EXECUTIVE FEDERALISM: FORGING NEW FEDERALIST CONSTRAINTS ON THE TREATY POWER

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I. INTRODUCTION

The treaty lives a double life. By day, it is a creature of international law, which sets forth extensive substantive and procedural rules by which the treaty must operate.¹ When these rules prove susceptible to dispute—as is the case with treaty reservations, for example—international lawyers vigorously debate both how to clarify the rules and who has the authority to do so.² By night, however, the treaty leads a more domestic life. In its

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domestic incarnation, the treaty is a creature of national law, deriving its force from the constitutional order of the nation state that concluded it.\(^3\)

Within the United States, therefore, the Constitution governs. Just as we look to international law to discern treaty rules on the international plane, so too must we look to the Constitution for substantive or procedural rules by which the treaty functions within the U.S. legal system.

In contrast to international law’s more comprehensive framework, the Constitution contains only three express commands with respect to treaties: (1) the federal government makes treaties; (2) the judiciary can hear cases concerning treaties; and (3) treaties trump state law.\(^4\)

First, in vesting executive power in the president, Article II assigns him the “Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.”\(^5\)

At the same time, Article I denies states the right to “enter into any Treaty, Alliance, or Confederation.”\(^6\)

Second, Article III extends the judicial power “to all Cases, in Law and Equity, arising under . . . Treaties made, or which shall be made, under” the authority of the United States.\(^7\)

Third, in Article VI the Constitution mandates that, like federal law, “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”\(^8\)

Such short textual treatment leaves ample room for interpretive play. Three issues have drawn particularly sustained attention. First, there is the judiciary’s role in enforcing treaties. If treaties are the “supreme Law of the Land” and subject to federal judicial power, should courts enforce or

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Comment No. 24, Nov. 2, 1994, 34 I.L.M. 839, 845 (insisting the Human Rights Committee established under the 1966 International Covenant on Civil and Political Rights (“ICCPR”) has authority “to determine whether a specific reservation is compatible with the [ICCPR’s] object and purpose”), with Observations by the United States on General Comment 24, 3 INT’L HUM. RTS. REP. 265 (1996) (rejecting the committee’s views of its own authority and insisting on the presumptive validity of reservations unless rejected by the parties).

3. See, e.g., AUST, supra note 1, at 143; Duncan B. Hollis, A Comparative Approach to Treaty Law and Practice, in NATIONAL TREATY LAW AND PRACTICE 1, 39–45 (Duncan B. Hollis, Merritt R. Blakeslee & L. Benjamin Ederington eds., 2005).

4. Notwithstanding its international usage, I use “state” herein to refer to U.S. states. Similarly, “state sovereignty” refers to immunities available to U.S. states under the Eleventh Amendment.

5. U.S. CONST. art II, § 2, cl. 2.

6. U.S. CONST. art I, § 10, cl. 1. See also id. at cl. 3 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact . . . with a foreign Power . . . .”).

7. U.S. CONST. art III, § 2, cl 1.

effectuate all U.S. treaties?9 Second, there is Article II’s exclusivity. Must the president send all treaties to the Senate for advice and consent, or does the Constitution permit alternative methods for making international agreements?10

For nearly a decade, scholars have engaged in a third, more fundamental question—does federalism constrain the Article II treaty power?11 Just as debates over reservations question what limits international law places on treaty-making, the federalism debate asks how—if at all—the Constitution’s federal structure restrains which treaties the United States can conclude or implement. Fueled by the Supreme Court’s recent adjustments to its domestic Commerce Clause jurisprudence, the current debate constitutes one more battle in a campaign that traces its roots back to the Founders.12 In its latest formulation, two camps have emerged.


10. Congress has historically used its legislative powers to authorize, before or after the fact, “congressional-executive agreements,” while the president has concluded other agreements relying on his own constitutional authorities. The Supreme Court has accepted both practices as alternative means of creating federal law, binding on the states. See, e.g., Am. Ins. Ass’n v. Garamendi, 539 U.S. 396, 415 (2003) (discussing sole executive agreements); B. Altman & Co. v. United States, 224 U.S. 583, 601 (1912) (discussing congressional-executive agreements). Following the North American Free Trade Agreement’s (“NAFTA”) conclusion as a congressional-executive agreement, debate over Article II’s exclusivity reemerged. See, e.g., Bruce Ackerman & David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995); Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221 (1995). Recognizing that “certain international agreements may well require Senate ratification,” the Eleventh Circuit declined, on political question grounds, to find it was required for NAFTA. See Made in the USA Found. v. United States, 242 F.3d 1300, 1302 (11th Cir. 2001). To avoid confusion, I use the term “treaty” herein only to refer to agreements concluded pursuant to Article II.


In one camp lie the reigning “nationalists.” Nationalists contend that the Supreme Court definitively, and correctly, resolved the question of federalism constraints on the treaty power in *Missouri v. Holland*.[14] The *Restatement (Third) of the Foreign Relations Law of the United States* encapsulates this view, relying on *Missouri* for the proposition that “the Tenth Amendment, reserving to the several States the powers not delegated to the United States, does not limit the power to make treaties or other agreements.”[15] Nationalists thus reject the idea that federalism imposes subject matter limitations on the conclusion or implementation of treaties, even for subjects Congress could not otherwise regulate in the treaty’s absence.[16]

In the other camp reside the rebellious “new federalists.” New federalists reject the orthodoxy’s view of *Missouri* in light of: (1) the Supreme Court’s renewed willingness to protect states’ rights under the banner of federalism; and (2) the expansion of treaty-making to include new procedures and subjects previously thought to be of distinctly local concern.[18] New federalists contend that the Court could, or should, restrict the subjects the United States may regulate by treaty—or Congress’s ability to implement them—to accord with existing limits on Congress’s enumerated powers.[19] They also support imposing other federalism-based

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16. See id. § 303 cmt. b & c. See also Damrosch, *supra* note 13, at 530 (explaining that “our constitutional law is clear: the treaty-makers may make supreme law binding on the states as to any subject, and notions of states’ rights should not be asserted as impediments to the full implementation of treaty obligations’’); Golove, *supra* note 12, at 1287 (arguing that “treaties may include matters that could not otherwise be regulated by Congress” and that “the treaty power extends to all proper subjects of negotiation and agreement between states’’). Nationalists do not, however, contend the treaty power is limitless. See infra notes 52–54 and accompanying text.


18. See, e.g., Bradley, *supra* note 17, at 394; Rosenkranz, *supra* note 17, at 1869–70.

19. See, e.g., Bradley, *supra* note 17, at 450; Bradley II, *supra* note 17, at 100; Swaine, *supra* note 17, at 415–16. Although I do not address his arguments here, John Yoo has suggested imposing federalism constraints on the treaty power by adopting a presumption that treaties are not self-
restrictions, such as the anticommandeering principle, to restrain the processes by which the federal government imposes treaty obligations on the states. Thus, new federalists suggest the Supreme Court should read Missouri more narrowly or overrule it entirely.

Despite their dramatically different legal prescriptions, both the nationalist and the new federalist camps focus attention on the same subject—the Supreme Court. Both seek to explicate what the Court has done with the treaty power to date and what it should do in the future. Any attention to other actors in the process—such as, the president and Senate in making treaties, or Congress in implementing them—serves merely as historical or incidental evidence in support of the Court taking one judicial interpretation of the treaty power over another.

In centering the fight on the judiciary, however, the current debate misses the mark in two key respects. First, treating the Court as the appropriate subject for the debate may be unrealistic. New federalists may be correct that the Court could act as the ultimate arbiter of limits on federal authority to conclude or implement treaties that impinge on the states’ powers. Nationalists may also be correct that the Court has already authoritatively addressed such questions in Missouri. Neither argument, however, fully addresses whether the Court will actually reenter the fray, either to affirm Missouri or apply its new federalism jurisprudence to treaties. Absent such involvement, it is hard to see a resolution of the ongoing debate in judicial terms. The reality is a Court that has shown little inclination to either clarify or overturn Missouri, and there is no assurance that changes in the Court’s composition will alter the status quo.

Second, whether or not the Court is an appropriate subject for the debate, it is clearly not the only subject. As the Court has disengaged from the issue, the executive has repeatedly interpreted the treaty power’s scope and devised its own mechanisms for accommodating federalism in U.S. treaty-making—for example, seeking differentiated treaty obligations for federal and nonfederal governments or leaving treaty implementation to the
states in lieu of new federal legislation. Thus, if you want to know whether federalism limits U.S. treaty-making today, you are more likely to find your answer in executive actions than in the scholarly readings of judicial tea leaves.

To date, however, scholars have largely ignored executive efforts to self-judge when and how federalism limits U.S. treaty obligations—efforts I label as “Executive Federalism.” But Executive Federalism has significant domestic and international ramifications. Domestically, it implicates (1) the nature of federalism, (2) the structure by which it operates, and (3) the content of the doctrine itself. First, the existence of Executive Federalism may change how we conceive federalism’s nature, by demonstrating that it need not function solely as a judicial or legislative safeguard for states’ rights. Second, even as it serves as a vehicle for executive self-restraint, Executive Federalism has larger structural implications; it can weaken the authority of other federal actors, including the Courts, the Senate, Congress, and even future presidents, to voice their views of federalism in the treaty context. Third, even if we adopt the more conventional judicial perspective of the treaty power, Executive Federalism provides valuable information about how the holder of that power—the executive—conceives its scope; a conception likely to influence the Court’s own view should it reengage with the issue.

Apart from its domestic implications, Executive Federalism can also dramatically affect U.S. foreign relations. It can prevent some treaty-making altogether, constrain U.S. negotiating positions, impose extra costs

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24. See infra Part IV.


26. One notable exception involved reaction to the executive’s position on human rights treaties. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, Treaties, Human Rights, and Conditional Consent, 149 U. Pa. L. Rev. 399, 402 (2000); Louis Henkin, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 Am. J. Int’l L. 341, 348–49 (1995). Moreover, my version of “Executive Federalism” should not be confused with the concept of the same name used in Canadian and European political science circles to refer to informal cooperation among executives at the federal and subfederal level in policymaking to the exclusion of federal and subfederal parliaments. Although both versions of “Executive Federalism” stress the notion of executive primacy, my use of the term “Executive Federalism” references the executive’s ability to dominate the constitutional separation of powers issues associated with the treaty power’s scope, not the informal political cooperation among various executives within the Canadian and European federal systems.
for achieving U.S. negotiating goals, or complicate questions of U.S.
compliance. All told, Executive Federalism challenges the traditional
presumption that courts will authoritatively resolve the treaty power debate
and requires us to reconceptualize that debate to treat the executive as an
essential subject in its own right.

Part II of this Article surveys the ongoing debate between nationalists
and new federalists over constitutional limitations on the treaty power and
demonstrates both sides’ preoccupation with the judiciary. Part III explains
why the Court is unlikely to engage on the issue, let alone follow new
federalist calls to overturn Missouri. Part IV reviews the executive’s
approach to federalism historically and assesses its increasing influence on
U.S. treaty-making. Part V analyzes the domestic implications of the
executive’s practice for federalism as a principle, as well as for other
governmental actors with an interest in the doctrine. Part VI concludes that
we need to actively engage in a normative dialogue over how the executive
should carry the federalism banner and the larger implications of its doing
so for U.S. foreign affairs.

II. FIGHTING OVER FEDERALISM AND THE TREATY POWER

During the second half of the twentieth century, scholars treated the
nationalist conception of the treaty power as conventional wisdom. Louis
Henkin summarized the perspective simply, stating: “There are no
significant 'state’s rights' limitations on the treaty power.”27 Nationalists
conceded the matter had been subject to recurring debate since the
Founding. But they viewed Justice Holmes’s decision in Missouri as
interring any possibility of federalism limitations on the treaty power.28
Without “imply[ing] that there are no qualifications to the treaty-making
power,” nationalists relied on Holmes’s finding that neither the
Constitution’s text nor any “invisible radiation from the general terms of
the Tenth Amendment” prohibited U.S. treaty-making or Congress’s
implementation thereof on matters beyond Congress’s enumerated
powers.29

In 1998, however, Curtis Bradley put Missouri v. Holland back in play
with his article, The Treaty Power and American Federalism.30 Bradley

27. Henkin, supra note 26, at 345.
29. Id. at 433–34.
30. See Bradley, supra note 17; Peter J. Spiro, Missouri v. Holland: Beside the Point?, 94 AM.
contended that “there is a strong case—based on history, doctrine, and policy—for subjecting the treaty power to the same federalism limitations that apply to Congress’s legislative powers,” even if it meant overruling all or part of Missouri. 31 Other scholars followed, claiming that federalism prohibited treaties from “commandeering” states to perform U.S. treaty obligations or from empowering Congress to enact implementing legislation in excess of its legislative powers. 32 In response, nationalists rallied to defend Missouri and the status quo. 33

In these debates, nationalists and new federalists have utilized various modalities of constitutional interpretation, including text, structure, history, prudence, and judicial doctrine. 34 For each side, however, judicial doctrine is the lynchpin. Each set of arguments ultimately distills into an effort to guide, or predict, the Supreme Court’s view of the treaty power. Thus, either the text, structure, history, and prudential claims explain why Missouri remains good law, as nationalists claim, or they enforce the new federalists’ contention that the Court’s resurgent federalism jurisprudence must supercede it.

A. TALKING TEXTUALLY

For nationalists, Missouri’s rejection of states’ rights limitations on the treaty power derives from the text of the Constitution. 35 The Tenth Amendment reserves to the states “powers not delegated to the United States by the Constitution, nor prohibited by it to the States.” 36 But nationalists emphasize that the treaty power plainly falls outside this reserved sphere. 37 The Constitution does delegate the treaty power, without

32. See, e.g., Rosenkranz, supra note 17, at 1868; Swaine, supra note 17, at 414, 430–31.
33. See, e.g., Martin S. Flaherty, Are We to be a Nation? Federal Power vs. “States’ Rights” in Foreign Affairs, 70 U. COLO. L. REV. 1277, 1280 (1999); Golove, supra note 12, at 1101; Sloss, supra note 13, at 1979.
34. See, e.g., Bradley, supra note 17, at 394–95. See also PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) (describing six “modalities” of constitutional interpretation—historical, textual, structural, doctrinal, ethical, and prudential). Bobbitt actually uses Missouri to illustrate his modalities. See id. at 45–63. Although I concur with Bobbitt’s larger thesis, declining to establish a hierarchy among modalities, I depart from his typology by treating judicial doctrine and political practice separately.
35. See, e.g., Golove, supra note 12, at 1090.
36. U.S. CONST. amend. X.
37. HENKIN, supra note 13, at 191. See also RESTATEMENT (THIRD), supra note 15, § 302, cmt. c; Note, Restructuring the Modern Treaty Power, 114 HARV. L. REV. 2478, 2481 (2001) [hereinafter Restructuring].
restriction, to the federal government. Moreover, Article I actually prohibits the states from treaty-making. And, if the treaty power operates independent of the Tenth Amendment, nationalists argue, then Congress has the power to pass “necessary and proper” legislation implementing a treaty, regardless of otherwise applicable limits on enumerated powers.

New federalists insist, however, the textual delegation of the treaty power tells us nothing about the scope of that delegation. The mere fact of the commerce power’s delegation, for example, has not precluded Tenth Amendment constraints on that power. Similarly, new federalists discount the ban on state treaty-making: “[w]hile it is true that the states have not reserved the power to enter into treaties, this does not mean that they have not reserved other regulatory powers that might be infringed by certain exercises of the federal treaty power.”

New federalists further reject interpreting the Constitution to empower Congress to implement treaties beyond its enumerated powers. Reading the treaty power together with the Necessary and Proper Clause, Nicholas Rosenkranz finds that Congress only has the “[p]ower . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . [the President’s] Power . . . to make Treaties.” He thus finds that Congress has the power to legislate in support of making treaties, that is, funding treaty negotiations, but not carrying them into execution. If a treaty’s implementation exceeds Congress’s Article I powers, Rosenkranz would leave implementation to the states or require a constitutional amendment.

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38. Golove, supra note 12, at 1082; RESTATEMENT (THIRD), supra note 15, § 302, cmt. d. In contrast, the Articles of Confederation had substantively limited Congress’s treaty-making power with respect to the states’ own regulation of commerce. See ART. OF CONFED., art. IX; HENKIN, supra note 13, at 188.

39. See HENKIN, supra note 13, at 189; Golove, supra note 12, at 1091.

40. HENKIN, supra note 13, at 190; Golove, supra note 12, at 1099–100. See also U.S. CONST. art. I, § 8, cl. 18.

41. Bradley, supra note 17, at 434.

42. See id. at 435.

43. Id. at 436. Curtis Bradley also questions the exclusivity of the delegation in light of Congress’s power to authorize compacts and congressional-executive agreements. Id.

44. Rosenkranz, supra note 17, at 1882 (emphasis added).

45. Id. at 1885.

46. Id. at 1919–20.
B. STRUCTURAL LIMITATIONS

From text, the debate moves quickly into structure. In particular, nationalists and new federalists contest the following: (1) whether the treaty power is an inherent power or a limited, enumerated one; (2) if limited, which limits apply to it; and (3) who should enforce such limits.

1. An Inherent or an Enumerated Power?

For nationalists and new federalists, the structural debate reflects different first principles. Some nationalists regard the treaty power as an inherent power—one that resides in all national governments—operating free from constitutional constraints designed for delegated powers. Other nationalists acknowledge that the Article II delegation is the source of the treaty power but regard that delegation as comprehensive, putting the federal power on par with whatever treaty powers other nations possess.

In contrast, new federalists start with the proposition that the Constitution establishes a federal government possessing only limited and enumerated powers. For them, an inherent treaty power would operate “in deep tension with the fundamental constitutional principle of enumerated legislative powers.” As such, they believe the treaty power must function like other enumerated powers and respect the reserved powers of the states.

2. Which Limitations?

Notwithstanding their divergent perspectives on the treaty power’s source, both camps acknowledge that the Constitution limits treaty-making; they concede, for example, that a U.S. treaty cannot violate protections in the Bill of Rights, such as freedom of speech, or usurp Congress’s...
exclusive powers, such as appropriation of federal funds. Nationalists even acknowledge some implicit constitutional restrictions protective of states’ rights. They generally accept that treaties cannot obligate courts to hear suits compromising state sovereign immunity. Similarly, they agree that treaties cannot dismember a U.S. state, cede state territory, modify the republican character of a state’s government, or abolish its militia.

The two camps part ways, however, once the federalism banner is raised over subjects reserved to the states. Nationalists like David Golove contend the Constitution’s text and structure contemplate a treaty power that reaches “all proper subjects of negotiation and agreement between states” in furtherance of U.S. national interests vis-à-vis other nations. As such, nationalists have no objection to treaties incidentally regulating matters otherwise within the states’ reserved domain. Nationalists are somewhat divided, however, on what constitutes a “proper subject of negotiation.” Many of them reject the distinction—previously championed by Charles Evans Hughes—that treaty-making can only occur on international (as opposed to domestic) matters. Most nationalists believe such a standard would constrain U.S. participation in human rights

52. Restatement (Third), supra note 15, § 302(2); Henkin, supra note 13, at 185, 187, 459 n.52; Bradley, supra note 17, at 393; Golove, supra note 12, at 1083, 1097; Healy, supra note 13, at 1750; infra note 171. Earlier scholars had suggested treaties were equal in authority to the Constitution, but no nationalist today subscribes to that view. See, e.g., Restatement (Third), supra note 15, § 302, cmt. b; Henkin, supra note 13, at 186.


