has been an aggressive defender of states' rights in most international negotiations, to the point where some regard its practices as contributing to a *sub silentio* adoption of the Bricker Amendment and a repeal of *Missouri v. Holland*.<sup>496</sup> On the other hand, states have not traditionally been permitted to participate in foreign compacts or interstate compacts ancillary to a treaty, and have had to suffer the indignity of coerced participation on the purely domestic front.<sup>497</sup> If we maintain the focus on what federalism permits under existing doctrine, it matters in the end that the coercion theory has never proven

492. See supra text accompanying notes 402–406.

493. See supra text accompanying notes 486–487.

494. See Kreimer, supra note 489, at 1359–63 (analyzing the strengths of using historical conditions as baseline). Professor Bohannon dismisses this particular baseline as irrelevant under the reasoning of *College Savings Bank*. See Bohannon, supra note 477, at 319 (stating that historical baseline “does not provide a plausible explanation for the *College Savings Bank* decision”).

495. The Ross Dam Treaty would suggest an exception, save that it involved conscription of a city rather than a state, see supra text accompanying notes 423–433; the Pacific Salmon Treaty involved several states, but did not directly require their participation, see supra text accompanying notes 434–437, and they were able to represent their own interests in the negotiating process to an exceptional degree, see supra note 370 (citing authorities discussing negotiations). Another precedent, arguably, were the negotiations concerning the U.S. annex to the WTO Agreement on Government Procurement, see supra note 72, where the federal government sought to persuade individual states to pledge to conform their procurement practices. It did not, however, resort to any kind of legal compulsion.

496. See supra text accompanying note 167.

497. See supra note 418 (citing example of the Indian Gaming Regulatory Act). If coerciveness were instead considered as a question of proportionality rather than tradition, the treaty-compact device would easily pass muster. *Contra West Virginia v. United States Dep't of Health & Human Servs.*, 289 F.3d 281, 291 (4th Cir. 2002) (concluding that “federal statutes that threaten the loss of an entire block of federal funds upon a relatively minor failing by a state are constitutionally suspect” (citing *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 570 (4th Cir. 1997) (en banc) (Luttig, J.) (suggesting, in opinion joined by five other judges out of thirteen judges sitting en banc, “that a Tenth Amendment claim of the highest order lies where, as here, the Federal Government . . . withholds the entirety of a substantial federal grant on the ground that the States refuse to fulfill their federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign States”))).

decisive in a conditional spending case, let alone in a sovereign immunity or commandeering case, and is subject to more judicial criticism than endorsement.<sup>498</sup>

If not turning on coerciveness, an unconstitutional conditions inquiry might instead ask whether the treaty-compact device affects the transfer of highly valued attributes of sovereignty in a particularly offensive fashion. Neither the right to be free from commandeering nor state sovereign immunity seem, facially, to be the kind of right that might be considered inalienable, particularly given the Court's belief that certain kinds of bargains may legitimately be offered for their surrender.<sup>499</sup> But there is intuitive appeal to the argument that the federal government, given the treaty and compact power to promote the collective interest, ought not be free to employ those powers to appropriate the states' sovereign interests and trade them to foreign nations. Such a claim would not rely, to paraphrase Dean Sullivan, on "a general theory of blocked exchanges," but rather on "a particularized theory for determining when to block surrender of preferred constitutional liberties to [foreign] government[s]."<sup>500</sup>

There is no clear-cut doctrinal basis for resolving such a claim. It is relevant, arguably, that the *Principality of Monaco* decision premised the immunity of states from suits by foreign powers not just on state sovereignty concerns, but also on the national interest, and that it cited compacts as the preferred alternative.<sup>501</sup> But prefabricated compacts surely do a less adequate job of promoting the national interest and state autonomy in equal measure, even if they give states a final choice in the matter. *Principality of Monaco* plainly did not anticipate, moreover, that Congress could employ compacts as a vehicle for persuading states to compromise

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498. Compare *Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000) ("[T]he coercion theory is unclear, suspect, and has little precedent to support its application."), *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997) (finding coercion theory unsupported by facts, "to the extent that there is any viability left in [it]"), *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989) (describing coercion as "highly suspect as a method for resolving disputes between federal and state governments" given "[t]he difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities"), and *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981) (declining to hold funding conditions coercive given that "[t]he courts are not suited to evaluating whether the states are faced here with an offer they cannot refuse or merely a hard choice"), with *West Virginia*, 289 F.3d at 291 (asserting that "we believe that *Riley* strongly indicates that the coercion theory remains viable in this circuit").

499. See Bohannon, *supra* note 477, at 330–41 (considering, and rejecting, application of inalienability theory to waivers of state sovereign immunity); cf. Kreimer, *supra* note 489, at 1378–93 (elaborating theory of inalienability with respect to individual rights); Sullivan, *supra* note 488, at 1476–89 (critically assessing same).