54. See Restatement (Third), supra note 15, § 302, reporter’s n.3; Henkin, supra note 13, at 166, 193; Golove, supra note 12, at 1144; Healy, supra note 13, at 1750.

55. Golove, supra note 12, at 1287. See also Henkin, supra note 13, at 197, 474 nn.93–94 (indicating that treaties can regulate matters otherwise “internal” to the states or normally subject to their jurisdiction and offering examples to support this proposition). Nationalists do not, however, endorse “mock marriage” treaties designed primarily to regulate domestic standards. See, e.g., id. at 185; Golove, supra note 12, at 1090; Healy, supra note 13, at 1750.

treaties.58 Others accept Hughes’s international concern test but read the
term “international” flexibly to encompass matters that have become
subject to international cooperation, even if once viewed as internal to the
states.59 Thus, notwithstanding differing terminology, nationalists
uniformly define the treaty power’s scope in terms of the appropriateness
of the subject matter for international negotiation.60

New federalists, by contrast, rebuff limiting the treaty power to
“proper subjects of negotiation,” as Golove proposes, or the older
“international concern” criterion.61 They maintain that an international
subject matter constraint makes no sense because today “almost any issue
can plausibly be labeled ‘international.’”62 Similarly, they find the proposal
to limit treaties to proper subjects of negotiation “lack[s] any real content,”
as it would have the “treaty power encompass any treaty that the treaty-
makers decide to conclude.”63 New federalists suggest that both approaches
produce an essentially unlimited treaty power in violation of the
fundamental notion of limited, enumerated powers.64

For their part, new federalists propose a constraint on the treaty power
that they believe would truly protect state interests—that is, making the
treaty power, or Congress’s ability to implement it, subject to Congress’s
limited and enumerated Article I powers.65 For new federalists, treaties

58. See Henkin, supra note 13, at 197. See also Restatement (Third), supra note 15, § 302,
cmt. c (rejecting international concern limitations for U.S. treaties); Golove, supra note 12, at 1288–90
(same); Restructuring, supra note 37, at 2498 (same). Henkin argues, however, that human rights
treaties do address matters of international concern. Henkin, supra note 13, at 197–98.

59. See Healy, supra note 13, at 1732, 1750; Gerald Neuman, The Global Dimension of RFRA,
14 Const. Comment. 33, 46 (1997). Although he had thought it “unlikely to prove a serious
limitation” in his second edition, the current edition of Laurence Tribe’s treatise on Constitutional law
now characterizes the international concern test as a “meaningful restriction.” Compare Laurence H.
Tribe, American Constitutional Law § 4–4, at 646 (3d ed. 2000) with Laurence H. Tribe,

60. See Golove, supra note 12, at 1285; Healy, supra note 13, at 1750.

61. See, e.g., Swaine, supra note 17, at 417. New federalists acknowledge support for an
international concern test in prior Supreme Court decisions upholding treaties on subjects typically
regulated by the states, such as real property, because they involved the treatment of aliens—a matter
that concerns “inter-national relations.” Bradley, supra note 17, at 419–21.


63. Id. See also Bradley II, supra note 17, at 107–08 (rejecting Golove’s “proper subjects of
negotiation” test); Swaine, supra note 17, at 417 (noting that few people continue to advocate an
international concern test and dismissing the possibility that courts would use Golove’s proposed test).

64. See, e.g., Bradley, supra note 17, at 393–94.

65. See id. at 450 (opposing treaties that create “domestic law that could not be created by
Congress”); Virginia H. Johnson, Application of the Rational Basis Test to Treaty-Implementing
(2001) (arguing for a more stringent review standard of Congress’s power to implement treaties);
Rosenkranz, supra note 17, at 1878, 1919 (arguing for constraints on Congress’s authority to implement
could be made on any subject but would only have force as U.S. law if they comported with Congress’s enumerated law-making power.66

Separately, nationalists and new federalists spar over whether and how the anticommandeering principle applies to U.S. treaty-making. That doctrine prohibits the federal government from mandating actions by state legislatures or executives.67 New federalists view its application to U.S. treaty implementation as inevitable.68 But some nationalists suggest that the principle would not apply if it conflicted with the federal government’s foreign affairs power.69

3. Who Should Enforce Federalism Limits?

As they contest federalism-based restraints on the treaty power, nationalists and new federalists also argue over who should impose any restraints. Nationalists contend that the political process already affords states sufficient protection, so states have little to fear from a broad reading of the treaty power.70 In doing so, they invoke the notion of “political safeguards of federalism,” first articulated by Herbert Wechsler and developed by Jesse Choper.71 For nationalists, the Senate serves as the states’ political safeguard in U.S. treaty-making.72 Given the supermajority

treaties); Swaine, supra note 17, at 421–22 (suggesting that implementing legislation receive the same review as ordinary legislation or a presumption that it comports with existing federal authorities).

66. See, e.g., Bradley II, supra note 17, at 100; Rosenkranz, supra note 17, at 1919.

67. See, e.g., New York v. United States, 505 U.S. 144, 188 (1992) (holding that the United States may not compel a state legislature to administer a federal program); Printz v. United States, 521 U.S. 898, 935 (1997) (holding that the United States may not compel state law enforcement officials to execute federal law).

68. See, e.g., Bradley, supra note 17, at 456; Swaine, supra note 17, at 431.

69. See Flaherty, supra note 33, at 1280; Healy, supra note 13, at 1246–47. See also Neuman, supra note 59, at 52 (suggesting that the anticommandeering principle would force Congress to implement human rights treaties); Tribe, supra note 10, at 1260 (surmising that the anticommandeering principle is inapplicable to the treaty power). Other nationalists concede the principle’s application in the treaty context. See, e.g., Henkin, supra note 13, at 193, 466 n.72; Golove, supra note 12, at 1087, 1281–82; Carlos Manuel Vázquez, Breard, Printz, and the Treaty Power, 70 U. COLO. L. REV. 1317, 1320–21 (1999).

70. See, e.g., Healy, supra note 13, at 1753.

71. Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543, 558 (1954); Henkin, supra note 13, at 441 n.84; Healy, supra note 13, at 1753; Sloss, supra note 13, at 1975. See also Jesse H. Choper, Judicial Review and the National Political Process (1980).

required for Senate advice and consent to a treaty, nationalists see no need for additional judicial safeguards.\footnote{\textsuperscript{73}}

New federalists are far less sanguine about relying on political safeguards.\footnote{\textsuperscript{74}} Although they acknowledge that the Senate can play an obstructionist role in the treaty process, they do not believe it does so out of any “genuine commitment to federalism.”\footnote{\textsuperscript{75}} They also deny the political process provides enough of a real benefit to state interests such that the Supreme Court would defer to it.\footnote{\textsuperscript{76}}

\section*{C. INVOKING HISTORY}

To support their textual and structural conclusions, both nationalists and new federalists turn to history.\footnote{\textsuperscript{77}} All acknowledge the treaty power’s scope received little debate during the Founding and the Framers failed to resolve what differences they had.\footnote{\textsuperscript{78}} Nevertheless, both sides extensively mine the materials to discuss whether the treaty power was intended to (1) operate as a limited, enumerated power; (2) reach only matters of international concern; (3) avoid infringements on state powers; and (4) empower Congress to enact implementing legislation.\footnote{\textsuperscript{79}}

For example, nationalists claim that the Framers did not envision constitutional limitations for treaties; both the \textit{Federalist Papers} and the Virginia Ratifying Convention debates stressed the breadth of the treaty power.\footnote{\textsuperscript{80}} They explain that breadth as an outgrowth of the Articles of Confederation experience, where rigid states’ rights limitations on the

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\textsuperscript{73.} See, e.g., \textsc{Henkin}, \textit{supra} note 13, at 443–44 n.4; \textsc{Healy}, \textit{supra} note 13, at 1754; \textsc{Sloss}, \textit{supra} note 13, at 1984–85.

\textsuperscript{74.} See, e.g., \textsc{Bradley}, \textit{supra} note 17, at 441, 443; \textsc{Bradley II}, \textit{supra} note 17, at 110; \textsc{Swaine}, \textit{supra} note 17, at 442.

\textsuperscript{75.} \textsc{Swaine}, \textit{supra} note 17, at 413 n.31. \textit{See also} \textsc{Bradley}, \textit{supra} note 17, at 442 (denying, as a historical matter, that the Founders intended the Senate’s protection of states’ rights to be the only protection for states’ rights).

\textsuperscript{76.} \textsc{Swaine}, \textit{supra} note 17, at 413, 443–44. \textit{See also} \textsc{Bradley II}, \textit{supra} note 17, at 110 (listing reasons why the treaty context is less amenable to a political safeguards argument than in the context of domestic legislation).

\textsuperscript{77.} Neither camp, however, insists upon an originalist approach. See, e.g., \textsc{Bradley II}, \textit{supra} note 17, at 119–20 (declaring originalism); \textsc{Golove}, \textit{supra} note 12, at 1101, 1313 (arguing that \textit{Missouri} was an “originalist” decision, but also employing textual, structural, and doctrinal arguments).

\textsuperscript{78.} \textsc{See \textsc{Henkin}}, \textit{supra} note 13, at 175; \textsc{Bradley}, \textit{supra} note 17, at 410–15. \textit{See also} \textsc{Golove}, \textit{supra} note 12, at 1187. \textsc{Golove} quotes Jefferson as saying: “To what subjects this [treaty] power extends has not been defined in detail by the Constitution; nor are we entirely agreed among ourselves.” \textsc{Id}.

\textsuperscript{79.} There is also some discussion of political safeguards as a historical concept. See \textsc{Bradley}, \textit{supra} note 17, at 412; \textsc{Healy}, \textit{supra} note 13, at 1753.

\textsuperscript{80.} \textsc{See \textsc{Henkin}}, \textit{supra} note 13, at 175, 186–87 n.4; \textsc{Golove}, \textit{supra} note 12, at 1138, 1141.
\end{thebibliography}
federal government had produced widespread state noncompliance with U.S. treaties. As such, nationalists contend that the Framers knew U.S. treaties would affect state interests, but rather than restricting the treaty power itself, they vested concurrent power in the Senate.

New federalists review the same materials and reach the opposite conclusion. They see in the historical debates a desire for a flexible treaty power, not an unlimited one. They find that the evidence supports not only a limitation on the treaty power to international matters, but also a corresponding autonomy for states from treaty interference with their domestic affairs. Thus, new federalists contend that history establishes the original “understanding that the treaty power was limited either by subject matter, by the reserved powers of the states, or both.”

New Federalists also contest Henkin’s claim that the Framers had intended the Necessary and Proper Clause to authorize Congress to implement all U.S. treaties. In reality, both Martin Flaherty, a nationalist, and Nicholas Rosenkranz, a new federalist, have shown that Henkin’s

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81. See, e.g., Henkin, supra note 13, at 175; Golove, supra note 12, at 1103, 1132. See also Thomas A. Bailey, A Diplomatic History of the American People 56–57 (10th ed. 1980) (detailing states’ violations of treaties during the Articles of Confederation period).
82. Golove, supra note 12, at 1135. The Framers originally planned to give the Senate the whole treaty power, only later transferring it to the president with Senate advice and consent. Samuel Crandall, Treaties: Their Making and Enforcement 43 (John Bryne & Co. 2d ed. 1916).
83. See Bradley, supra note 17, at 413 (citing Madison’s views).
84. Id. at 411, 413, 415 (citing Hamilton, Madison, and Jefferson for the international concern test, and Randolph and Nichols for the reserved powers limitation); Bradley II, supra note 17, at 129–30 (citing state ratification debates to support states’ rights protections). Jefferson eventually endorsed the reserved powers limitation in his Senate Manual of Parliamentary Practice, § LII (J. Milligan and W. Cooper, 1812), available at http://www.constitution.org/tj/tj-mpp.htm (stating that the treaty power was not intended to include “rights reserved to the States; for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing”).
85. Bradley, supra note 17, at 417. See also id. at 411, 417, 457 (citing Hamilton and Madison as supporting the existence of an international concern limitation on the treaty power and constitutional scholars such as Rawle, Mikell, and St. George Tucker as supporting the existence of a reserved powers limitation). Not surprisingly, nationalists disagree. See, e.g., Henkin, supra note 13, at 197, 471 n.87 (finding, except for Jefferson, that the international concern test is of “uncertain constitutional origins”).
86. Rosenkranz, supra note 17, at 1912–18. See also Johnson, supra note 65, at 354 (noting how little prior attention was paid in federalism debates regarding the Congressional power to implement treaties). Relying on Charles Butler’s work, Henkin suggested an early version of the Necessary and Proper Clause included congressional authority to enforce treaties, but that such language was stricken as superfluous. See Henkin, supra note 13, at 481 n.111 (citing M. Farrand, The Records of the Convention of 1787, at 382 (rev. ed. 1966)); C. Butler, The Treaty-Making Power of the United States 318 (1902). See also id. at 460 n.53 (“The debates on limitations [of the treaty power] do not distinguish between the authority to make treaties or to give them effect as law in the United States.”).
claim was in error.87 Absent such evidence, Rosenkranz concludes “there is no reason in constitutional history to believe that the clause as adopted entails power, beyond the other enumerated powers, to enforce treaties.”88

Beyond the Founding materials, both sides present subsequent historical evidence to bolster—or undermine—their respective interpretations.89 Often, they rely on the same source. For example, nationalists cite John Calhoun for the idea that the Constitution wholly vests the treaty power in the federal government and requires no enumeration like that for shared legislative powers.90 In contrast, new federalists emphasize that Calhoun’s statements suggest states’ rights and international concern limits for the treaty power.91 Similar competing claims are made with respect to Joseph Story, William Rawle, Henry St. George Tucker, attorney general opinions, and the Senate’s views.92

Post-Missouri, nationalists and new federalists debate the more recent historical record in two respects: the implications of the Bricker Amendment and the question of changed circumstances in U.S. treaty-making. In the 1950s, Senator Bricker sought a constitutional amendment limiting the treaty power, including a proposal to supersede MissourI by

87. The language Henkin relied upon was included (and removed from) the Militia Clause, not the Necessary and Proper Clause. See Martin S. Flaherty, History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land”, 99 COLUM. L. REV. 2095, 2123–24 (1999); Rosenkranz, supra note 17, at 1915–18.
88. Rosenkranz, supra note 17, at 1918.
89. See, e.g., Bradley, supra note 17, at 418–22; Golove supra note 12, at 1189–92, 1238, 1240. Golove’s discussion is extensive. See Golove, supra note 12, at 1154–93, 1206–43, 1246–53. The two sides’ conflicting reading of the Court’s doctrine is discussed in Part II.E.3, infra.
90. See Golove, supra note 12, at 1091. Golove quotes Calhoun as saying: “[E]numeration of legislative powers in the Constitution has relation, then, not to the treaty-making power, but to the powers of the States. In our relation to the rest of the world the case is reversed. Here the States disappear.” Id.
91. Bradley II, supra note 17, at 103, nn.26–27 (citing Calhoun for the notion that the supremacy of treaties cannot “extend beyond the delegated powers” and that the treaty power was to be “strictly limited” to “questions between us and foreign powers which require negotiation to adjust them”). But see HENKIN, supra note 13, at 460 n.54. Henkin quotes Calhoun at length, including language favoring both reserved powers and international concern limitations:
[The treaty power] has for its object contracts with foreign nations, as the powers of Congress have for their object whatever can be done in relation to the powers delegated to it . . . . Each in its proper sphere operates with general influence . . . . A treaty never can legitimately do that which can be done by law; and the converse is also true. Id.
92. Compare Golove, supra note 12, at 1206–10, 1222, 1226–28, 1239 (reciting views of Story, Rawle, St. George Tucker, Attorney Generals Wirt and Taney, and Senate Foreign Relations Committee Chair Charles Sumner to bolster the nationalist conception of the treaty power); Bradley II, supra note 17, at 416–17, 421–22 (reciting views of Story, Rawle, St. George Tucker, Attorney General Wirt, and the Senate to bolster the new federalist conception of the treaty power); Bradley II, supra note 17, at 127 (contesting Golove’s characterization of Wirt’s views).
making treaties “effective as internal law in the United States only through legislation which would be valid in the absence of treaty.”\textsuperscript{93} That proposal never passed, although a later version fell one vote shy of the necessary two-thirds majority.\textsuperscript{94} Nationalists suggest that this defeat actually strengthened Missouri’s constitutional underpinnings and confirmed their vision of the treaty power.\textsuperscript{95} New federalists emphasize, however, that to defeat Bricker, President Eisenhower promised the Senate that he would not send it any human rights treaties, signaling real political restrictions on the treaty power, even in the absence of a constitutional amendment.\textsuperscript{96}

Instead of Bricker, new federalists focus on a radical transformation they claim has occurred in the subjects of U.S. treaty-making, including matters such as human rights, criminal law, and environmental protection that nation states previously addressed domestically.\textsuperscript{97} Moreover, they contend treaties now operate as “international ‘legislation,’” directed at individuals rather than the nation states whose relationships treaties had traditionally regulated.\textsuperscript{98} Taken together, new federalists suggest that these changes alter “the very essence of international commitments,” undermining any continued adherence to the nationalist conception of the treaty power.\textsuperscript{99} Nationalists object to such claims, arguing that the new subjects of U.S. treaty-making are functionally equivalent to those covered in earlier U.S. treaties.\textsuperscript{100}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{93} Duane Tananbaum, The Bricker Amendment Controversy: A Test of Eisenhower’s Political Leadership 91 (1988).
\item \textsuperscript{94} Id. at 180.
\item \textsuperscript{95} Henkin, supra note 13, at 193; Golove, supra note 12, at 1275.
\item \textsuperscript{96} Swaine, supra note 17, at 415; Bradley, supra note 17, at 427. Nationalists concede this fact has some importance. See Henkin, supra note 13, at 193; Healey, supra note 13, at 1732–33; Henkin, supra note 26, at 349.
\item \textsuperscript{97} See, e.g., Bradley, supra note 17, at 396, 402–08.
\item \textsuperscript{98} See, e.g., id. at 396, 456. U.S. treaty-making has undergone a third change, increasingly utilizing the congressional-executive agreement format in lieu of Article II. See supra note 10. The two methods are widely viewed as interchangeable; implicitly suggesting to some that they both operate free from Congress’s enumerated power limits. See Restatement (Third), supra note 15, § 303, cmt. c; Henkin, supra note 13, at 217. Not all nationalists make that inference. See Golove, supra note 12, at 1307; Restructuring, supra note 37, at 2498–500. To the extent the domestic legal force of congressional-executive agreements depends on Congress’s authorities, however, they must operate within the confines of Congress’s enumerated powers. As such, this Article focuses on the federalism question solely in the Article II context.
\item \textsuperscript{99} Bradley, supra note 17, at 397.
\item \textsuperscript{100} See, e.g., Golove, supra note 12, at 1101, 1305. Nationalists also argue that the current treaty-making subjects have always been within the treaty power’s scope; the federal government had simply not exercised all aspects of the power previously. Id. at 1304–05.
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Beyond text, structure, and history, the federalism debate has produced various prudential claims. First, nationalists argue that applying enumerated power limits to treaties would likely preclude treaty-making on subjects important to U.S. foreign relations because the states themselves cannot make treaties even for matters within their reserved powers. Nationalists fear the U.S. inability to speak on issues internationally.