500. Sullivan, *supra* note 488, at 1489.

501. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 331–32 (1934).

that autonomy for the immediate sake of foreign nations,<sup>502</sup> even if the national interest is ultimately being pursued.

The decisive factor, in my view, involves the alternatives already sanctioned in the domestic context. The superficial point is that the treaty-compact device is no more offensive to the states than the alternatives already permitted for purely domestic matters. Of course, the Court's decisions establishing the anticommandeering and state sovereign immunity principles have never established a coherent basis for their exceptions, and most scholars conclude that they could not.<sup>503</sup> But the more redemptive angle, as I have suggested, consists of two themes struck in these decisions: first, the need to provide adequate (by some measure) means of enabling the federal government to pursue its enumerated powers; and second, the favoring of devices that circumvent the new federalism by relying on state consent.<sup>504</sup> The treaty-compact device appears to satisfy both conditions. Because the compacts at issue promote compliance with U.S. treaty obligations, moreover, international law as well as constitutional law advocates resolving constitutional ambiguity in their favor.

Important questions regarding enforceability remain, with their resolution depending both upon the sweep of the new federalism and the precise form that treaty-compact devices might take. If *Missouri v. Holland* is drastically revised, such that the relevant compacts exceed Congress's legislative competence and would not, therefore, furnish a federal rule of decision,<sup>505</sup> the most obvious grounds for predicating federal jurisdiction would be lost.<sup>506</sup> Several cases have indicated, however, that

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502. See *id.* at 330 ("The foreign State lies outside the structure of the Union. The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan, and to the United States as the sovereign which the Constitution creates. We perceive no ground upon which it can be said that any waiver or consent by a State of the Union has run in favor of a foreign State."); cf. *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 541 (1885) ("In their relation to the general government, the States of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the State, they are not those of a different country; and the two, the State and general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution.").

503. See *supra* text accompanying notes 301, 330.

504. See *supra* text accompanying notes 302–304, 347–348.

505. See *supra* text accompanying notes 438–442.

506. I further assume that, were Congress deprived of legislative authority over a particular subject matter, it could not provide for federal jurisdiction in legislation implementing the treaty. The treaty might itself give rise to federal jurisdiction, were it self-executing, but not without running afoul of post-*Holland* principles. *Contra* *Republic of Paraguay v. Allen*, 134 F.3d 622, 626 (4th Cir. 1998) (presenting claim based on Paraguay's treaty rights and, on behalf of the Paraguayan Consul General, a claim under 42 U.S.C. § 1983 alleging denial of rights under the federal treaty). It could not automatically do so against the states without depriving them of their ability to consent—meaning that the compact would again have to provide any legal basis.

notwithstanding the Spartan text of 28 U.S.C. § 1331,<sup>507</sup> federal question jurisdiction might be predicated on the need to provide a neutral forum,<sup>508</sup> the federal interest reflected in consent authority,<sup>509</sup> or the need to retain control over foreign relations.<sup>510</sup> It is at least remotely possible,

507. See 28 U.S.C. § 1331 (2000) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

508. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) (Frankfurter, J.) (“Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts. It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the ‘federal common law’ governing interstate controversies . . . is the function and duty of the Supreme Court of the Nation.” (quoting *Hinderlider v. La Plata Co.*, 304 U.S. 92, 110 (1938))); *Kentucky v. Indiana*, 281 U.S. 163, 176–77 (1930) (“Where the States themselves are before this Court for the determination of a controversy between them, neither can determine their rights *inter sese*, and this Court must pass upon every question essential to such a determination, although local legislation and questions of state authorization may be involved . . . . A decision in the present instance by the state court would not determine the controversy here.” (citations omitted)); Note, *Charting No Man’s Land*, *supra* note 411, at 2002 (“An independent justification for federal jurisdiction is that federal courts provide a more neutral forum than state courts.”).

509. See *Sims*, 341 U.S. at 28 (explaining that “we are free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States”); Note, *Charting No Man’s Land*, *supra* note 411, at 2002–03 (discussing “requirement of congressional consent”).

510. Compare *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997) (holding, in suit brought by Peruvian citizens against U.S. company in which neither the United States nor Peru were parties, that “plaintiffs’ complaint raises substantial questions of federal common law by implicating important foreign policy concerns”), *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1377–78 (11th Cir. 1998) (asserting that “[w]here a state law action has as a substantial element an issue involving foreign relations or foreign policy matters, federal jurisdiction is present,” but concluding that similar suit brought by Venezuelans injured in accident involving a U.S. company did not affect American foreign policy), *Republic of Philippines v. Marcos*, 806 F.2d 344, 353 (2d Cir. 1986) (asserting that “there is federal question jurisdiction over actions having important foreign policy implications”), cert. dismissed, 480 U.S. 942, cert. denied, 481 U.S. 1048 (1987), and *id.* at 354 (“[F]ederal jurisdiction is present in any event because the claim raises, as a necessary element, the question whether . . . the American courts [should] enforce the foreign government’s directives to freeze property . . . .”), with *Patrickson v. Dole Food Co.*, 251 F.3d 795, 799–805 (9th Cir. 2001) (concluding that foreign policy concerns alone cannot be the case for federal question jurisdiction). The viability of this theory clearly would turn in part on the circumstances of the alleged breach. But it is notable that even within the Fifth Circuit, one of those recognizing this basis for jurisdiction, a district court recently distinguished a matter as unsuitable for federal question jurisdiction in part because “the foreign state has initiated the suit in state court, wants the case to remain there, and does not allege any facts implicating itself as liable for the damages claimed”—circumstances presumably available in any foreign state suit for breach of a compact. See *Rio de Janeiro v. Philip Morris Cos.*, No. 9-99CV196, 1999 U.S. Dist. LEXIS 21958, at \*15 (E.D. Tex. Sept. 14, 1999), appeal dismissed, 239 F.3d 714 (5th Cir. 2001). But see *id.* at \*16 (emphasizing

moreover, that to the extent that the compact's terms ape those of the treaty, a federal court may regard the underlying issues as federal in nature.<sup>511</sup> Depending on the litigants and their alignment, federal courts may also be seized of matters that pit one state against another,<sup>512</sup> involve a foreign ambassador or consul<sup>513</sup> or a foreign nation,<sup>514</sup> where the United States is entitled to proceed against a recalcitrant state,<sup>515</sup> or where the foreign nation proceeds against a municipality or like entity.<sup>516</sup>

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that "the causes of action alleged do not threaten, strike at, or implicate the vital economic or sovereign interests of Rio de Janeiro to justify [federal jurisdiction] in this case").

511. Cf. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13 (1983) (finding federal question jurisdiction appropriate, under some circumstances, when "it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims"); *id.* at 27–28 (explaining that even where state law creates the cause of action, federal question jurisdiction may exist if the "plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law"); *Rains v. Criterion Sys.*, 80 F.3d 339, 347 n.9 (9th Cir. 1996) (emphasizing that "we do not suggest that the mere fact that a state statute is construed in accordance with a federal statute gives rise to federal question jurisdiction," but passing over question). But see *Merrell Dow Pharms. v. Thompson*, 478 U.S. 804, 809 (1986) (urging that *Franchise Tax Board* "be read with caution"); *Hunneman Real Estate Corp. v. E. Middlesex Ass'n of Realtors*, 860 F. Supp. 906, 910–11 (D. Mass. 1994) (dismissing complaint for lack of federal question where Massachusetts Antitrust Act merely relied on federal antitrust law for "guidance," "insofar as practicable," for construing state law (internal citations omitted)). While the chances of such an argument prevailing seem remote, the area is not one susceptible to generalization. "What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. . . . a selective process which picks the substantial causes out of the web and lays the other ones aside." *Franchise Tax Bd.*, 463 U.S. at 20–22 (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109, 117–18 (1936)).

512. 28 U.S.C. § 1251(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."); cf. U.S. Const. art. III, § 2 ("The judicial Power [of the United States] shall extend . . . to Controversies between two or more States. . . . In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction.").

513. U.S. Const. art. III, § 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls . . . the supreme Court shall have original Jurisdiction."); 28 U.S.C. § 1251(b) ("The Supreme Court shall have original but not exclusive jurisdiction of: (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties."); *id.* § 1351 (providing for federal question jurisdiction over civil suits against foreign consuls or other diplomatic personnel); e.g., *Breard v. Greene*, 523 U.S. 371, 374–75 (1998) (noting attempt by Government of Paraguay to file complaint invoking the Supreme Court's original jurisdiction).

514. 28 U.S.C. § 1330 (providing for federal question jurisdiction over suits against a foreign state).

515. *Id.* § 1251(b) ("The Supreme Court shall have original but not exclusive jurisdiction of . . . (2) All controversies between the United States and a State.").

516. Diversity jurisdiction is provided where more than \$75,000 is at issue and the suit "is between . . . a foreign state . . . as plaintiff and citizens of a State or of different States." *Id.* § 1332(a). Suits against the state, or where the state is the real party in interest, fall outside § 1332. See *Postal Tel. Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894) (refusing to grant federal jurisdiction in suit against New York corporation "brought by the State [of Alabama] to recover taxes and penalties imposed by its own revenue laws"). But a political subdivision of a state, unless it is simply "the arm or *alter ego* of the State," is a citizen of the

Finally, the Supreme Court may at least be capable of exercising review.<sup>517</sup>

These and other details are best left to the negotiation, domestically and internationally, of actual agreements. Differing methods of enforcement may be appropriate to differing types of treaties, and more than one method may be satisfactory in a given situation. Where reasonable officials may differ, or bargain within a range of solutions, nothing in international or constitutional law suggests that any particular interest must be sacrificed—even when an encumbrance is unique to federalism.