New federalists are more concerned with maintaining a federal government of limited powers than preserving the U.S. ability to operate internationally. They fear that, as a practical matter, the treaty power could get around federalism limits on Congress’s power and revive statutes that otherwise did not survive constitutional scrutiny. They raise the specter of U.S. ratification of treaties like the U.N. Convention on the Rights of the Child or the Convention on the Elimination of All Forms of Discrimination Against Women as impinging on areas historically addressed by the states and for which Congress might otherwise lack legislative power. New federalists suggest tying the treaty power to Congress’s legislative power would avoid any such infringements.

E. Doctrine: Judging the Treaty Power’s Scope

In the end, the foregoing arguments serve as no more than evidence in a larger doctrinal debate. For both nationalists and new federalists, the treaty power’s scope ultimately rests on Missouri v. Holland. Nationalists...
are explicit that their arguments aim to affirm Missouri as rightly, and authoritatively, disposing of any claim that either the Tenth Amendment specifically, or federalism more generally, restrains U.S. treaty-making.106 Nationalists view Missouri as “one of the cornerstones of the whole edifice of the constitutional law of foreign affairs.”107

New federalists are equally focused on the Supreme Court. Instead of defending Missouri, however, they seek to justify overturning it or dramatically restricting its scope.108 New federalists contend that the Supreme Court’s revival of federalism outside the treaty context suggests that the Court would, or should, overrule Missouri.109 As Rosenkranz writes, “Missouri v. Holland may be canonical, but it does not present a strong case for the application of stare decisis. It is wrongly decided and it should be overruled.”110

In focusing on the Court, the debate emphasizes three doctrinal questions: (1) Did Missouri have doctrinal support when it was decided? (2) What is the scope of Missouri’s holding? and (3) Will the Court’s new federalism jurisprudence modify that holding?

1. Pre-Missouri Precedents

Nationalists emphasize Missouri’s roots in earlier Supreme Court cases upholding the validity of treaties dealing with local matters regulated by the states.111 Thus, they read the Court’s opinion in Ware v. Hylton to support not just the supremacy of treaties over state law, but also the treaty’s ability to regulate subjects otherwise within the purview of state legislatures.112 Similarly, nationalists rely on Geofroy v. Riggs, which described the treaty power as “unlimited” and touching “any matter which

106. Golove, supra note 12, at 1079 (“It is to defending the correctness of Missouri that I devote the following pages.”). See also Henkin, supra note 13, at 190 (arguing that claims of a states’ rights limitation on the treaty power were “finally and definitively” rejected in Missouri); Sloss, supra note 13, at 1978–79 (critiquing Bradley’s proposal that the Supreme Court should overrule Missouri). The title of Healy’s article—Is Missouri v. Holland Still Good Law?—suggests a similar concern. See Healy, supra note 13, at 1726, 1756.
107. Golove, supra note 12, at 1314.
108. See, e.g., Bradley, supra note 17, at 460; Swaine, supra note 17, at 419, 422.
109. See Swaine, supra note 17, at 419, 422; Bradley II, supra note 17, at 112; Bradley, supra note 17, at 435, 458–60.
110. Rosenkranz, supra note 17, at 1937.
111. Henkin, supra note 13, at 191; Golove, supra note 12, at 1193.
112. Golove, supra note 12, at 1152–53; Healy, supra note 13, at 1729. See also Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (invalidating a Virginia statute cancelling debts owed to British subjects as inconsistent with Article IV of the Treaty of Peace with Great Britain).
is properly the subject of negotiation with a foreign country.”¹¹³ Nationalists believe these early Court cases, while not definitive, suggest Missouri was not “a surprise to anyone carefully following the precedents.”¹¹⁴

New federalists, however, suggest Missouri was actually a departure from prior doctrine. They read the nationalists’ litany of cases to establish nothing more than the supremacy of treaties over state law, not to grant them an unlimited scope.¹¹⁵ Moreover, new federalists emphasize that these early cases all involved treaties regulating alien rights, a matter concededly of international concern and within Congress’s power.¹¹⁶ They interpret Geofroy to reflect both an “international concern” constraint, as well as a prescription against using treaties to expand legislative powers.¹¹⁷ They cite other cases, notably New Orleans v. United States, to demonstrate that the Court has opposed using the treaty power to expand Congress’s Commerce Clause authority.¹¹⁸

2. And Then There Is Missouri

Missouri v. Holland is the “most discussed case in the constitutional law of foreign affairs.”¹¹⁹ It involved federal enforcement of the 1918 Migratory Bird Treaty Act, passed to give effect to a 1916 U.S. treaty with Great Britain, which forbade the hunting, killing, sale, or shipment of

¹¹³. See, e.g., Golove, supra note 12, at 1245–46. In Geofroy v. Riggs, the Court acknowledged that the treaty power could not extend “so far as to authorize what the Constitution forbids, or a change in the character of [state] government . . . or a cession of any portion of the territory of the latter,” but upheld the U.S. ability to regulate alien property rights by treaty, notwithstanding state law. 133 U.S. 258, 266–67 (1890).

¹¹⁴. Golove, supra note 12, at 1246. See also Healy, supra note 13, at 1729 (discussing Hauenstein v. Lynham, 100 U.S. 483, 490 (1879), where the Court in dicta cited Calhoun: “all questions which may arise between us and other powers, be the subject-matter what it may, fall within the treaty-making power”).

¹¹⁵. Bradley, supra note 17, at 418. See also Bradley II, supra note 17, at 130. Bradley critiques Golove for overstating “the degree to which Supreme Court precedents resolved the treaty power issue prior to Holland. Most of the decisions Golove cites . . . simply held that valid treaties preempt inconsistent state law.” Id.

¹¹⁶. Bradley, supra note 17, at 420.

¹¹⁷. See id. at 419 nn.163 & 167 and accompanying text.

¹¹⁸. Bradley, supra note 17, at 419; Rosenkranz, supra note 17, at 1899–900. See also New Orleans v. United States, 35 U.S. (10 Pet.) 662, 736 (1836) (stating that the U.S. government has limited powers and “can exercise authority over no subjects, except those which have been delegated to it” and neither legislative nor treaty-making powers can enlarge federal jurisdiction). But see Golove, supra note 12, at 1231 n.519 (reading the case to suggest that the “equal footing” doctrine, rather than reserved powers, prohibited U.S. exercise of jurisdiction over intrastate property).

¹¹⁹. HENKIN, supra note 13, at 190. For comprehensive treatment of the decision itself, see Charles A. Lofgren, Missouri v. Holland in Historical Perspective, 1975 SUP. CT. REV. 77 (1975).
migratory birds, except as allowed by federal regulations.\(^\text{120}\) Two Missouri citizens were indicted for violating the regulations and Missouri sued to enjoin further enforcement, arguing the Act fell outside Congress’s enumerated powers.\(^\text{121}\)

Missouri argued that none of Congress’s enumerated powers allowed it to regulate migratory birds; indeed, lower courts had invalidated an earlier 1913 migratory bird statute based on such an understanding.\(^\text{122}\) For Missouri, the fact that the new 1918 Act implemented a treaty did not grant Congress additional powers: “[e]very treaty must be presumed to be made subject to the rightful powers of the governments concerned, and neither the treaty-making power alone, nor . . . in conjunction with any or all other departments . . . can bind the Government to do that which the Constitution forbids.”\(^\text{123}\) Missouri argued that a contrary interpretation would mean the treaty power had no limits and could control state laws on “purely internal affairs.”\(^\text{124}\)

Writing for the Court, Justice Holmes focused on the treaty’s validity, reasoning that “if the treaty is valid, there can be no dispute about the validity of the statute” under the Necessary and Proper Clause.\(^\text{125}\) But Holmes declined on textual grounds to use either the Tenth Amendment or Congress’s enumerated powers as benchmarks for analyzing treaties: “Acts of Congress are the supreme law of the land only when made in pursuance


\(^{121}\) See Lofgren, supra note 119, at 92–94.

\(^{122}\) Missouri, 252 U.S. at 432; Lofgren, supra note 119, at 82, 91–92. In United States v. Shauver, the federal government justified the legislation under Congress’s power to make rules on U.S. property (per U.S. Const. art. IV, § 3), claiming Commerce Clause authority only in the motion for a rehearing. 214 F. 154, 160 (E.D. Ark. 1914). Interestingly, the judge who voided the 1913 Act found the 1918 Act constitutional because of the treaty power. See United States v. Thompson, 258 F. 257 (E.D. Ark. 1919).

\(^{123}\) Missouri Appellant Brief, supra note 123, at 73 (expressing concern that treaties could overrule state laws on inspection, quarantine, health, internal trade, elections, opium, and intoxicating liquors).

\(^{124}\) Missouri Appellant Brief, supra note 123, at 73 (expressing concern that treaties could overrule state laws on inspection, quarantine, health, internal trade, elections, opium, and intoxicating liquors).

\(^{125}\) Missouri, 252 U.S. at 432. Notwithstanding his objections, Rosenkranz notes this statement had doctrinal roots. See Rosenkranz, supra note 17, at 1880 n.61 (citing Keller v. United States, 213 U.S. 138, 147 (1909); Neely v. Henkel, 180 U.S. 109, 121 (1901); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 619 (1842)).
of the Constitution, while treaties are declared to be so when made under the authority of the United States, so that any limits on treaty-making “must be ascertained in a different way” from statutes. Holmes proposed a national interest test for such an assessment: “[i]t is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could.”

Holmes then made the nationalists’ now-standard structural, historical, and doctrinal arguments to justify this national interest test. Structurally, Holmes assumed the treaty power covered matters requiring “national action,” because it had to match powers enjoyed by other nations. Historically, he invoked the Civil War to suggest that no longer could states insist that certain subjects, such as slavery, were inherently reserved—in Holmes’s words, by “some invisible radiation from the general terms of the Tenth Amendment”—and thus off-limits to U.S. treaty-makers. Finally, Holmes turned to the Court’s own precedents to demonstrate that even if issues “usually fall within the control of the State . . . a treaty may override its power.”

With respect to migratory birds, Holmes reasoned that a “national interest of very nearly the first magnitude” was involved that could only be protected by national action. He implied that the states would leave no birds to protect if they retained power over the matter. As such, Holmes upheld both the treaty and its implementing statute.

126. Missouri, 252 U.S. at 432–33. Although his statements might suggest otherwise, Holmes did “not mean to imply that there are no qualifications to the treaty-making power.” Id. He acknowledged treaties must comport with constitutional prohibitions. See id. at 433.

127. Id.

128. Id.

129. Id. at 433–34 (“[W]hen we are dealing with words that also are a constituent act, like the Constitution . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said one hundred years ago. . . . The only question is whether [the treaty] is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what the country has become in deciding what the Amendment has reserved.”). See also Golove supra note 12, at 1262–65 (analyzing Holmes’s historical argument).

130. Missouri, 252 U.S. at 434–35 (citing Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); Hauenstein v. Lynham, 100 U.S. 483 (1879); Geofoy v. Riggs, 133 U.S. 258 (1890)).

131. Id. at 435.

132. Id.
3. Missouri’s Legacy and the New Federalism

Nationalists see Missouri as the centerpiece of their defense against federalism-based attacks. They emphasize the Court’s subsequent affirmations of Missouri’s reasoning, notably in Asakura v. City of Seattle and Santovincenzo v. Egan. More recently, lower courts have relied on Missouri to validate legislation implementing U.S. obligations under the Hostage-Taking Convention. Given such continuing doctrinal support, nationalists view Missouri as unassailable.

New federalists, however, have serious doubts. They recognize that for many years post-Missouri the Supreme Court showed little inclination to limit the federal government’s regulation of the states. This trend reached its zenith with Garcia v. San Antonio Metropolitan Transit Authority, where a 5-4 majority declined to find a “sacred province of state autonomy” warranting constitutional protection from the exercise of Congress’s commerce power, in lieu of the political process protections afforded to states by the constitutional scheme. The new federalists insist, however, that the landscape has changed. Since the 1990s, the Court has shown a new willingness to limit Congress’s domestic powers and to provide judicial protections to states from federal legislative intrusion.

Looking at these efforts, new federalists suggest two areas—the Court’s restrictions on Congress’s commerce power and its prohibition of federal commandeering—where the Court’s precedents could operate to constrain the treaty power.

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133. See Damrosch, supra note 13, at 530; Golove, supra note 12, at 1266; Healey, supra note 13, at 1731.
134. Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) (stating that the treaty power “is broad enough to cover all subjects that properly pertain to our foreign relations”); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (“[The treaty power] is not limited by any express provision of the Constitution, and, though it does not extend ‘so far as to authorize what the Constitution forbids,’ it does extend to all proper subjects of negotiation between our government and other nations.”). See also Reid v. Covert, 354 U.S. 1, 18 (1957) (affirming Missouri’s rejection of Tenth Amendment barriers to treaty-making).
135. See, e.g., United States v. Ferreira, 275 F.3d 1020, 1027–28 (11th Cir. 2001); United States v. Lue, 134 F.3d 79, 82–84 (2d Cir. 1998). See also Rosenkranz, supra note 17, at 1871 n.11 (citing earlier cases of courts holding statutes as necessary and proper to implement treaties).
136. See, e.g., Bradley II, supra note 17, at 111; Swaine, supra note 17, at 414.
137. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985). The Court, over a strong dissent, acknowledged the origins of its rule in the work of Wechsler and Choper. Id. at 551 n.11.
138. See Bradley II, supra note 17, at 400.
139. See Bradley II, supra note 17, at 111; Swaine, supra note 17, at 406–07. New federalists also contend a third element of the Court’s federalism jurisprudence—state sovereign immunity—precludes treaty-making that would obligate, or authorize, suits by foreign nations or individuals against the states in federal or state courts. See, e.g., Swaine, supra note 17, at 433. Nationalists, however, have not
In 1995, in *United States v. Lopez*, the Supreme Court struck down a statute that criminalized firearms possession within a school zone as beyond Congress’s interstate commerce power.\(^{140}\) In doing so, the Court emphasized the federal government as one of enumerated powers, requiring a distinction between what is “truly national and what is truly local.”\(^ {141}\) Five years later, in *United States v. Morrison*, the Court again struck down part of a statute—the Violence Against Women Act—as an unconstitutional infringement on the reserved powers of the states.\(^ {142}\) In order to protect individual rights, the Court affirmed the need to distinguish between national and local authorities and emphasized the judiciary’s role in drawing this line, notwithstanding the political protections of states’ rights that might exist under the Constitution.\(^ {143}\)

New federalists interpret *Lopez* and *Morrison* to mean that, just as the Court imposed an outer limit on Congress’s commerce power, so too could it impose such a limit on the treaty power.\(^ {144}\) Moreover, they insist that, at a minimum, these cases support viewing all federal power as enumerated power, notwithstanding *Missouri’s* rejection of any “invisible radiation” from the Tenth Amendment.\(^ {145}\) Absent limits on the treaty power to subjects of international concern, new federalists suggest the only other available limits on federal power exist in those applicable to Congress.\(^ {146}\) Nationalists, however, think *Lopez* “is unlikely to foreshadow so radical a change,” nor are they all willing to accept the demise of an international concern test.\(^ {147}\)

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\(^{141}\) Id. at 552, 568.

\(^{142}\) *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that Congress lacked the authority to enact a statute under the Commerce Clause or the Fourteenth Amendment). See also *City of Boerne v. Flores*, 521 U.S. 507, 518, 536 (1997) (voiding the Religious Freedom Restoration Act as outside Congress’s remedial powers under the Fourteenth Amendment and reasoning that “as broad as the congressional enforcement power is, it is not unlimited”’ (quoting *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970)).

\(^{143}\) See *Morrison*, 529 U.S. at 616 n.7.

\(^{144}\) Swaine, *supra* note 17, at 475. For a discussion of *Gonzales v. Raich*, see *infra* notes 200–03 and accompanying text.

\(^{145}\) See Swaine, *supra* note 17, at 416.

\(^{146}\) See Bradley, *supra* note 17, at 450.

\(^{147}\) Neuman, *supra* note 59, at 47. See also Healy, *supra* note 13, at 1750 n.192 (acknowledging that the international concern limitation may have continuing validity).
In a separate line of anticommandeering cases starting with *New York v. United States*, the Supreme Court found that the Tenth Amendment prohibited the federal government from commandeering state legislatures.\(^{148}\) Noting that the Tenth Amendment was “but a truism” the Court described “mirror image” methods for the Court’s protection of federalism—either policing the limits of Congress’s Article I powers or monitoring Congressional action to see if it invades the province of state sovereignty reserved by the Tenth Amendment.\(^{149}\) As between the two, the Court opted to determine if Congress had acted within its enumerated powers, concluding that it had not.\(^{150}\)

In *Printz v. United States*, the Court extended the anticommandeering principle to prohibit Congress from enlisting state law enforcement officials to perform a federal program.\(^{151}\) Using originalist, structural, and doctrinal analysis, the Court reasoned that “‘[e]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.’”\(^{152}\) Thus, the Court reasoned that even if the Commerce Clause authorized Congress to regulate interstate commerce directly, it did “‘not authorize Congress to regulate state governments’ regulation of interstate commerce.’”\(^{153}\) In this way, the Court articulated the protections of the Tenth Amendment not only through limits on enumerated powers, as was arguably the case in *New York*, but also by protecting a zone of residual state sovereignty.\(^{154}\) As such, some new federalists suggest that the anticommandeering principle could now restrict U.S. treaty implementation, by preventing, for example, the federal government from forcing states to enforce specific treaty requirements.\(^{155}\)

\(^{148}\) *New York v. United States*, 505 U.S. 144, 175–76 (1992). Under the challenged statute, Congress required states to take title to, and accept accompanying liability for, radioactive waste or to regulate it in accordance with congressional guidelines. The Court found both mandates unconstitutional. *Id.*

\(^{149}\) *Id.* at 155–56.

\(^{150}\) *Id.* at 157, 177. *But see id.* at 177 (suggesting that the provision violated the constitutional structure regardless of which method is used).

\(^{151}\) *Printz v. United States*, 521 U.S. 898 (1997) (finding unconstitutional the Brady Act’s requirement that local law enforcement evaluate whether potential firearm purchases complied with that Act).