#### CONCLUSION

There is little reason to believe that the treaty-compact device will be regularly exploited. Many treaties raise no federalism issues whatsoever, or raise only questions of political federalism—questions concerning the balance of authority within the United States, but where the national government is clearly capable of acting within its rights. Even where issues of constitutional federalism are posed, other solutions abound: rejecting a treaty, negotiating for a federal state clause, asserting a federalism RUD, or catering to states within implementing legislation. Foreign compacts are likely to be employed in the manner suggested in this Article only when the national government desires state compliance, has the political will to withstand state pressures to advance state interests at the negotiating table or afterward, and perceives that the increment in U.S. authority offered by employing compacts outweighs the domestic and foreign complications the strategy may pose. These are arguably unusual circumstances, even were it plainly understood that accepting state constitutional prerogatives was no longer an inevitability.

But the infrequency with which the mechanism is likely to be employed does not, in my view, eliminate or even substantially reduce its relevance. As a practical matter, the most tangible value may be for foreign governments confronting U.S. claims for federal state exceptionalism: if this Article is correct, objections by U.S. delegations that the Con-

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state for federal diversity jurisdiction purposes. *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973) (quoting *State Highway Comm'n v. Utah Constr. Co.*, 278 U.S. 194, 199 (1929)).

517. *Merrell Dow Pharms. v. Thompson*, 478 U.S. 804, 816 & n.14 (1986) (noting that “even if there is no original district court jurisdiction for these kinds of action, this Court retains power to review the decision of a federal issue in a state cause of action” (citing *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 214–15 (1934) (“Questions arising in actions in state courts to recover for injuries sustained by employees in intrastate commerce and relating to the scope or construction of the Federal Safety Appliance Acts are, of course, federal questions which may appropriately be reviewed in this Court. . . . But it does not follow that a suit brought under the state statute which defines liability to employees who are injured while engaged in intrastate commerce, and brings within the purview of the statute a breach of the duty imposed by the federal statute, should be regarded as a suit arising under the laws of the United States and cognizable in the federal court in the absence of diversity of citizenship.”))).

stitution restricts their ability to command state instrumentalities, or open them up to suit, become less credible. It may also have some purchase in domestic negotiations, at least where the federal government perceives that advancing state claims is not in its overall interest.

Notwithstanding the above, the states also may benefit. If the new federalism's reasoning is to be believed, the binary choice presented by even the sparest treaty-compact device is both doctrinally and functionally preferable to conscripting the states, and for many of the same reasons seems superior to attempts by the federal government to maximize its preemptive authority. Perversely, the new federalism may even be enlivened. If doctrine is indeed sensitive at its margins to preserving national means to pursue constitutional ends, such as the treaty power, rediscovery of the compact power and realization of its new uses may embolden the Court to extend the new federalism to the treaty power, confident that national power may be sustained.

Even if the result on the domestic front is a stalemate, there is independent conceptual value to the exercise. The debate on foreign relations federalism has in large part stalled: there are those who advocate limiting the national treaty power and those who oppose that argument, and those leery of new state assertions of foreign relations authority and those who are much more welcoming. The shared premise of most participants is that constitutional entitlements are independent grants, hermetically sealed from one another, and that the only viable recourse is to the unstructured interactions of the political process. But the horizontal constitution of foreign relations authority—the interactions between the President, the Senate, and (especially in the case of congressional-executive agreements) the Congress as a whole—does not have that character at all. Just so its vertical dimension. Once the compact power, and deliberate decisions to refrain from its use, are considered, it becomes more obvious that our foreign affairs constitution everywhere privileges consent above independence, even where the states are considered.

It may also be helpful in bringing international law back in. The *Missouri v. Holland*, anticommandeering, and state sovereign immunity rules are commonly evaluated solely as matters of domestic constitutional law, with passing concerns regarding the desirability of impairing (or enhancing) the ability of the United States to ensure adherence to its treaty obligations. But how international law accommodates U.S. federalism, and the dynamic impact of constitutional constraints on international bargaining, are rarely considered. The irony is noteworthy. It is the everyday tides of globalization—the flow of trade, investment, and peoples—that make it more difficult to distinguish matters of foreign affairs, and which have challenged the traditional American demarcation between local matters and matters for adjustment by treaty. But the more formal legal trappings of global affairs, including the principle of good faith, should not be ignored in the bargain, and attention must be paid to their implications for the international function of federal government.