\(^{152}\) *Id.* at 924 (quoting *New York*, 505 U.S. at 166). *See also id.* at 905, 918, 925 (detailing the Court’s historical, structural, and doctrinal arguments).

\(^{153}\) *Id.* at 924 (quoting *New York*, 505 U.S. at 166).

\(^{154}\) *See id.* at 918–20. *See also Reno v. Condon*, 528 U.S. 141, 149 (2000) (characterizing both *New York* and *Printz* as invalidating statutes because the procedural exercise of that authority violated federalism principles contained in the Tenth Amendment).

\(^{155}\) *See, e.g.*, Swaine, *supra* note 17, at 425.
In sum, new federalists have seized on the Court’s recent federalism jurisprudence, combined with the expansion of U.S. treaty-making in both scope and substance, to explain the need for change. They claim the time has come to overrule Missouri and read the treaty power to reach as far as, but no further than, Congress’s Article I powers.156

III. WHY THE COURT MIGHT NOT ANSWER THE CALL TO OVERRULE MISSOURI

The previous section demonstrated the rigor, complexity, and force with which nationalists and new federalists have debated the treaty power’s scope. At the same time, it suggested a common purpose of all concerned—to elucidate an interpretation that would find favor with the Supreme Court.

Let me be clear—I am not suggesting that either the nationalists or the new federalists have ignored voices outside the judiciary; far from it. Both sides extensively rely on historical materials other than judicial precedent.157 But, I am suggesting that both argue the veracity of their respective positions through a judicial lens—fighting over what the Court’s prior pronouncements mean with respect to the treaty power and what it could do in the future.158 They do not invoke the views of other government actors for their own sake, but to marshal evidence that supports—or undermines—existing precedents and explains whether the Court should reexamine them today.159 In making such arguments, each side implicitly assumes only the Court will be effective in this sphere, whether by affirming Missouri or deciding that legislative power limitations apply to treaty-making and its implementation. Absent further judicial pronouncements, therefore, the debate stands stalemated.160

I believe both the nationalists and new federalists are wrong to view their debate solely through a judicial lens. A closer examination of the Court’s case law suggests five reasons why—notwithstanding Lopez, Morrison, New York, and Printz—it is unlikely to reexamine Missouri any time soon: (1) support for Missouri on the Court, (2) judicial reluctance to review treaties, (3) renewed deference to the foreign affairs power, (4)

156. Bradley, supra note 17, at 458–60; Rosenkranz, supra note 17, at 1868.
157. See supra Part II.C.
158. See supra notes 106–10 and accompanying text.
159. Thus, nationalists and new federalists do not offer dueling Calhoun quotations to contest the views of Calhoun qua Calhoun, but as competing versions of historical evidence that the Court could use in analyzing the treaty power’s scope. See supra notes 90–91 and accompanying text.
160. See Swaine, supra note 17, at 533.
reemergence of broader conceptions of Congress’s legislative powers, and (5) executive interpretations of the treaty power’s scope. Although the first four reasons favor the nationalist conception, they should not be too quick to declare victory; nor should the new federalists cry foul. By viewing my arguments only in judicial terms, nationalists and new federalists are likely to misinterpret their significance. Both sides miss the point if they only care about whether Missouri warrants stare decisis treatment—the real issue today is how the executive branch regards the treaty power. Its views will largely determine that power’s future scope.

A. Missouri Still Finds Favor with the Court

For a case as venerable as Missouri, it has received surprisingly little doctrinal attention. Members of the Court have cited it only thirty-four times, and only twenty-two of those were majority opinions. Nevertheless, five members of the current Court have endorsed opinions citing Missouri as good law within the last five years. Most recently, in United States v. Lara, Justice Breyer authored a majority opinion, in which then-Chief Justice Rehnquist and Justices Stevens, O’Connor, and Ginsburg joined, citing Missouri favorably. Lara considered whether the treaty power, read together with the Indian Commerce Clause, gave Congress plenary power to dictate the Indian tribes’ sovereign power to exercise criminal jurisdiction. In discussing the treaty power, Breyer differentiated it from Congress’s legislative power. But, citing Missouri, Breyer noted how the treaty power authorized Congress to implement matters it otherwise lacked the power to legislate. Justice Thomas’s concurring opinion in Lara also cited Missouri, suggesting Congress gained no additional power to legislate absent a specific treaty requiring implementation. Thus, Lara shows four of the current Justices—Breyer, Ginsburg, Stevens, and Thomas—accepting Missouri as good law.

161. These citation counts for Missouri were derived using the Sheperdizing function at www.lexis.com (last visited Sept. 20, 2006).
163. Id.
164. Id. (citing Missouri v. Holland, 252 U.S. 416, 433 (1920); Henkin, supra note 13, at 72).
165. See id. at 225 (Thomas, J., concurring) (rejecting the idea that the treaty power “provide[s] Congress with free-floating power to legislate as it sees fit on topics that could potentially implicate some unspecified treaty”).
A fifth justice, Souter, can also be listed in Missouri’s corner given his dissenting opinion in *Missouri*. There, Souter criticized the majority decision for finding the Violence Against Women Act lacked the requisite connection to interstate commerce because the matter regulated was “traditionally subject” to state criminal law. Souter complained such “special solicitude for ‘areas of traditional state regulation’” had no textual basis but relied on the “‘spirit’ or “what Justice Holmes more bluntly called ‘some invisible radiation from the general terms of the Tenth Amendment.’” Souter recalled Holmes had admonished against such readings “in deciding what that Amendment has reserved.” Taken together, the Court’s recent jurisprudence suggests at least five of the current justices affirmatively support Missouri, and there is no corresponding evidence that the remaining justices are hostile to it.

B. THE COURT RESISTS JUDICIAL REVIEW OF THE TREATY POWER

For all the pages devoted to Missouri and the treaty power, one might expect to find at least a few cases where the Court struck down treaties on federalism grounds. In reality, however, the Supreme Court has never struck down a treaty for exceeding the scope of the treaty power. The Court seems to have implicitly adopted Justice Chase’s views in *Ware v. Hylton* that “[i]f the court possess a power to declare treaties void, I shall never exercise it, but in a very clear case indeed.” Of course, by

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167. *Morrison*, 529 U.S. at 646.


169. *Id.* Separately, in *Minnesota v. Mille Lacs Band of Chippewa Indians*, a five judge majority (Justices O’Connor, Stevens, Souter, Ginsberg, and Breyer) cited *Missouri* for the proposition that, notwithstanding state interests in regulating wildlife and natural resources, the states shared that authority “when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making.” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999).

170. I have found no evidence that Chief Justice Roberts or Justice Alito have expressed or joined in any written opinion taking a position on Missouri’s continued validity.

171. *HENKIN*, supra note 13, at 190; Golove, supra note 12, at 1292. In *Reid v. Covert*, the Court struck down a provision that authorized overseas court-martials of U.S. citizens as conflicting with the Fifth and Sixth Amendments. *Reid v. Covert*, 354 U.S. 1 (1957). One of the invalidated provisions implemented an executive agreement concluded under the NATO treaty’s framework. The Court concluded that Congress had no necessary and proper authority to implement that treaty because “no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.” *Id.* at 16.

172. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1796) (Chase, J.) (examining the Articles of Confederation’s treaty power). *See* *Golove*, supra note 12, at 1295 n.747 (suggesting that courts defer
upholding the 1916 Migratory Bird Treaty, Missouri implies the Court could declare a treaty unconstitutional, but Holmes’s national interest requirement does not suggest a test easily adjudicated.Nor has the Court done anything to clarify the different way Holmes proposed the Court should evaluate treaties.

Curtis Bradley suggests that the Court should end such judicial abdication given the blurring line between international and domestic matters. But such blurring may actually make the Court less likely to impose limits, especially if it had not been willing or able to do so even when the line was more clearly drawn. Moreover, although the Court is divided on the issue in the legislative context, some justices might view the political safeguards of federalism as minimizing any need for a judicial role in treaty-making, particularly where it has not had one in the past. In either case, it would require a dramatic change for the Court to suddenly begin policing limits on the treaty power.

C. FOREIGN AFFAIRS CAN COUNTERBALANCE FEDERALISM

Considered in isolation, new federalists paint a picture of treaty-making changes and shifts in federalism jurisprudence that suggest a greater likelihood the Court will start to police the treaty power’s scope. But these changes have not occurred in isolation. While the Court has revised federalism limits in the Commerce Clause context, it has also demonstrated a heightened willingness to protect a broad foreign affairs power from interference by states’ laws. By their very nature, treaties—even those dealing with matters traditionally regulated by the states—implicate foreign relations. As such, the Court’s recent foreign affairs jurisprudence may serve as a counterweight to any pressure to apply the new federalism jurisprudence to treaties.
This is not to suggest, as Justice Sutherland did in *Curtiss-Wright*, that the treaty power is not an enumerated power.\(^\text{179}\) The Court now views it as such.\(^\text{180}\) But, even as an enumerated power, the treaty power clearly falls within the panoply of express and implied executive powers that comprise the president’s power to act in foreign affairs.\(^\text{181}\) Thus, the Court could treat the relationship between treaty and state powers much the way it has treated the relationship between foreign affairs and state powers. On the latter, the Court’s views have long been clear—“[p]lainly, the external powers of the United States are to be exercised without regard to state laws or policies.”\(^\text{182}\)

Recently, in *American Insurance Ass’n v. Garamendi*, the Court reiterated the autonomy of foreign affairs from state interference.\(^\text{183}\) The Court invalidated a California statute—the Holocaust Victim Insurance Relief Act—because it conflicted with the president’s foreign policy.\(^\text{184}\) In reaching this decision, the Court presumed that there is “no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government’s policy” because uniformity in foreign relations had “animated the Constitution’s allocation of the foreign

\(^{179}\) In *United States v. Curtiss-Wright Export Corp.*, Justice Sutherland drew a sharp line between exercising power over foreign and domestic matters. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315–16 (1936). For the former, he assumed that Britain’s “external sovereignty” over the colonies passed directly to the federal government, rather than flowing through the states as a function of the constitutional enumeration of powers. As such, he reasoned external affairs powers—including the treaty power—were free from whatever constitutional limits applied to the federal government’s internal powers. *Id.* at 316–17.

\(^{180}\) See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (listing the treaty power as one of the federal government’s “enumerated constitutional powers”).

\(^{181}\) See *United States v. Belmont*, 301 U.S. 324, 331 (1937) (Sutherland, J.) (listing the treaty power as one of the United States’ external powers).

\(^{182}\) *Id.* Justice Sutherland likely reached this conclusion based on his assumption that the external affairs power had extra-constitutional origins. *See supra* note 179. But, his conclusion does not depend on that assumption; one can also explain the irrelevancy of the states by reasoning that the federal government received a complete and exclusive delegation of the foreign affairs powers (and, by implication, the treaty power). *See Belmont*, 301 U.S. at 330 (finding that federal and state governments share internal affairs powers while the external affairs power is “vested exclusively in the national government”). Indeed, more recent judicial pronouncements adopt this view. *See Garamendi*, 539 U.S. at 413.

\(^{183}\) *See Garamendi*, 539 U.S. at 413. The decision was 5-4, but divided along different lines than the Court’s new federalism cases. Justice Souter wrote the majority opinion, joined by Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Breyer. Justice Ginsburg wrote a dissenting opinion, joined by Justices Stevens, Scalia, and Thomas, arguing that state statutes should not conflict with foreign policy absent a formal “clear statement” of foreign policy or an executive agreement. *See id.* at 430, 443 (Ginsburg, J., dissenting). But if the dissent accepts conflicting executive agreements as sufficient for preemption purposes, it follows treaties would serve equally well.

\(^{184}\) *Id.* at 401.
relations power to the National Government in the first place.” The Court noted that treaties, and valid executive agreements, are thus fit to preempt state law. Interestingly, in doing so, the Court made clear that constitutional guarantees of individual rights still apply. But, it made no corresponding caveat regarding the reserved powers of the states. In fact, the Court indicated that federal power would trump state actions in cases of a sufficiently clear conflict even where states had acted within their “traditional competence.”

_Garamendi_ also reaffirmed an idea some new federalists had declared moribund—the need to restrain exercises of state power that hamper the president’s ability to speak for the Nation with “one voice.” The _Garamendi_ Court reasoned that California’s statute undercut the president’s “considerable independent constitutional authority” to conduct foreign relations even though Congress had not expressly approved his actions. Similarly, in 2000, the Court decided in _Crosby v. National Foreign Trade Council_ that the president’s foreign policy toward Burma preempted different policies in a Massachusetts statute imposing sanctions on Burma. _Crosby_ concluded that the state’s statute conflicted with the president’s authority “to speak for the United States among the world’s nations”—an authority it found, citing _Youngstown_, was at its “maximum” given congressional approval and the president’s own constitutional powers, including the treaty-making power. Thus, _Crosby_ suggests the case for a “one voice” override of states’ rights is stronger when the executive and legislative branches take a common position. But that is exactly the scenario where new federalists insist on overruling _Missouri—that is, cases where the president’s conclusion of a treaty, with Senate

185. _Id._ at 413. The Court further accepted “executive authority to decide what that policy should be,” _Id._ at 414 (relying on concurring opinions in _Youngstown Sheet & Tube Co. v. Sawyer_, 343 U.S. 579 (1952), for an explanation of how the president and Congress shared foreign affairs power).

186. _Id._ at 416.

187. _Id._ at 416 n.9.

188. _Id._ at 419 n.11. The Court noted it might evaluate the strength of the foreign policy interests at issue. _Id._

189. _See_ Bradley, _supra_ note 17, at 447–48. _But see_ Swaine, _supra_ note 17, at 405 n.5 (citing cases on preemption of state laws in the foreign affairs and favoring continued, limited protection of the president’s power to negotiate in that context).

190. _Garamendi_, 539 U.S. at 424. President Eisenhower had criticized the Bricker Amendment on this point, arguing that it would make him “represent 49 governments in . . . dealings with foreign powers, whereas he was convinced that in foreign affairs there could be only one United States.” _Golove, supra_ note 12, at 1276.


193. _Id._ at 380–81 (citing _Youngstown Sheet & Tube Co. v. Sawyer_, 343 U.S. 579, 635 (1952)).
advice and consent, is followed by implementing legislation that exceeds
the power Congress has absent the treaty.194

Taken together, Garamendi and Crosby reveal a Court concerned not
only with protecting state autonomy from federal interference in the
commerce context, but also protecting foreign affairs autonomy from state
interference in the foreign relations context. Given the competing strains, it
becomes difficult to conclude that new federalism will win out over foreign
affairs. Unlike Missouri, however, this issue may receive judicial
clarification. A Texas state court is currently deliberating whether to give
effect to President Bush’s decision that state courts will comply with U.S.
obligations under the Vienna Convention on Consular Relations (“VCCR”)
as interpreted by the International Court of Justice (“ICJ”) in the Avena
case, even if it requires preemption of state procedural default rules.195
Should it decline to do so, the foreign affairs power may again find its way
before the Court.

D. CONSTRAINING NEW FEDERALISM INSTEAD OF TREATIES

The revival of a strong foreign affairs power is not the only landscape
change since new federalists called for restraining the treaty power. From
1937 until Lopez in 1995, the Court largely refused to employ federalism to
void federal statutes.196 This may explain why, as a doctrinal matter,
notwithstanding Senator Bricker’s efforts, Missouri’s nationalist view held
sway for so long.197 Given Lopez and its progeny, however, new federalists

194. See supra note 103 and accompanying text.
195. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963,
21 U.S.T. 77; Case Concerning Avena and other Mexican Nationals (Mexico v. United States), 2004
I.C.J. 12, 70–71 (Mar. 31) [hereinafter Avena]. In Avena, the ICJ ruled that Mexican defendants on
death row in the United States were entitled to “review and reconsideration” of their convictions and
sentences because the United States failed to give them timely notification of their right to contact their
consul per VCCR Article 36. President Bush has indicated that state courts will comply with this
decision as a matter of comity. See Memorandum from President George W. Bush to Attorney General
ws/releases/2005/02/20050228-18.html [hereinafter Bush Memo]. The Texas Criminal Court of
Appeals is currently considering whether to provide review and reconsideration in an individual case,
notwithstanding that doing so would conflict with the state’s procedural default rules requiring
defendants to raise all defenses at trial. See Ex Parte Jose Ernesto Medellin, No. AP-75,207 (Tex. Crim.
App. filed Mar. 24, 2005). In arguing Texas courts must comply, the United States has emphasized its
treaty obligation to obey the ICJ under the U.N. Charter, even though it expressly disagrees with the
ICJ’s interpretation of the VCCR. See Brief for the United States as Amicus Curiae at 12–14, Ex Parte
196. Nat’l League of Cities v. Usery, 426 U.S. 833 (1976), was a notable exception.
197. See HENKIN, supra note 13, at 165–66.
suggest the tide has turned. Now, they envision a “substantial risk” that legislative power limitations or the anticommandeering doctrine will apply to the treaty power; revisiting Missouri is only a matter of time.

But the new federalist characterization of the Court’s jurisprudence no longer tells the whole story. In 2005, the Court decided in Gonzales v. Raich that the commerce power authorized Congress to prohibit marijuana possession even where it was cultivated and consumed intrastate for medicinal purposes. The Court found that Congress had the power to regulate even intrastate, noncommercial activity if necessary to effectuate regulation of an interstate market. In doing so, the Court distinguished Lopez and Morrison, choosing to rely instead on an earlier “New Deal” decision, Wickard v. Filburn, left intact by Lopez.

A full assessment of Raich’s implications for the Court’s Commerce Clause jurisprudence is beyond the scope of this Article. At a minimum, however, Raich suggests that Lopez and Morrison did not entirely supplant the Court’s earlier view of a broad commerce power. Alternatively, one could view Raich as Justice O’Connor did in dissent—that is, “irreconcilable” with Lopez and Morrison. Either way, Raich suggests a Court that will still, on occasion, read Congress’s legislative powers quite

198. See, e.g., Bradley, supra note 17, at 394; Rosenkranz, supra note 17, at 1867. New federalists also focus on the Court’s defense of state sovereign immunity. See Bradley II, supra note 17, at 117 (discussing state sovereign immunity cases, including Seminole Tribe v. Florida, 517 U.S. 44 (1996), and Alden v. Maine, 527 U.S. 706 (1999)).

199. Swaine, supra note 17, at 412. See also Bradley, supra note 17, at 394 (“If federalism is to be the subject of judicial protection—as the current Supreme Court appears to believe—there is no justification for giving the treaty power special immunity from such protection.”).

200. Gonzales v. Raich, 125 S. Ct. 2195 (2005). See also Reno v. Condon, 528 U.S. 141 (2000) (holding Congress’s regulation of how states use their drivers’ personal data was not violative of the Tenth Amendment and not in excess of Congress’s enumerated powers). Even before Raich, one scholar suggested that the Court’s federalist revival had “seen neither the revolution that partisans of states’ rights might have wished nor the deluge that many nationalists feared.” See Ernest A. Young, The Rehnquist Court’s Two Federalisms, 83 TEX. L. REV. 1, 2 (2004).

201. Raich, 125 S. Ct. at 2206. The Court further suggested Congress needed to show only a “rational basis” for concluding that the regulated activity substantially affects interstate commerce. Id. at 2208–09.


203. Raich, 125 S. Ct. at 2221 (O’Connor, J., dissenting). Chief Justice Rehnquist—the author of the Court’s opinions in Lopez and Morrison—and Justice Thomas joined O’Connor’s dissent. Id. at 2220. See also id. at 2229 (Thomas, J., dissenting) (arguing the “Federal Government is no longer one of limited and enumerated powers” if Congress can regulate intrastate, noncommercial activity with no demonstrable effect on the national economy—it means Congress “can regulate virtually anything”).
broadly. Thus, post-Raich, the new federalist assertion that extending legislative power limits to the treaty power will effectively constrain that power vis-à-vis the states no longer appears a foregone conclusion. And, if that is true, the argument that the Court needs to extend those limits to the treaty power loses much of its force.

E. EXECUTIVE (IN)ACTION IN EMPLOYING MISSOURI

The foregoing tests new federalist arguments on doctrinal terms—that is, examining the judicial tea leaves for reasons why Missouri remains good law. The most likely explanation for why the Court will not reengage the issue, however, has nothing to do with the judiciary. As Peter Spiro writes, “[t]here is today little prospect that the Supreme Court will soon have the opportunity to reexamine the Missouri holding—not because Missouri is widely respected by constitutional actors, but because the political branches have systematically refused to deploy . . . the treaty power” as expansively as Missouri did.204 Spiro suggests that the source of such reluctance is the Senate, which avoids applying the broad treaty power envisioned in Missouri to areas traditionally subject to state regulation, such as criminal or family law.205

In reality, however, the executive plays the central role. The executive, in exercising its Article II power, has consistently held the reins on accepting U.S. treaty obligations. The Senate may occasionally exercise its own prerogatives and may even do so with some interest in protecting existing state powers.206 And the executive may adapt its own actions to its perception of how the Senate—or the Court—would respond. But, it is ultimately the executive that negotiates and concludes U.S. treaties and determines the scope of the obligations it wishes to assume. Thus, it is the executive’s choice, first and foremost, whether to defer to federalism in treaty-making. Of late, it has done so with increasing frequency. As such, the Court may never have a chance to revisit Missouri. The treaties the president concludes today simply do not implicate the legal authority questions Holmes had to address.

204. See Spiro, supra note 30, at 141.
206. The Senate has rejected a treaty sent to it by the president on twenty-one occasions. See U.S. Senate, Treaties, http://senate.gov/artandhistory/history/common/briefing/Treaties.htm (last visited Sept. 16, 2006). It has also frequently attached reservations, understandings, declarations, and provisos to treaties submitted to it pursuant to Article II.
IV. EXECUTIVE FEDERALISM: EXECUTIVE PERSPECTIVES ON FEDERALISM AND THE TREATY POWER

On November 3, 2005, the United States joined the U.N. Convention Against Transnational Organized Crime (“TOC Convention”), as well as two supplementary protocols. The TOC Convention requires parties to criminalize certain conduct, such as participation in an organized criminal group, money laundering, bribery of domestic public officials, and obstruction of justice. In ratifying the Convention, the United States attached a reservation invoking “fundamental principles of federalism” and declining to criminalize conduct of a “purely local character”:

The United States of America reserves the right to assume obligations under the Convention in a manner consistent with its fundamental principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to the conduct addressed in the Convention. U.S. federal criminal law, which regulates conduct based on its effect on interstate or foreign commerce, or another federal interest, serves as the principal legal regime within the United States for combating organized crime, and is broadly effective for this purpose. Federal criminal law does not apply in the rare case where such criminal conduct does not so involve interstate or foreign commerce, or another federal interest. There are a small number of conceivable situations involving such rare offenses of a purely local character where U.S. federal and state criminal law may not be entirely adequate to satisfy an obligation under the Convention. The United States of America therefore reserves to the obligations set forth in the Convention to the extent they address conduct which would fall within this narrow category of highly localized activity. This reservation does not affect in any respect the

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208. See TOC Convention, supra note 207, at annex I, arts. 5, 6, 8, 23. The two protocols require parties to criminalize trafficking in persons and migrant smuggling. See id. at annex II, arts. 3, 5; id. at annex III, art. 6. Separately, the TOC Convention and its protocols require parties to cooperate in combating covered offenses. See id. at annex I, art. 7, 9, 13, 16–20, 26–30.
ability of the United States to provide international cooperation to other Parties as contemplated in the Convention.\textsuperscript{209}

The Senate included a related declaration in its Resolution of Advice and Consent, indicating that “current United States law, including the laws of the States of the United States, fulfills the obligations of the Convention . . . . Accordingly, the United States of America does not intend to enact new legislation to fulfill its obligations under the Convention.”\textsuperscript{210}

The reservation does not state that federalism requires the United States to decline obligations out of deference to states’ rights. It is framed in descriptive terms, explaining the distribution of criminal jurisdiction between federal and state authorities. As Secretary of State Colin Powell explained, without the reservation, there would be “a narrow category” of conduct “that the United States would be obliged under the Convention to criminalize, although under our federal system such obligations would generally be met by state governments rather than the federal government.”\textsuperscript{211}

Despite such ambiguity, the actual import of the reservation and declaration is clear—these treaties do not provide the additional, independent grant of federal authority envisioned in Missouri. First, the reservation ensures that, in this instance, the treaty power accords with Congress’s legislative power under the Commerce Clause.\textsuperscript{212} Under the TOC, the United States only assumes obligations to criminalize conduct Congress already had the power to criminalize. Second, even where Congress can use its legislative power to criminalize conduct, the declaration makes clear that the TOC does not provide Congress any incentive to do so. It reflects the shared understanding of the president and Senate that the TOC’s criminalization obligations maintain the status quo,

\textsuperscript{209} Senate Resolution of Advice and Consent to the TOC Convention, Oct. 7, 2005, S. TREAY DOC. NO. 108-16 (on file with author) [hereinafter Senate TOC Resolution]. The Trafficking Protocol ratification contains a similar reservation; the Migrant Smuggling Protocol does not. \textit{See id.}

\textsuperscript{210} \textit{See id.} A similar declaration was included for the Trafficking Protocol. \textit{Id. See also} 151 CONG. REC. S11334-35 (Oct. 7, 2005) (reproducing parts of the Senate TOC Resolution); U.N. Convention Against Transnational Organized Crime, Aug. 31, 2005, S. EXEC. REP. NO. 109-04 (containing the text of reservations and declarations as approved by the Senate Foreign Relations Committee).


\textsuperscript{212} The U.S. reservation to the Trafficking Protocol also acknowledges Congress’s power to criminalize conduct under the Thirteenth Amendment’s prohibition of “slavery” and “involuntary servitude.” Senate TOC Resolution, supra note 209.
preserving existing federal and state criminal laws. Such efforts belie the broad and independent treaty power advocated by the nationalists. Whether or not constitutionally required, the TOC reservation and declaration reflect the more constrained version of the treaty power that new federalists have advocated the Supreme Court impose.

But, the Court was not responsible for this. Nor did the Senate, its advice and consent notwithstanding, come up with such constraints. The TOC federalism reservations and declarations all originated with the president. Moreover, far from an isolated case, such executive self-restraint on federalism grounds has become an increasingly visible feature of U.S. treaty-making. In recent years, the executive—not the Court—has limited treaties from expanding federal law-making beyond Congress’s legislative powers or interfering with activities traditionally regulated by the states.

In fact, the executive has long had the dominant role in dictating the scope of the treaty power vis-à-vis the states. At times, as nationalists maintain, the executive has opted for treaties—or sought implementation—that interfered with matters traditionally regulated by the states, overriding any Tenth Amendment or states’ rights concerns. At other times, as the TOC case suggests, it has invoked federalism to explain why it opted not to do so. Thus, an understanding of the current round of “Executive Federalism” begins by appreciating the alternating interpretations the executive has given the treaty power over time. Using such a historical perspective as a foundation, we can explore how the executive has integrated federalism into modern treaty practice.

213. The reservations and declarations do indicate, however, that to the extent existing state criminal law satisfies the treaties’ criminalization obligations, the United States accepted an obligation to maintain those laws. See Senate TOC Resolution, supra note 209 (extending the reservation’s scope to “where U.S. federal and state criminal law may not be entirely adequate to satisfy” TOC obligations (emphasis added)). This raises the possibility of the federal government requiring states to maintain their criminal laws in accordance with the TOC Convention or Congress stepping in to regulate such conduct if states ceased to do so. This suggests, in turn, that the executive does not view the anticommandeering principle as applicable to treaties. See infra note 352 and accompanying text.


215. See supra notes 171–74 and accompanying text.
A. “EXECUTIVE NATIONALISM” AND “EXECUTIVE FEDERALISM” PRE-MISSOURI

In the early years following the Founding, the executive viewed the treaty power broadly, capable of trumping the states’ reserved powers. The 1788 Consular Convention with France, negotiated under the Articles of Confederation, was the first treaty ratified by President Washington. It contained a number of provisions overriding state law with respect to the treatment of French consuls and nationals, for example, granting consuls immunity from state law and authorizing consuls to exercise police powers over French nationals. Similarly, at Hamilton’s urging, Washington ratified the Jay Treaty—the first treaty negotiated under the Constitution—notwithstanding that Article IX granted British subjects a right to hold and devise real property in contravention of state laws subjecting such property to forfeiture. Washington did so fully aware of challenges to the treaty’s constitutionality on grounds that it infringed on the states’ reserved legislative powers. As for the Tenth Amendment specifically, while Thomas Jefferson thought it could be construed to prevent the United States from completing the Louisiana Purchase by treaty, it did not actually prevent him from doing so.
A more complicated picture begins to emerge, however, in the run-up to the Civil War. During this period, the executive negotiated a number of treaties regulating the treatment of aliens in ways that conflicted with existing state law, suggesting an executive branch sympathetic to a nationalist vision of the treaty-power. But, on occasion, executive officials suggested that the Constitution did not permit treaty-making on matters within the states’ reserved powers. For example, in 1819, Attorney General William Wirt interpreted a Swedish treaty of amity to guarantee reciprocal exchanges of personal, but not real, property rights, and suggested that the federal government lacked the power “either by law or treaty” to change state real property laws.

Five years, later, however, Wirt took a more nationalist view in concluding that South Carolina’s controversial Negro Seaman’s Act—providing for detention and potential enslavement of free black mariners while in South Carolina ports—was unconstitutional because it conflicted with Congress’s foreign commerce power and U.S. treaties. Great Britain had complained that the Act violated its 1815 Commerce Convention with the United States. Foreshadowing more recent efforts to engender state compliance with U.S. treaties, Secretary of State John Quincy Adams used Wirt’s opinion, together with Britain’s diplomatic protests, to request that South Carolina repeal the act. The Governor harshly rejected the request, threatening rebellion.

The next attorney general, John Berrien, took a different view of the relationship between treaties and South Carolina’s right to regulate entry into its ports. He concluded that the same Seaman’s Act was constitutional as within the state’s reserved powers, which Congress had to respect “in the

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223. See Hayden, supra note 222, at 567–68 (describing varying levels of deference to state law in forty-four treaties relating to alien rights concluded between 1778 and 1860). The Senate’s practice was mixed, often consenting to treaties affording aliens property rights, but on seven occasions between 1830–60, rejecting, amending, or dropping treaties with similar provisions. Id. at 571–84.

224. 1 Op. Att’y Gen. 275 (1819) (emphasis added). As Wirt himself acknowledged, his interpretation of the treaty ran counter to several contemporary Supreme Court opinions; the Court eventually explicitly rejected his interpretation. See Todok v. Union State Bank, 281 U.S. 449, 453 (1930); Golove, supra note 12, at 1205 n.421. Thus, even though the Court may have never declared a treaty unconstitutional on federalism grounds, it has long asserted an independent authority to interpret treaties.

225. 1 Op. Att’y Gen. 659, 661 (1824). Wirt’s opinion does not, however, express a view on whether the treaty conflict would sustain a finding of unconstitutionality independent of his foreign commerce power finding.

226. See Golove, supra note 12, at 1211–12.

227. Id. at 1222–23.
formation of treaties, and in the enactment of laws.”

Notwithstanding Berrien’s opinion, Secretary of State Edward Livingston informed the British that the federal government would continue to seek the statute’s repeal.

For his part, Livingston also contradicted Wirt’s 1819 opinion and wrote that the Constitution did permit treaties to regulate alien real estate succession even if power over such matters was not enumerated in the federal government and consequently was “reserved to, and . . . still vested in, the several States.” A little more than a decade later, John Calhoun echoed similar thoughts in his last significant pronouncement on the subject: “[t]he treaty-making power has, indeed, been regarded to be so comprehensive as to embrace, with few exceptions, all questions that can possibly arise between us and other nations, and which can only be adjusted by their mutual consent, whether the subject matter be comprised among the delegated or the reserved powers.”

In the years that followed, executive opinion continued to alternate on whether the states’ reserved powers limited U.S. treaty-making, particularly in authorizing alien ownership or inheritance of real property. In 1850, both President Fillmore and Secretary of State William Marcy expressed the view that the matter lay within the states’ reserved powers, asking the Senate to amend a proposed treaty with Switzerland to eliminate such a provision. In an 1853 Consular Convention with France, contrary to earlier precedents, the executive went so far as to condition alien rights to real property on state law; agreeing only to recommend changes to nonconforming state laws. The president subsequently sent letters to the governors requesting such changes. In 1857, however, Attorney General Caleb Cushing informed Marcy that the Constitution, considered both

229. Golove, supra note 12, at 1226. Secretaries of State Buchanan and Webster would later inform the British of their own hostility to the Seaman’s Act. Id. at 1232.
230. See 5 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 177 (1906).
231. CRANDALL, supra note 82, at 247 (emphasis added).
232. The executive was more unified on the Constitution’s supremacy over treaties; both Secretaries of State Marcy and Blaine wrote that a treaty could not contravene constitutional provisions. MOORE, supra note 230, at 167, 169.
233. Hayden, supra note 222, at 575, 577.
235. See CRANDALL, supra note 82, at 267. Similar to its 1853 treaty with France, the United States agreed in an 1854 treaty with Great Britain to urge its states to grant British subjects national treatment in using state canals. Treaty Concerning Fisheries, Commerce, and Navigation in North America art. 4, U.S.-U.K., June 5, 1854, 12 Bevans 119.
textually and historically, clearly authorized the treaty power to reach alien real property rights in a way that “abrogates any incompatible” state law. But that did not settle the matter. Two years later, Secretary of State Lewis Cass informed the British that regulating alien inheritance of real property was so questionable that the executive preferred to delay negotiations on the topic pending resolution of ongoing litigation.

After the Civil War, Secretary of State Hamilton Fish, at last, set out what became the executive’s fixed position on the subject. He concluded that, notwithstanding contrary state laws, treaties could guarantee aliens real property rights; any earlier doubts had come from “extreme constructionists touching the constitutional power . . . to conclude such a treaty, doubts in which I do not share.” When Secretary of State Bayard revisited the issue in 1886, he acknowledged over his own “grave doubts” the constitutionality of such treaties was now established. But, lest one view Fish as a firm defender of an unlimited treaty power, he did invoke the states’ “reserved powers” in declining a Peruvian request to negotiate “private international law” treaties harmonizing domestic laws and granting national treatment for contracts, marriages, and civil rights.

Property issues aside, the problem of treaty rights for aliens conflicting with state law remained. In 1906, Japan complained that a San Francisco school board decision to segregate its schools violated national treatment provisions in the 1894 U.S.-Japan Treaty of Commerce and Navigation. The executive branch agreed and took action to overturn the decision—including litigation—thus taking the position that treaties could override local educational policy.

Secretary of State Root later rejected suggestions that states’ rights should have precluded federal enforcement:

237.  MOORE, supra note 230, at 177.
238.  Id. at 178 (Apr. 22, 1870 correspondence). Fish also consulted the Senate Foreign Relations Committee Chair (Sumner) who conveyed the Senate’s agreement with this interpretation. Id. (responding to Fish’s inquiry on the propriety of negotiating a treaty on inheritances and marriages with the Government of Baden, the Senate Foreign Relations Committee “advised the negotiations”). But see id. at 177–78 (discussing February 1870 and May 19, 1874 correspondence from Fish taking the position that the federal government lacked the power to conclude treaties on matters prescribed by the laws of the states).
239.  Id. at 178–79.
241.  See Golove, supra note 12, at 1249.
242.  Id. at 1250. The School Board resolution was rescinded before the litigation could produce a decision. Id. at 1251.
“[t]here was and is no question of state’s [sic] rights involved,” noting that, while other powers were distributed between the federal and state governments, “[t]he treaty-making power is not distributed; it is all vested in the national government; no part of it is vested in or reserved to the states. In international affairs there are no states; there is but one nation.”

Root acknowledged, however, a problem if treaty-makers concluded treaties “under pretense” on subjects inappropriate for the exercise of that power. Root thus suggested an executive branch devoted to a treaty power free of any states’ rights limitations, although perhaps subject to an “appropriate” subject matter limitation.

Ironically, given his admission of a pretense problem, Root devised the idea of a Migratory Bird Treaty to give the federal government “constitutional authority to deal” with migratory birds, notwithstanding open questions about Congress’s legislative power to regulate them. In Root’s defense, however, a few years earlier Attorney General John Griggs had similarly favored using treaties to regulate fisheries that otherwise were a matter for state laws. Moreover, the solicitor general subsequently adopted Root’s stance in the U.S. brief to the Court in Missouri.

The fact that the executive regarded migratory birds as a proper subject for negotiation, however, did not imply that it necessarily regarded all subjects as proper. One year before arguing Missouri, the United States insisted, in negotiating the original Constitution of the International Labor Organization, that the treaty’s subject matter—labor legislation—notwithstanding limitations of the Tenth Amendment. As a result, the United States negotiated the first “federal-state” treaty clause, which provided special treatment for federal states: “[i]n the case of a Federal State, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of the

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244. Id. at 279.
245. See Golove, supra note 12, at 1255; Lofgren, supra note 119, at 81.
247. See Brief of Appellee United States at 18–24, 36–41, Missouri v. Holland, 252 U.S. 416 (1920), reprinted in 20 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW (Philip B. Kurland & Gerhard Casper eds., 1975) (arguing that reserved powers’ limitations do not apply to the treaty power, which covers matters that are “properly” the subject of international negotiations).
Government of such State to treat a draft convention to which such limitations apply as a recommendation only.\textsuperscript{249}

The history of executive practice pre-	extit{Missouri} suggests an executive inconsistent in its view of exactly what the treaty power authorized the federal government to do if a treaty implicated state powers. Not surprisingly, nationalists and new federalists cite the record selectively to align with their respective interpretations of the treaty power.\textsuperscript{250} David Golove, for example, focuses on cases employing the treaty power to override state law while dismissing contrary views as mere negotiating postures: “self-denying—self-interested—statements . . . highly suspect as genuine expressions of the executive’s constitutional views,” given inconsistent prior practice.\textsuperscript{251}

Although executive claims of constitutional incapacity could have been mere negotiating ploys,\textsuperscript{252} I believe varying executive positions on the treaty power’s scope simply reflected different executive interpretations of what the Constitution required. Just as the Court may vary over time in its interpretation of the Constitution, it should come as no surprise that over time—where the Court has not foreclosed the option—the executive may hold different views of the treaty power’s scope or the propriety of treaties on specific subjects. What the historical record demonstrates above all is that, as the holder of the power, the executive, subject to occasional Senate checks, can effectuate its interpretation in the actual treaty obligations assumed by the United States.

B. MODERN EXECUTIVE FEDERALISM

\textit{Missouri} confirmed a nationalist interpretation of the treaty power, whose scope turned on matters of national interest, not states’ rights. But even though that case might authorize the executive to conclude treaties on

\textsuperscript{249} Looper, supra note 248, at 167. The United States made clear that the “limitations” reference included constitutional and judicial limitations—presumably referencing \textit{Hammer v. Dagenhart}, the Supreme Court decision from the previous year, which suggested that Congress lacked the power to regulate child labor. See \textit{Hammer v. Dagenhart}, 247 U.S. 251 (1918). The federal-state clause was adopted as Article 405 of the Treaty of Versailles. The United States did not adhere to the International Labour Organization (“ILO”) Constitution until 1934. See Looper, supra note 248, at 165, 167.

\textsuperscript{250} See, e.g., Bradley, supra note 17, at 421–22 (emphasizing evidence suggesting that the treaty power is limited by the “international” subject matter test, by the reserved powers of states, or both).

\textsuperscript{251} Golove, supra note 12, at 1242.

\textsuperscript{252} Similarly, Bradley’s views might have merit. Despite inconsistent views on reserved powers limitations, the executive has consistently viewed treaty-making as appropriate only for matters of international concern, at least in so far as the executive decides what warrants international concern. See infra notes 259–65 and accompanying text.
matters of the “sharpest national exigency” irrespective of reserved state powers, the decision did not say that the executive had to do so. In practice, therefore, the executive retains the prerogative to decide whether to negotiate and on what topics it assumes obligations.253

The executive has largely addressed the treaty power question ad hoc.254 On occasion, it has taken advantage of Missouri’s import and insisted on a nationalist conception of the treaty power. But, just as often, it has invoked federalism as a continuing brake on its exercise of that power, even if only as a matter of policy.255 For example, in opposing the Bricker Amendment, Secretary of State Dulles indicated treaty-making should occur within “traditional limits,” denying that “treaties should, or lawfully can, be used as a device to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.”256 Looking at modern executive practice, it has adopted no less than six different approaches to federalism in its treaty-making: (1) no accommodation, (2) rejecting the treaty, (3) modifying the treaty, (4) modifying U.S. consent to the treaty, (5) limiting federal implementation of the treaty, and (6) limiting federal enforcement of the treaty.

253. See Golove, supra note 12, at 1272.

254. See, e.g., Bradley, supra note 17, at 447. The executive has promulgated executive orders to ensure federal policies are devised in accordance with “fundamental principles of federalism,” but these orders do not explicitly cover treaty-making, addressing only “regulations, legislative comments, or proposed legislation, and other policy statements or actions.” Exec. Order No. 13132, 64 Fed. Reg. 43255 (Aug. 4, 1999). See also Exec. Order No. 12612, 52 Fed. Reg. 41685 (Oct. 26, 1987) (replaced by Exec. Order No. 13132). In 1955, the State Department issued a circular on U.S. treaty-making, indicating they should promote U.S. interests by securing action by foreign governments in a way deemed advantageous to the United States. It provided that treaties were not to be used as a device for the purpose of effecting internal social changes or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern. DEPT. OF STATE, CIRCULAR 175, reprinted in 50 AM. J. INT’L L. 784, 785 (1956). The current circular no longer contains such guidance, indicating only the Department’s intent that treaty-making be “carried out within constitutional and other appropriate limits.” DEPT. OF STATE, CIRCULAR 175, 11 FOREIGN AFFAIRS MANUAL 720.2(a) (1985).

255. In 2002, the U.S. State Department Legal Adviser’s Office published a memorandum outlining “as a matter of policy” U.S. ways of tailoring treaty obligations to federalism concerns. See Memorandum Summarizing U.S. Views and Practice in Addressing Federalism Issues in Treaties (Nov. 8, 2002), available at http://www.state.gov/s/l/38637.htm. For purposes of full disclosure, while an attorney in that office, I drafted this memorandum; so, I bear responsibility for any errors it contains (for example, suggesting ICCPR had a U.S. federalism reservation when it was an understanding).

256. Treaties and Executive Agreements: Hearings Before a Subcommittee of the Committee on the Judiciary United States Senate, 83d Cong. 825 (1953). Two years later, Dulles informed the Senate that treaties could not reach “purely internal” affairs but must “essentially affect the actions of nations in relation to international affairs.” Treaties and Executive Agreements: Hearings on S.J.R.1 Before a Subcommittee of the Committee on the Judiciary United States Senate, 84th Cong. 183 (1955).
1. No Federalism Accommodation

In many cases, the executive, with subsequent Senate advice and consent, joins a treaty without any accommodation for federalism. Oftentimes, federalism is simply not an issue. In other instances, no accommodation is made even though the treaty regulates a topic otherwise within the states’ legislative powers. Such displacement mostly occurs on matters having a connection with foreign persons or transnational conduct. For example, in 1950, the president ratified the Road Traffic Convention, which provided for recognition of foreign drivers’ licenses and foreign registrations of motor vehicles—both subjects traditionally fully within the states’ powers. In 1988, the executive joined the Convention on Contracts for the International Sale of Goods, which provides rules governing certain international contracts that preempt state laws—such as those adopting the Uniform Commercial Code.

At times the executive has opted to join treaties without any federalism accommodation, notwithstanding earlier suggestions that the treaty’s subject matter lay beyond the treaty power. Thus, although Secretary Fish and others previously denied that the United States could conclude private international law treaties, it has now done so repeatedly. The United States has even joined treaties without a federalism accommodation, notwithstanding treaty provisions

257. For example, in 2002, the United States and Russia concluded the Moscow Treaty, which delineated further reductions of strategic nuclear warheads. See Treaty on Strategic Offensive Reductions, U.S.-Russ., May 24, 2002, S. TREATY DOC. NO. 107-8. Because decisions on how many nuclear weapons to maintain had nothing to do with the states, federalism was never an issue. Of course, at one time the executive regarded the manufacture of armaments (viz. their reduction) as something falling within the states’ reserved powers. See infra note 272.


260. See supra note 240. As head of delegation, Charles Evans Hughes invoked constitutional grounds to explain, in part, why the United States could not join private international law treaties, a position Henkin suggests motivated him to develop the international concern test. See Henkin, supra note 13, at 471 n.87; supra note 57 and accompanying text.

contemplating such accommodations. For example, the 1958 New York Convention on Foreign Arbitral Awards contains a “federal state” clause, which creates a bifurcated system of obligations. For treaty articles “that come within the legislative jurisdiction of the federal authority,” a federal state assumes the same obligation as nonfederal states. But for those articles “within the legislative jurisdiction of constituent states,” and for which constituent states are not bound by the constitutional system to take action, the federal government need only bring them to the constituent states’ attention “with a favourable recommendation.” In joining the Convention, the executive did not take advantage of this second, lesser obligation for federal states because it viewed arbitration as coming within federal legislative jurisdiction, namely the Federal Arbitration Act.

The executive has also occasionally joined treaties that impose obligations directly on state law enforcement officials without any accommodation for federalism or the anticommandeering doctrine. In stolen vehicle treaties, for example, the executive commits not only to have state or local law enforcement give notice when they recover a vehicle stolen from the treaty partner’s territory, but also requires them to hold the vehicle pending notification of recovery to the foreign owner. The VCCR and the U.N. Headquarters Agreement are also frequently cited for the obligations they impose on state and local officials.

2. Rejecting Treaties on Federalism Grounds

At the other end of the spectrum, the executive has found states’ rights issues raised by a treaty so problematic that it never actually joins the treaty. Thus, the executive has essentially ceased seeking ratification of the International Covenant on Economic, Social and Cultural Rights.
Although it had pushed for ratification in the Carter administration, even then the executive acknowledged some of the treaty’s provisions were “in view of the nature of the United States federal system . . . not acceptable.”\(^\text{267}\) Similarly, the executive never joined the U.N. Convention on the Rights of the Child (“CRC”), in part, because it focuses on areas “of almost exclusive state-level authority.”\(^\text{268}\) For example, the CRC bans execution of children, which twenty U.S. states permitted before the Supreme Court declared the practice unconstitutional in \textit{Roper v. Simmons}.\(^\text{269}\) Executive opposition to the CRC thus included a concern that joining it would dramatically interfere with the states’ power to manage their criminal justice systems.\(^\text{270}\)

Of course, with the abolition of the juvenile death penalty, the executive might take a more positive view of the CRC. That possibility demonstrates a lasting feature of Executive Federalism—the perceived appropriateness of a particular method can change over time. Thus, although the Eisenhower administration responded to federalism concerns by refusing to join human rights treaties, the executive position has since softened to allow modified U.S. consent to these instruments.\(^\text{271}\) Similarly, the executive has done an about-face on treaty-making with respect to various subjects—armaments production, private international law, and, to

\(^{267}\) See ICESCR, supra note 266, at x (Letter of Submittal from Acting Secretary of State Warren Christopher, Dec. 17, 1977). The executive proposed a reservation to rectify the problem, indicating the United States would progressively implement all the provisions of the Covenant over whose subject matter the Federal Government exercises legislative and judicial jurisdiction; with respect to provisions over whose subject matter constituent units exercise jurisdiction, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Covenant. Id. at x-xi.

\(^{268}\) See supra note 205; Spiro, supra note 205, at 575 nn.25–26. Other opposition to the CRC involved its vesting children with procedural and substantive rights, including privacy, freedom of expression, and entitlement to a minimum standard of living. See CRC, supra, at arts. 12–29. The United States signed the CRC on February 16, 1995, but is one of two states, the other being Somalia, that has not joined the treaty. Office of the U.N. High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (June 9, 2004), available at http://www.unhchr.ch/pdf/report.pdf.

\(^{269}\) See supra note 205; Roper v. Simmons, 543 U.S. 551 (2005).

\(^{270}\) See supra note 13, at 477 nn.100–01.
a lesser extent, labor rights—the regulation of which had earlier been perceived to lie with the states.  

3. Modifying Treaties to Account for Federalism

Beyond the all-or-nothing approaches just described, the executive has frequently sought to negotiate around federalism by trying to draft treaties in ways that do not implicate, or at least mitigate, their impact on areas subject to state regulation. In doing so, it has adopted two methods: (1) an “exceptional” approach, which seeks to incorporate a federal-state clause; or (2) an “integrated” approach, which seeks treaty modifications or clarifications to avoid the specter of federalism altogether.

a. Federal-State Clauses

Executive success in negotiating a federal-state clause in the International Labour Organization (“ILO”) Constitution prompted the United States and other federal states, like Canada and Australia, to seek similar clauses elsewhere. For the most part, these clauses replicate the one found in the New York Convention—that is, equating federal and nonfederal state obligations for provisions within each federal state’s “legislative jurisdiction” but only requiring federal states to recommend to their constituent units provisions that fall within the constituent units’ “legislative jurisdiction.” In joining the 1967 Protocol to the Convention Relating to the Status of Refugees, Secretary of State Rusk explained the import of that treaty’s identical federal-state clause:

The United States would assume obligations only in respect of matters that come within the legislative jurisdiction of the Federal Government. State laws would not be superseded by any provision of the Convention. With respect to any articles in the Convention that may come within the legislative jurisdiction of the states under our constitutional system, the

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272. See, e.g., HENKIN, supra note 13, at 191–92, 464 n.68; Golove, supra note 12, at 1272. For example, in 1927, the executive described the federal government as “powerless” to prohibit arms manufacturing by treaty given the states’ jurisdiction over such matters. See Special Commission for the Preparation of a Draft Convention on the Private Manufacture of Arms and Ammunition and of Implements of War, League of Nations Doc. No. C219M.142 (1927) (U.S. Delegate statement), available at http://www.library.northwestern.edu/govpub/collections/league/search.html. By 1932, however, the executive reversed its position. See HENKIN, supra note 13, at 464 n.67 (citing Disarmament Conference, Minutes of 30th Meeting, Nov. 18, 1932, I, at 100).

273. See HENKIN, supra note 13, at 192; supra note 249 and accompanying text. See also Maurice Copithorne, Canada, in NATIONAL TREATY LAW AND PRACTICE, supra note 3, at 91, 95, 97–98 (describing Canada’s experience with the federal-state clause).

274. These lesser obligations are inapplicable where constituent units have constitutional obligations to implement the treaty. See supra notes 262–63 and accompanying text.
Federal Government is obligated to bring such articles to the notice of the appropriate state authorities with a favorable recommendation.  

Two problems, however, stymied widespread use of federal-state clauses. First, nonfederal states generally rejected them because they effectively meant nonfederal states assumed more obligations than federal states. Thus, nonfederal states blocked U.S. efforts to include federal-state clauses in most human rights treaties, making those treaties “extend to all parts of federal states without any limitations or exceptions.” Second, questions were raised about whether the United States could even invoke the clause because it still imposed obligations whenever a federal government exercises jurisdiction. As Louis Henkin noted, Missouri suggests all matters covered by a treaty come within the federal government’s jurisdiction by virtue of the treaty itself. As a result, from the 1970s onward, conventional wisdom held that the United States did not need to rely on such clauses. They fell into disuse given other federal

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276. Only a handful of treaties contain federal-state clauses. More common are territorial—formerly known as colonial—clauses where a state whose constitution establishes two or more territorial units with different systems of law may—upon notice to other parties—extend the treaty’s obligations to only one or more of these units. See AUST, supra note 1, at 170; Yuen-Li Liang, Notes on Legal Questions Concerning the United Nations: Colonial Clauses and Federal Clauses in U.N. Multilateral Instruments, 45 AM. J. INT’L L. 108 (1951).

277. Henkin, supra note 26, at 345.


279. HENKIN, supra note 13, at 192. Thus, the RESTATEMENT (THIRD) distinguishes Canada’s constitutional need for federal-state clauses from the U.S. case where it was sought for domestic political purposes. See RESTATEMENT (THIRD), supra note 15, § 302, reporter’s n.4. But see Commission on Human Rights, 34, U.N. Doc. E/CN.4/1987/25 (1987) (containing a U.S. proposal for CRC to include a federal-state clause).
states’ similar disillusionment and the diplomatic costs of negotiating them.280

Recently, however, the federal-state clause has reappeared with mixed results. On November 9, 2005, the Senate Foreign Relations Committee reported favorably on the Cybercrime Convention.281 Like the TOC Convention, the Cybercrime Convention defines certain conduct that is committed through, against, or related to, computer systems, and requires parties to criminalize it in their domestic law.282 As in the TOC context, the treaty covers conduct, such as attacks on stand-alone computers with no connection to the Internet, which the United States would be obligated to criminalize, but that is not currently subject to federal criminal jurisdiction.283

Unlike the TOC Convention, the Cybercrime Convention has a federal-state clause. Article 41 authorizes a federal state to avoid the treaty’s criminalization obligations “consistent with its fundamental principles governing the relationship between its central government and constituent States” provided it does not “exclude or substantially diminish” those criminalization obligations. Thus, Article 41 differs from previous federal-state clauses by explicitly limiting the amount of deviation a federal state can have from other states’ obligations. Like earlier federal-state clauses, however, Article 41 requires the federal government to favorably inform, and encourage implementation by, its constituent states for provisions “the application of which comes under the jurisdiction of constituent States . . . that are not obligated by the constitutional system of the federation to take legislative measures.”284

In transmitting the treaty to the Senate, the executive indicated its intention to rely on Article 41 to avoid having the United States assume a treaty obligation for “a narrow category of conduct regulated by U.S. State,


282. Cybercrime Convention, supra note 281, at arts. II–X.

283. Letter of Submittal from Secretary of State Colin Powell, U.S. Dep’t of State, Cybercrime Convention, supra note 281, at xxii [hereinafter Cybercrime Submittal].

284. Cybercrime Convention, supra note 281, at arts. 41(1)–(3). The federal state must file a reservation to take advantage of article 41 and also still perform the treaty’s other obligations, including international cooperation in combating cybercrime. Id. at arts. 41(1), 42.
but not federal, law.\textsuperscript{285} Moreover, it also recommended an understanding that, given its modified obligations, “the Convention does not warrant the enactment of any legislative or other measures” and the United States would “rely on existing federal law” to meet its obligations.\textsuperscript{286} The Cybercrime federal-state clause, therefore, will function similarly to the TOC Convention, albeit through a multilateral agreement rather than via a unilateral reservation and without reliance on state laws for compliance.

As might be expected, however, resistance has begun to emerge for these new federal-state clauses; indeed foreign states have gone so far as to ask whether they are necessary under Missouri. In the context of negotiating amendments to the World Health Organizations’ International Health Regulations (“IHRs”), the United States sought a provision letting it implement its obligations “consistent with the division of rights and responsibilities existing in [its] constitutionally mandated systems of government.” Other states refused to accommodate the U.S. request. As a result, the executive has indicated that it will now “submit a narrowly tailored reservation” to clarify how the United States will implement the IHRs; that is, it will implement them “to the extent it exercises jurisdiction over the matters covered therein. Otherwise, our state and local governments will implement them.”\textsuperscript{287}

b. Negotiating Around Federalism

Although less publicly visible, the executive may also seek a more integrated federalism accommodation by trying to negotiate modifications or clarifications to treaties that avoid implicating state law or imposing responsibilities on state officials. For example, in the Tobacco Convention negotiations, early drafts would have required the United States to have states promote measures combating the dangers from exposure to tobacco smoke in indoor public places, indoor workplaces, public transport, and elsewhere.\textsuperscript{288} As finally negotiated, however, Article 8 only imposes those obligations on the federal government “in areas of existing national jurisdiction as determined by national law” while “actively promot[ing it] at other jurisdictional levels.”\textsuperscript{289}

\textsuperscript{285} See Cybercrime Submittal, supra note 283, at xxi–xxii.

\textsuperscript{286} Id.


In the Council of Europe Corruption Convention, the executive faced another situation where the treaty’s criminalization requirements—this time relating to bribery—implicated state criminal law. Instead of negotiating a textual modification, however, the executive obtained a clarification in the formal negotiating record. With respect to the Convention’s requirement that parties criminalize bribery at the national level, the Explanatory Report indicates “it was the intention of the drafters of the Convention that [c]ontracting parties assume obligations under this Convention only to the extent consistent with their [c]onstitution and the fundamental principles of their legal system, including, where appropriate, the principles of federalism.”

In a few cases, the United States has even gone so far as to negotiate a voice for states directly into a treaty. Thus, in the U.S.-Mexican Treaty on Execution of Penal Sentences, article IV(5) contemplates that “[i]f the offender was sentenced by the courts of a state of one of the Parties, the approval of the authorities of that state as well as that of the Federal Authority shall be required.” Other law enforcement treaties have included similar provisions on the states’ role.

4. Modifying U.S. Consent to Treaties to Account for Federalism

Instead of working with treaty-partners to account for federalism, the executive can also address the issue unilaterally through the use of reservations, understandings, and declarations. Although collectively referred to as “RUDs,” for present purposes they divide into two categories.

First, there are reservations. The executive—with Senate concurrence—actually unilaterally modifies U.S. international obligations to accommodate a federalism concern. The TOC Convention reservation is a good example of this. The executive proposed the same approach to

292. Id. Of course, efforts to negotiate around federalism will not always succeed. Evidently, the executive invoked states’ rights to oppose foreign monitoring of prisons in the Torture Convention negotiations, but its objections were rebuffed. See Swaine, supra note 17, at 406.
295. See supra notes 207–14 and accompanying text. See also supra notes 281–86 and accompanying text (discussing the Cybercrime Convention).
U.S. participation in another law enforcement treaty recently approved by the Senate—the U.N. Corruption Convention. 296

The executive’s modern federalism reservations have few antecedents. In 1951, however, the Senate—over State Department objection—imposed a reservation to U.S. ratification of the Organization of American States (“OAS”) Charter, prohibiting the Charter from being considered “as enlarging the powers of the federal government . . . or limiting the powers of the several states . . . with respect to any matters recognized under the Constitution as being within the reserved powers of the several states.” 297 Although all twenty members of the OAS accepted the reservation—a requirement at the time—two states, Mexico and Uruguay, expressed discomfort with the reservation and the ambiguity it conveyed, particularly if it became a precedent. 298

Second, beyond reservations, there are understandings which have been used to facilitate U.S. membership in the Torture Convention and two core human rights treaties—the International Covenant on Civil and Political Rights (“ICCPR”) and the Convention on the Elimination of All Forms of Racial Discrimination (“CERD”). 299 In all three cases, the federalism caveat originated with the executive. In forwarding the ICCPR and the CERD to President Carter, Warren Christopher proposed virtually identical reservations:

296. U.N. Convention Against Corruption, Oct. 31, 2003, S. TREATY DOC. NO. 109-6 [hereinafter U.N. Corruption Convention]. Secretary Rice’s submittal letter describes how existing federal criminal law does not cover a “narrow category of conduct” that the United States would otherwise have to criminalize under the Convention, and proposes a reservation to rectify that situation. Letter of Submittal from Secretary of State Condoleezza Rice, U.S. Dep’t of State, in U.N. Corruption Convention, supra, at 2–3. Like the TOC Convention, the executive also proposed an understanding that the treaty will not warrant any enactment of new legislation and that “existing federal law and applicable state law” will meet U.S. obligations. Id. at 3. The Senate gave advice and consent to the Convention on September 15, 2006. The Senate’s resolution of advice and consent adopts, virtually unchanged, the reservation and understanding proposed by the executive.


298. Diplomatic Note No. 151 from Mexico to OAS Secretary General (Mar. 17, 1951) (on file with author); Diplomatic Note No. 321/950/5 from Uruguay to OAS Secretary General (Dec. 26, 1950) (on file with author).

The United States shall implement all the provisions of the [Covenant] over whose subject matter the Federal Government exercises legislative and judicial administration; with respect to the provisions over whose subject matter constituent units exercise jurisdiction, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Covenant.\textsuperscript{300}

When President Reagan submitted the Torture Convention to the Senate, he proposed a similar reservation, which the first Bush administration subsequently endorsed.\textsuperscript{301} Ultimately, it was restyled as an understanding by the Senate and attached to the U.S. instrument of ratification.\textsuperscript{302} In 1991, the Bush administration similarly restyled the ICCPR federalism reservation as an understanding along the lines of the Torture Convention, and the Senate approved it without further change.\textsuperscript{303} President Clinton followed suit with respect to the CERD in 1994.\textsuperscript{304}

\textsuperscript{300} Letter of Submittal from Acting Secretary of State Warren Christopher, U.S. Dep’t of State, in ICCPR, supra note 278, at xiv; Letter of Submittal from Acting Secretary of State Warren Christopher, U.S. Dep’t of State, in CERD, supra note 299, at viii. The bracketed language reads “Convention” for the CERD proposed reservation. With respect to the ICCPR, Christopher justified the reservation by reference to article 50, which required that the treaty apply to all parts of the federal state.

\textsuperscript{301} Summary and Analysis of the Convention, Torture Convention, supra note 299, at 2–3 (Reagan proposal); Torture Convention, Aug. 30, 1990, S. EXEC. REP. NO. 101-30, at 8 (indicating support from the Bush administration). The SFRC favorably reported out the provision as a reservation. Id. at 29.

\textsuperscript{302} See Office of the U.N. High Commissioner for Human Rights, Declarations and Reservations to the Torture Convention (Apr. 23, 2004), http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm (understanding treaty “shall be implemented” by the federal government “to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments” and in implementing certain provisions, the federal government “shall take measures appropriate to the Federal system to the end that . . . [the states] may take appropriate measures for the fulfillment of the Convention”).


\textsuperscript{304} International Convention on the Elimination of All Forms of Racial Discrimination, June 2, 1994, S. EXEC. REP. NO. 103-29, at 8, 24 [hereinafter CERD SFRC Report] (explaining that “[s]tate and local governments have a fairly substantial range of action within which to regulate or prohibit discriminatory action beyond the reach of federal law,” which the federal government has “no disposition to preempt. . . . in some areas it would be inappropriate to do so”); Office of the U.N. High Commissioner for Human Rights, Declarations and Reservations to the CERD (May 8, 2006), http://www.ohchr.org/english/countries/ratification/2.htm#reservations. The Declarations and Reservations state that the Federal Government shall implement the treaty “to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the
But what did these understandings do exactly? Throughout all the versions, the executive clearly indicated it still accepted all of the treaty’s obligations, except, of course, as qualified by other reservations or understandings. For example, the Reagan administration indicated it would not “exclude state or local officials from the prohibitions on torture contained in the Convention.” Similarly, the first Bush administration clarified that a reservation was not required for the ICCPR because “the intent is 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 concerning implementation.”

The real importance of these understandings lies in their domestic value, signaling to Congress and the states that the executive had no aspirations to bring Missouri into the human rights context. The first Bush administration characterized the ICCPR federalism understanding as emphasizing “that there is no intent to alter the constitutional balance of authority between the State and Federal governments or to use the provisions of the Covenant to ‘federalize’ matters now within the competence of the States.” But interesting questions remain. Do these treaties—by leaving certain obligations to state-level performance—“command” state legislatures to enact, or maintain, the requisite provisions? Or, are states free to disregard the treaty’s requirements, even if the federal government bears legal responsibility under international law? Scholarly opinion is divided, although it would seem the better answer is that the states are bound.

305. Several commentators have complained that the understandings are meaningless. See Henkin, supra note 26, at 346; Neuman, supra note 59, at 51–52. Brad Roth has argued, however, that they preclude Congress from enacting implementing legislation beyond its enumerated powers. Brad R. Roth, Understanding the “Understanding”: Federalism Constraints on Human Rights Implementation, 47 WAYNE L. REV. 891 (2001).

306. See Summary and Analysis of the Convention, Torture Convention, supra note 299, at 3.

307. ICCPR SFRC Report, supra note 303, at 18. The report notes Australia followed a similar path. Id. For the CERD, the Clinton administration specifically noted that it was following the ICCPR precedent. CERD SFRC Report, supra note 304, at 8.

308. ICCPR SFRC Report, supra note 303, at 17–18.

309. Compare Bradley, supra note 17, at 455–56 (stating that there is no compulsion on states via understandings), with Neuman, supra note 59, at 51–52 (stating that federal implementing legislation for human rights treaties is more appropriate to avoid commanding state legislatures/administrators), with Sloss, supra note 13, at 1977 (suggesting that understandings signal that state judges should enforce treaties), with Vázquez, supra note 69 (suggesting that understandings compel state legislatures). David Stewart, who helped formulate these understandings, suggests they signal to U.S. treaty partners that “the federal government will remove any federal inhibition to the states’ abilities to meet their obligations.” David P. Stewart, United States Ratification of the Covenant on Civil and
5. Limiting Federal Implementation of Treaties on Account of Federalism

Whether or not the executive commits the United States to a treaty with some signal to treaty-partners of federalism issues, the executive can also accommodate federalism domestically at the implementation stage. As just noted, in the context of human rights treaties, the executive decided to allow implementation of treaty obligations to occur at both federal and state levels. In other words, rather than imposing all treaty obligations through federal legislation or regulation, the executive may leave the states responsible for compliance with respect to some portion of the treaty’s obligations—usually that portion beyond Congress’s enumerated powers or which the states have traditionally regulated.310

For example, although it has declined to join the CRC, the United States recently ratified two optional protocols to that treaty, one of which addresses issues frequently the subject of state law: the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.311 The Protocol requires states to criminalize the sale of children and their organs as well as child pornography and prostitution.312 In explaining to the Senate its plans to implement the treaty, the Clinton administration took the position that it would meet the Protocol’s obligations via federal and state law, because the treaty only required that the sale of children, child pornography, and child prostitution be “covered by criminal law,” not that they be “crimes per se or that specific crimes be established in national law.”313 The Clinton administration went on to explain, for example, that while federal law only prohibited transporting a person across foreign or state borders for prostitution, “all 50 states prohibit prostitution activities involving minors under the age of 18.”314 Thus, in the likely event child prostitution occurs solely within a single U.S. state, the executive would have to invoke that

310. For trade agreements concluded as congressional-executive agreements, a different approach has emerged. Congress enacts federal legislation to satisfy the treaty’s obligations, notwithstanding that some of its subjects were previously regulated only by the states, such as product safety, banking, and insurance. But the statute authorizes only the federal government to enforce it if states are noncompliant. See, e.g., NAFTA Implementation Act, 19 U.S.C. §§ 3312(b)(1)–(3), 3312(c)(1)–(2) (2000); Uruguay Round Agreements Act, 19 U.S.C. §§ 3512(b)(1)(C), 3512(b)(2) (2000).


312. Id. at 3.

313. Id. at 12 (Article-by-Article Analysis).

314. Id. at 15–16.
state’s prostitution statute to explain the basis on which it had complied with the Protocol.

Such an approach is increasingly common, but not universal. The second Bush administration relied on it in the context of implementing the Terrorist Bombings Convention. Rather than seek additional federal legislation to criminalize state terrorist bombings as required under that treaty, it relied on existing state criminal law.315 This approach, however, contradicted a long-standing practice of the executive to implement terrorism conventions entirely at the federal level.316 In joining the Hostage Taking Convention, for example, the executive sought, and obtained, implementing legislation from Congress that criminalized even intrastate hostage taking if a foreign national was involved.317

Finally, there are still occasions where the executive seeks to enact implementing legislation in ways that implicate Missouri more directly. In 2004, the second Bush administration proposed legislation implementing the 2000 U.S.-Russia Agreement on the Conservation and Management of

315. See 18 U.S.C. § 2332f(d)(3) (Supp. 2005) (exempting offenses committed within the United States where jurisdiction is predicated solely on nationality of the victims or the alleged offender and the offense has no substantial effect on interstate or foreign commerce).

316. For example, under the U.N. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, the United States was obligated to criminalize certain acts against diplomats (murder, kidnapping, or other attack). Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents art. 2, Dec. 14, 1973, 1035 U.N.T.S. 168, 169. The United States could have relied on existing state laws but instead pursued federal legislation. In signing the implementing legislation, President Ford noted that “[p]reventing or punishing such acts is a prime concern of this Government and one which I will pursue with all the force of this office.” Statement by the President on Signing H.R. 15552 into Law, 12 Wkly. Compilation Presidential Documents 1485, 1485 (Oct. 10, 1976).

the Alaska-Chukotka Polar Bear Population. The purpose of the Agreement is to manage subsistence taking of polar bears by the native populations of the United States and Russia to avoid depletion of the species. Given the treaty’s regulation of noncommercial killing of a migratory species within a single state, it suggests Missouri might still retain some life.

6. Limiting Federal Enforcement of Treaties on Federalism Grounds

The final opportunity for federalism to play into executive treaty practice arises at the enforcement stage; that is, when there is some question of treaty noncompliance by one of the states. In addition to Missouri, Holmes authored another opinion, Sanitary District of Chicago v. United States, in which the Supreme Court found that the executive has standing to sue a state agency “to carry out treaty obligations to a foreign power.” As with Missouri, however, it appears that the executive branch often may opt not to act on such judicial pronouncements of its authority and may invoke federalism to explain why.

The most dramatic examples have occurred in the context of what remedial rights individual defendants obtain for violations of VCCR article 36. That article requires parties to notify foreign nationals upon their arrest or detention of their right to see and contact their consul if they so desire. The provision speaks directly to state law enforcement and, with increasing frequency, they are alleged to have violated this notification requirement. In a series of death penalty cases, foreign defendants and their countries have sued in U.S. courts and the ICJ to obtain some relief from the U.S. failure to provide consular notification.

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319. Because the implementing legislation is being sought individually rather than as part of a larger statutory scheme, although the legislation would amend such a scheme, it is unclear whether the regulated conduct would substantially affect interstate commerce in a post-Raich world.

320. Sanitary Dist. of Chi. v. United States, 266 U.S. 405, 425 (1925) (finding that the attorney general had standing to sue to enforce the City of Chicago’s compliance with the water diversion requirements of the 1909 Boundary Waters Treaty with Canada). But see Henkin, supra note 13, at 208, 484 n.128 (describing the State Department view that it could not seek a judicial remedy against a state for violating the U.S.-Japan Treaty of Commerce, Friendship and Navigation).

321. The U.S. position has been to deny that relief should be forthcoming even in the case of an article 36 violation, as the right inheres to the national’s state, not the national individually. See also
Under an optional protocol to the VCCR, the United States agreed to have disputes concerning that treaty heard by the ICJ and is bound under the U.N. Charter to comply with any decision the ICJ renders. To date, the ICJ has taken up three nation states’ claims against the United States, alleging that it should have provided their nationals with some judicial relief in cases where those nationals failed to receive the requisite consular notification. In the first case, the defendant, Breard, was near execution, so the ICJ issued a provisional measures order requesting a stay of U.S. criminal justice proceedings, pending the ICJ’s review.

In response to the ICJ’s order—hearkening back to Adams’s response to the Seaman’s Act—Secretary of State Albright asked the governor of Virginia to stay Breard’s execution; there was no demand of compliance. Virginia refused, arguing that for it to comply “would have the practical effect of transferring responsibility from the courts of the Commonwealth and the United States to the International Court.” Breard’s case made its way to the Supreme Court, and there the solicitor general argued that the federal government could not compel Virginia to comply with the ICJ’s provisional measures order because “our federal system imposes limits on the federal government’s ability to interfere with the criminal justice systems of the States.”

In another case, *Avena*, involving fifty-two Mexican nationals on death row in the United States, the ICJ actually issued a final order indicating that a Mexican national, Jose Ernesto Medellín, was entitled to judicial review and reconsideration of his conviction and sentence where he had never received consular notification. The ICJ ruled that this review should trump state and federal procedural due process rules.

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Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006) (holding that even in cases of VCCR article 36 violations, a defendant’s remedy would not include application of the exclusionary rule or a right to override state procedural default rules).

322. VCCR, supra note 195, at Optional Protocol art. I; U.N. Charter art. 94. On March 7, 2005, the United States gave notice that it was withdrawing from the VCCR Optional Protocol.


324. At the time, there was some debate about whether such an order had legal effect. The ICJ confirmed that they did in the *LaGrand* decision, supra note 323, ¶ 128.


326. Brief for the United States as Amicus Curiae at 51, Breard v. Greene, 523 U.S. 371 (1998) (No. 97-1390). The United States assumed the provisional measures order was binding for purposes of making this argument.

Supreme Court was preparing to hear the suit, the president indicated that
the United States would discharge its international obligations under the
*Avena* case “by having state courts give effect to the decision in accordance
with general principles of comity.” 328 Although open to debate, this
assertion appears to rest, at least in part, on the treaty power through the
U.N. Charter article 94 obligation to comply with ICJ decisions. 329

V. EXECUTIVE FEDERALISM AND ITS IMPLICATIONS

Why should we care about Executive Federalism? After all, the treaty
power is an executive power—why should it matter that on occasion the
executive has, or has not, negotiated a treaty with an eye toward the states?
Is it not the executive’s prerogative to decide when and what treaty
obligations to assume on behalf of the United States? What can Executive
Federalism tell us about the treaty power that we do not already know from
reading *Missouri* and the nationalist-new federalist debate it has spawned?

Executive Federalism matters because it offers an alternative vision of
the treaty power to that presented by either nationalist or new federalist
conceptions. It shows us a power with safeguards for the states, although
not necessarily from the judicial or legislative sources in which the
scholarship would lead you to believe. At the same time, Executive
Federalism reveals a treaty power the very exercise of which can weaken
when and how other government actors address the power’s content and
limits. And, even if the Court somehow reengages the issue, Executive
Federalism offers evidence of treaty power limits from the power-holder’s
perspective—limits to which the Court is likely to defer.

A. THE NATURE OF EXECUTIVE FEDERALISM

Nationalists and new federalists offer competing visions of
federalism’s nature in the treaty power context. New federalists view it
essentially as a judicial safeguard. 330 They envision the Supreme Court
policing the boundaries of U.S. treaty-making to ensure that federal power
does not exceed the boundaries assigned to Congress’s legislative
authorities. They cite the Court’s new federalism jurisprudence and the
changing nature of treaty-making to make a descriptive claim for their
view, and use text, structure, and history to explain why that claim has

329. *See supra* note 322 and accompanying text.
330. *See* Bradley, *supra* note 17, at 441–46. *See also* Swaine, *supra* note 17, at 447; *supra* notes
74–76 and accompanying text.
normative value. In doing so, they disparage the idea that the Senate specifically—or Congress as a whole—protects the nation’s federal structure.

In contrast, nationalists view federalism protections, to the extent they exist at all post-Missouri, as political safeguards. In doing so, nationalists align with Herbert Wechsler, who famously argued that, in accordance with the Framers’ vision, the political branches of government offered enough protection for the states. Wechsler envisioned such protection occurring primarily through Congress, which reflected the local spirit and would constrain the president as the “prime organ of a compensating ‘national spirit.’” Nationalists frequently adopt Wechsler’s framework to treaty-making, where they argue the Senate’s unique role sufficiently protects states’ rights.

Both sides assume, therefore, that any check on executive employment of the treaty power will be external to it; that is, either judicial oversight of treaty-making that offers restraints in parallel with those imposed on the exercise of congressional powers, or as a political brake on treaty-making that would otherwise impact traditional areas of state regulation. Federalism is either a judicial or legislative safeguard against unbridled

331. New federalists specifically emphasize how the Court has developed judicial standards for protecting state sovereignty, notwithstanding its earlier pronouncement in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), that the political process already did so sufficiently. See, e.g., Bradley, supra note 17, at 441–42; John C. Yoo, The Judicial Safeguards of Federalism, 70 S. CAL. L. REV. 1311, 1312–13 (1997).

332. Bradley, supra note 17, at 443.

333. See Wechsler, supra note 71, at 558 (“[T]he national political process in the United States—and especially the role of the states in the composition and selection of the central government—is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states.”).

334. Id. at 552. Wechsler recognized, however, that states’ rights would undoubtedly influence the Presidency through the national election process, but ultimately he viewed Congress as the repository of states’ rights. Id. at 557–58.

335. See, e.g., Henkin, supra note 13, at 168 (explaining that although the president is not impervious to local influence, the Senate still substantially represents states); Damrosch, supra note 13, at 527, 530 (explaining Senate acts as a surrogate for American people and proxy for states); Golove, supra note 12, at 1099, 1270 (explaining that the Senate imposes political, not constitutional, standards on the exercise of the treaty power); Sloss, supra note 13, at 1963–64 (citing Wechsler and arguing that there is little need for judicial intervention given the Senate’s special role). In contrast, Jesse Choper did note, albeit briefly, that the use of federal-state clauses in treaty-making suggested some presidential solicitude for states’ rights and an awareness of the need to avoid impinging on “local matters.” Choper, supra note 71; Jesse H. Choper, The Scope of National Power Vis-à-vis the States: The Dispensability of Judicial Review, 86 YALE L.J. 1552 (1977). Larry Kramer has posited nonstructural political sources for political safeguards, although without any analysis of their application to foreign affairs generally or treaty-making specifically. Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 COLUM. L. REV. 215 (2000).
executive power. There is no role for internal executive visions of its power consonant with the interests of the states.336

What Executive Federalism suggests, however, is that neither the nationalist nor new federalist vision offers a complete or accurate depiction of how federalism operates in the treaty context. Although the Court has intervened at times to support the executive’s power to conclude treaties, it would be a stretch to suggest it has offered any real check on the exercise of that power. Nor does the Court’s current doctrine suggest that situation is likely to change. At the same time, emphasizing the Senate’s role misses the fact that most federalism accommodations to the treaty power originate with the executive. Whether in treaty negotiations, in U.S. adherence to the treaty, or in its implementation or enforcement, the primary way in which states’ rights garner protection in the treaty context is through the executive.337

This is not to suggest that the executive will always align itself with state interests; the executive ultimately operates in pursuit of its own interests. Thus, the executive can opt to disregard states’ rights where it perceives the national interest outweighs matters of local concern. As both Missouri and U.S. practice demonstrate, treaty-making can and has occurred in ways that supplant areas traditionally regulated by state law or require action by state officials. What Executive Federalism demonstrates, however, is that the executive does not always do this. More often than not, it appears executive treaty-making incorporates an internal dialogue of national and state interests, which may actually adjust U.S. positions to accommodate state laws and powers. As such, whether or not there are, or should be, external judicial or legislative safeguards on federalism in the treaty context, there are undoubtedly internal executive safeguards of federalism.

336. See, e.g., Bradley, supra note 17, at 443 (citing Friedman for the idea that there is “not much in the political process of electing a President that suggests any particular sensitivity to state concerns”); Johnson, supra note 65, at 392 (attributing human rights RUDs to the Senate’s unwillingness to permit domestic effect for treaties); Neuman, supra note 59, at 52–53 (noting that federalism understandings reflect congressional reluctance to impact states’ rights); Rosenkranz, supra note 17, at 1898, 1935 (rejecting “self-restraint” as a proper check; handing power to treaty-makers incentivizes more vague treaties that are non-self-executing because they increase the treaty-makers’ power, in lieu of fewer, specific treaties that are self-executing); Young, supra note 200, at 153 (suggesting that the practice of congressional-executive agreements demonstrates that the Senate is an “effective ‘political safeguard’ for state autonomy”).

337. Executive Federalism thus suggests federalism is a political safeguard, just not the one scholars had envisioned.
Thus, Executive Federalism requires that we broaden our conception of federalism in the treaty context. It is not enough to argue about whether the Court has, or should, protect state interests in U.S. treaty-making, or whether the Senate can fill any judicial void. Clearly, the executive has taken the matter into its own hands, and, in doing so, requires us to think about federalism differently than if we could simply attribute it to the executive unbridled national ambitions.

B. THE STRUCTURAL IMPLICATIONS OF EXECUTIVE FEDERALISM

Reconceiving federalism to incorporate an executive safeguard raises important structural questions concerning the executive’s use of the treaty power itself and the impact of executive accommodation to federalism interests on other government actors.

First, there is the question of whether Executive Federalism has any legal importance. After all, one could simply take the view that Executive Federalism involves inherently political acts. Could it be, as David Golove describes it, simply a negotiating ploy, one designed to limit obligations assumed while maximizing commitments received from U.S. treaty partners?338 That does not seem likely, however, particularly where accommodations to federalism now take place, not just at the negotiating table, but in the adherence, implementation, and enforcement of U.S. treaties. If this was only about negotiating better deals, you would not expect to see the federalism specter again once the executive had cut the best deal it could.

Alternatively, it might be possible to conceive of Executive Federalism as an entirely appropriate exercise of political discretion, as simply an expression of the executive’s decision in certain situations not to employ the full force of the treaty power described by Holmes in Missouri.339 After all, why should the executive make treaties that implicate federalism if it can avoid doing so; is it not entirely appropriate to our federal system for the executive to exercise self-restraint in cases where it can do so? We could analogize it to prosecutorial discretion where no one interprets the prosecutor’s decision not to charge a particular defendant as depriving the prosecutor of the power to charge other defendants in the future. Article II gives the president the treaty-power, and all agree that

338. See supra note 251 and accompanying text. Of course, given the likelihood of repeat negotiations, we need to consider the effect of making these arguments on U.S. credibility in subsequent negotiations.

339. See Swaine, supra note 17, at 446 n.173.
power allows him to decide when and where to employ it. 340 In that scenario, why should there be any legal issue if the executive decides to use only part of the power (that is, to assume treaty obligations consistent with existing state laws) leaving the remainder dormant until such time as the executive decides to invoke it?

Such reasoning has merit, at least as a way to explain the results of Executive Federalism where, notwithstanding Missouri, U.S. treaty-making often avoids supplanting state powers. But it proves less workable as a way to explain the rhetoric of Executive Federalism. The executive’s own position, while certainly not free from ambiguity, alludes to restraints that have a legal underpinning. References to fundamental principles of federalism may not suggest that the executive must accommodate otherwise reserved state powers in treaty-making, although some will certainly draw that conclusion—but at a minimum, it suggests that there is legal authority for the executive to do so. As such, Executive Federalism rhetoric lays the foundation for continuing a more constrained treaty practice over time. And the longer the rhetoric is matched by action, the greater the likelihood of some future suggestion—by the executive or even the Court—that the authority has actually become a requirement constraining the treaty power itself.341

By carrying the federalism banner rather than letting others wave it, Executive Federalism also has important structural implications for other government actors. Specifically, it can preempt their ability to articulate the power’s content or limits. Consider the case where the executive explains its nonadherence to a treaty, at least in part, by invoking federalism or the reserved powers of the states. But in that very act of not joining the treaty, the executive preempts the ability of other government actors to second guess its views. The Supreme Court will not have an opportunity to opine

340. Although not the original intent, the Senate now becomes involved only after the power has engaged, and it can only confirm, modify, or reject the president’s particular proposals—it cannot force him to exercise the power because the president always retains discretion not to ratify a treaty if he disagrees with the Senate’s terms.

341. I am not endorsing Michael Paulsen’s suggestion that the executive may autonomously interpret the Constitution if that means contradicting the Court’s interpretation; but to the extent that interpretation leaves ambiguity, I certainly agree with his conclusion about the concept of “executive restraint” and the executive’s significant authority to develop and apply its own view of what the law means. See Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 GEO. L.J. 217, 221, 224–25 (1994). See also Spiro, supra note 205, at 577 (recognizing the “constitutional significance” of political branch interpretation of the treaty power’s scope in practice); Swaine, supra note 17, at 444 (“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.”).
on whether the International Covenant on Social and Economic Rights falls within the bounds of the treaty power because the president’s decision not to proceed with ratification preempts any role it might have.\footnote{342} All that is left is the executive’s invocation of federalism and the impression that it precluded U.S. ratification of the treaty. More interestingly, the executive today has also demonstrated that it can do the same thing through federal-state clauses, such as Cybercrime Convention Article 41, or federalism reservations, as in the TOC Convention.\footnote{343} In both cases, the United States only assumes obligations pursuant to whatever legislative authority Congress already had, thus depriving the Court of any opportunity to review whether fundamental principles of federalism actually required this result, or even to affirm—if it was so inclined—the broader scope of the treaty power envisioned in \textit{Missouri}.

Of course, the Senate has a role to play in cases where the executive decides to take advantage of a federal-state clause or issue a federalism reservation or understanding. But it is hard to envision that the Senate—which functions as a restraining influence on the treaty power—would switch roles and suddenly push the executive not to invoke a federal-state clause or issue a federalism understanding. The more likely result is Senate confirmation of the executive’s proposed accommodation, as was the case with the human rights understandings.\footnote{344} This then creates an understanding between the two branches as to the appropriate exercise of the treaty power in a particular case—an understanding likely to warrant substantial deference from the Court.\footnote{345}

Executive Federalism may have other structural implications in the implementation context. First, the suggestion that existing law satisfies a particular treaty’s obligations may appear initially innocuous, but it has significant repercussions. What happens if a subsequent president or Congress decides the initial evaluation was mistaken or circumstances have

\footnote{342. \textit{Similarly, Executive Federalism can limit Senate prerogatives in those cases, such as the CRC, where the executive invokes federalism and does not submit the treaty to the Senate for advice and consent.}}

\footnote{343. \textit{See supra} notes 207–14, 281–86 and accompanying text.}

\footnote{344. \textit{See supra} notes 302–04 and accompanying text.}

\footnote{345. \textit{See Bradley & Goldsmith, supra} note 26, at 444–45; Spiro, supra note 205, at 577–78. Although the issue has not arisen before the Court and remains subject to academic debate, several courts have enforced RUDs appended by the executive to U.S. treaties. In the only opinion to examine their validity in detail, the Third Circuit held, in a decision joined by then-Judge Alito, that “for purposes of domestic law, the understanding proposed by the president and adopted by the Senate in its resolution of ratification are the binding standard to be applied in domestic law.” Auguste v. Ridge, 395 F.3d 123, 142 (3d Cir. 2005) (adopting the definition of “torture” included in the U.S. instrument of ratification to the Torture Convention).}
changed requiring new legislation to meet the treaty’s requirements? Does the shared understanding between the president and the Senate preclude reliance on the treaty as additional authorization?346 Second, what should states make of the situation where implementation of a treaty obligation is left to the operation of state law?347 Does this mean that state legislatures are precluded from modifying their laws in ways that would put the United States in breach of its international treaty obligations? Not even Missouri went that far. But that is the logical consequence of the United States accepting such a treaty obligation and giving it the status of “Supreme Law of the Land.”348 In both cases, moreover, there is the foreign affairs context to consider where the Court has shown deference simply to political branch expressions of foreign policy, let alone legally binding obligations such as a treaty.349

So, is Executive Federalism a good or bad thing? It is neither. It is a function of the very power Article II invests in the executive. The executive may clearly exercise that power in a variety of ways, with attendant good or bad effects, depending on one’s point of view. If the president wants, he could certainly try and take advantage of Missouri’s implications more often, as the Medellín case reminds us, to the detriment of the states. It is equally important to recognize, however, that the executive will often favor treaty-making methods more accommodating to the states, but which have a corresponding detrimental effect on the ability of other government actors, especially the courts, to address the treaty power and its limits.

C. EXECUTIVE FEDERALISM: WHAT SORT OF LIMITS ARE THERE?

What the preceding survey demonstrates is not only that the executive can accommodate federalism concerns in U.S. treaty-making, but also that it has actually done so with some frequency and complexity. Thus, apart from Executive Federalism’s own independent legal significance, it can also provide evidence of what sorts of limits the Court might apply should it reconsider the issue. Moreover, the Court is likely to give the executive view deference given the foreign affairs context and the fact that in most

346. In this respect, the new TOC and Cybercrime Convention understandings are different from earlier federalism understandings in the human rights context, because the latter did not purport to constrain Congress’s ability to enact future implementing legislation under the Necessary and Proper Clause. See Bradley, supra note 17, at 444; supra notes 210–13, 286 and accompanying text.
347. This can arise through federalism reservations, as in the TOC; understandings like those used for the ICCPR, CERD, and the Torture Convention; or in implementing legislation itself, like those used for the Sale of Children Protocol and the Terrorist Bombings Convention.
348. See Henkin, supra note 26, at 344.
349. See supra notes 181–88 and accompanying text.
cases the executive will have acted with the approval of the Senate (and, if there is implementing legislation, the Congress as a whole).

Notwithstanding its extensive accommodations for federalism, looking at the actual practice, it does not appear that the executive endorses the new federalist vision of tying the treaty power to Congress’s legislative powers. Certainly, there are cases where it has done so—the TOC Convention being a prime example. But, there are also clearly cases—President Bush’s Memorandum on *Avena* being the most recent example—where the executive has relied on treaties in ways that interfere with core state powers that for most other domestic purposes would be considered reserved. At the same time, however, the executive clearly does not accept the unlimited treaty power conception articulated by some nationalists.

Somewhat surprisingly, the best explanation of the treaty power’s scope may still lie in the old proper subjects for negotiation standard that has been with us since the Founding. 350 The executive branch generally seems to negotiate, conclude, implement, and enforce treaties, the obligations of which are matters of international concern, as the executive defines them. This is not the static version of the international concern test articulated by Hughes, because the executive may take issues previously regulated by the states and subject them to treaty-making. But it is also clearly not an unlimited power. The reality is that, while the executive has allowed treaty-making to expand on certain subjects that implicate state laws and powers, it has also demonstrated a willingness to regard other areas as still not rising to a level where it will negotiate with other states over them, such as certain health regulations, local corruption, and organized crime.

Executive Federalism also bears watching for the limits that do not appear in executive practice. As noted above, many scholars assume from *New York* and *Printz* that the federal government cannot command state legislatures or state executives via treaty. 351 Yet, executive practice is replete with contrary examples—for example, the stolen vehicle treaties, human rights understandings, and the VCCR. As such, serious questions remain about whether, or to what extent, the Court would defer to

350. See supra notes 55–60 and accompanying text. Despite Louis Henkin and the *RESTATEMENT*’s repudiation, the test has never been rejected by the courts, and indeed has enjoyed a recent resurgence in the context of appellate court approval of the Hostage Convention’s implementing legislation. See, e.g., United States v. Ferreira, 275 F.3d 1020, 1027–28 (11th Cir. 2001); United States v. Lue, 134 F.3d 79, 82–84 (2d Cir. 1998).

executive practice and not extend its anticommandeering principle to treaty-making, or only extend it in part.352

VI. CONCLUSION

Nationalists and new federalists would leave the debate over federalism and the treaty power in the Court’s hands, letting it lay down one clear rule or another. But treaties live a more complicated domestic life. Executive Federalism shows that waiting for a judicial resolution of the ongoing debate may not be realistic, or even possible, given the executive’s own exercise of its treaty power. Nevertheless, even without judicial intervention, federalism still has a large role to play. As a function of Executive Federalism, the United States has developed a variety of methods for accommodating the powers and laws of its states in all stages of treaty-making—from the negotiating stage, through adherence and implementation, to enforcement.

In thinking about the treaty’s domestic life, however, we must keep in mind its second existence. As a creature of international law, treaties impose obligations on nation states, and those obligations bind all nation states the same way, regardless of constitutional differences or governmental structures. Thus, the executive is well advised to carefully weigh the costs and benefits of the commitments it accepts. Accommodating federalism in a treaty undoubtedly has benefits—especially for the states—benefits that some would say are warranted given the U.S. federal structure.

But Executive Federalism also has costs. As already noted, it can cost other domestic governmental actors, for example, the Court and Congress, in terms of their authority over the interpretation and exercise of the treaty power. But it can also cost the United States internationally. It may prevent the United States from joining treaties it might otherwise have an interest in joining. It may restrain the United States from obtaining concessions from other nations with regard to their behavior because of the knowledge that

352. For example, it might be easier to justify commanding state law enforcement to comply with, or otherwise enforce, a treaty obligation, in much the same way state courts are compelled to do. Given the state sovereignty inherent in a state’s legislature, however, it seems the Court is less likely to defer to treaties that require state laws to remain static, especially where Congress could be otherwise authorized per Missouri to replicate any legislative difficulty at the national level. That distinction is not free from doubt, however, as it still leaves the problem of what to do with a treaty such as the Wills Convention, which implicates an area almost exclusively regulated by state law, where the idea of a federal statute implementing requirements for wills only involving a foreign person or property would have obvious prudential difficulties. See supra note 261.
the United States would not be able to reciprocate given states’ rights concerns. Executive Federalism can impose additional costs on U.S. negotiations if a federal-state clause is required, depriving it of negotiating capital to achieve other desired ends. Indeed, other nations may object to the executive’s characterization of the treaty power’s scope. Thus, Executive Federalism may backfire, as in the ICCPR context, where executive efforts to obtain a federalism reservation led to article 50’s requirement that ICCPR obligations applied to federal states in their entirety and without limitation. Executive Federalism can even complicate questions of U.S. compliance, whether in relying on state law to meet a treaty’s obligations, like in the ICCPR, or the need to overcome state law, such as procedural default rules, to ensure U.S. compliance with treaty obligations.

What Executive Federalism suggests, therefore, is that we need to think about federalism and treaties in a new way, beyond the well-covered ground of constitutional text, structure, history, and doctrine. We need to think about federalism not just as a judicially imposed doctrine, but one capable of invocation and imposition by other branches. Whether or not the executive should carry the federalism banner may not be open to debate. Article II, after all, vests the treaty power with the executive and it is the president’s prerogative to exercise that power in his discretion. But that does not mean we cannot debate how and when the executive carries federalism into the treaty negotiations. We can talk about whether particular methods of Executive Federalism better protect the states or which are most harmful to U.S. negotiating objectives. We can debate why the executive should use one form of accommodating federalism over another, that is, methods that are international versus internal, or multilateral versus unilateral. We can talk about the relevance of, and how best to preserve, the roles of other actors in the treaty process. In other words, we can, and should, be debating how to make the domestic life of the treaty more peaceful. As rich and rewarding as the nationalist-new federalist debate has been, we need to reorient the discussion to include an analysis of the executive branch as an essential subject in its own right.