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## Of Federalism, Human Rights, and the *Holland Caveat*: Congressional Power to Implement Treaties

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# OF FEDERALISM, HUMAN RIGHTS, AND THE HOLLAND CAVEAT: CONGRESSIONAL POWER TO IMPLEMENT TREATIES

*Ana Maria Merico-Stephens\**

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\* Associate Professor of Law and Affiliated Professor of Latin American Studies, The University of Arizona, James E. Rogers College of Law. I am grateful for the thoughtful comments and critiques my colleagues at the University of Arizona shared with me when I presented this paper in its early stages at a Faculty Workshop. I am indebted to Barbara Atwood, Dean Toni Massaro, Graeme Austin, Jim Anaya, Associate Dean Kay Kavanagh, Ted Schneyer, and Carlos Manuel Vázquez for their very thoughtful comments on an earlier draft as well as for their generosity with their time. All helped me to sharpen the discussion, clarify legal propositions, make assumptions explicit and defend them. This Article is stronger than it was originally because of their thoughtful suggestions. Of course, the standard disclaimer about errors and omissions applies; the responsibility is all mine.

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## INTRODUCTION

The Rehnquist Court's federalism doctrine and the domestic implementation of human rights obligations can coexist in harmony. This is not a timid suggestion. American federalism and the human rights implementation discourse do not share a visible common ground. Each theme can be polarizing. Each triggers passionate debate about classic conceptual tensions.<sup>1</sup> Each embodies political ideologies, though discussions for the most part treat these subjects as non-ideological.<sup>2</sup> For instance, commentators disagree on the value of judicial federalism as an abstract matter and as a structural arrangement,<sup>3</sup> debate the merits of judicial restraint versus judicial intervention vis-à-vis the power of Congress to legislate,<sup>4</sup> dispute the importance of cultural relevance in relation to human rights norms, argue about the political orientation of the underlying debate,<sup>5</sup> and generally find little to agree upon.

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1. For a thoughtful examination of the tensions and norms that have developed around the role of the Rehnquist judiciary as both policy-makers and decision-makers, see Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003). For an essay reflecting on some of the points of tension, see Ann Althouse, *A Response to Professor Woolhandler's "Treaties, Self-Execution, and the Public Law Litigation Model"*, 42 VA. J. INT'L L. 789, 794 (2002).

2. See Makau Wa Mutua, *Politics and Human Rights: An Essential Symbiosis*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 149 (Michael Byers ed., 2000); see also Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47, 48-49 (2003); R. Randall Kelso, *A Post-Conference Reflection on Federalism, Toleration, and Human Rights*, 40 S. TEX. L. REV. 811 (1999) (asserting that commentators' views about federalism are often driven by partisan political calculations).

3. See, e.g., Richard H. Fallon, Jr., *The Conservative Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 430 (2002) (citing to the divergent interpretations of the Supreme Court's federalism doctrine).

4. See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1092 (2001); Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong With Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 (2002).

5. See Mutua, *supra* note 2, at 149; see also Curtis Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457 (2001); Frank B. Cross, *The Relevance of Law in Human Rights Protection*, 19 INT'L REV. L. & ECON. 87 (1999); Jack Goldsmith, *Should International Human Rights Law Trump US Domestic Law?*, 1 CHI. J. INT'L L. 327 (2000); Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635 (2003); Dinah Shelton, *Protecting Human Rights in a*

This Article explores whether the Rehnquist Court's federalism doctrine, as elaborated during this last decade, should or ought to extend to the domestication of discrete provisions of ratified human rights treaties. It explores this question by examining the International Covenant on Civil and Political Rights (Covenant) and by considering the civil remedy provision of Violence Against Women Act (VAWA) as potential implementing legislation for the equality provisions of the Covenant. In the context of this inquiry, the discussion engages federalism, as developed by the current Court, on its own terms. That is, I do not seek here to defend it or reject it. It seeks to refocus the broader debate to the specific context of the VAWA and the ICCPR.

Similarly, this Article openly assumes the normative value of complying with human rights norms, and supports the extant understanding that the political safeguards of federalism is a substantive and significant limitation. In other words, what follows proposes a framework where the domestication of human rights provisions through the treaty power is consistent with the structural allocation of powers set out in the Constitution.<sup>6</sup>

The federalism doctrine of 1920 posed no judicially enforceable limits on Congress's power to implement treaties. Justice Holmes, in *Missouri v. Holland*,<sup>7</sup> announced that the "invisible radiations" emanating from the

*Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273 (2002); Beth Stephens, *Taking Pride in International Human Rights Litigation*, 2 CHI. J. INT'L L. 485 (2001); Mark Tushnet, *Federalism and International Human Rights in the New Constitutional Order*, 47 WAYNE L. REV. 841 (2001).

6. I refer here to the distribution of powers between the states, the federal government, and the judiciary. The federalism doctrine of the Rehnquist Court has been justified as much by the structural guarantees of the Constitution—reserving to the states an unquantifiable quantum of power not delegated to the federal government—as it has by the specific provisions of the Constitution and the Tenth, Eleventh, and Fourteenth Amendments. It seems reasonable to posit that executive and congressional powers in the realm of treaty making merit more judicial deference than in other areas, such as those addressed by the Court in its federalism cases. Just as "context matters" in affirmative action programs in higher education, as found in *Grutter v. Bollinger*, 539 U.S. 306, 319 (2003), perhaps, too, context matters or ought to matter in foreign affairs. See Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1223 (1999) (suggesting that the context of foreign relations law necessitates that it be treated differently from other domestic legal regimes); see also *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 2374 (2003) (striking down California's Holocaust Victims Insurance Act as preempted by the foreign affairs doctrine). Justice Souter stated several well worn principles in *Garamendi*: "There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy . . ." *Id.* at 2386. "Nor is there any question generally that there is executive authority to decide what that policy should be." *Id.* "[V]alid executive agreements are fit to preempt state law, just as treaties are . . ." *Id.* at 2387. In a footnote, the opinion limited the preemptive power of treaties to the Constitution's guarantee of individual rights and explained that it should be exercised in subordination to the Constitution's applicable provisions, citing Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). *Id.* at 2387 n.9.

7. 252 U.S. 416 (1920).

Tenth Amendment did not curb a plenary treaty power exercised through implementing legislation, even if Congress lacked the power to enact the same statute under Article I.<sup>8</sup> Justice Holmes's analysis has been, and remains today, settled constitutional law since 1920. But because the case's holding seemed so broad, many feared that *Holland* cleared the path for a dangerously expansive use of the treaty power. This apprehension centered on the potential encroachment into state interests that would result from the domestication of human rights norms, which could negatively affect state interests.<sup>9</sup> The specter of forced international compliance with international human rights treaties provoked a strident political campaign to overrule or narrow *Holland's* reach.<sup>10</sup> These attempts failed, and eighty years later, *Holland*<sup>11</sup> remains an explicit Supreme Court endorsement of Congress's power to domesticate international agreements.<sup>12</sup> Justice Holmes tethered this holding to the caveat that whatever qualifications exist to the treaty-making power, they must be found somewhere other than in the Tenth Amendment.<sup>13</sup> The *Holland* caveat raises important questions about the proper scope of the treaty power in the presence of a vigorous state-rights doctrinal presumption.

Constitutional life was simpler in 1920, and the domestic implications of international law relatively undemanding. But the breathtaking developments of the last 80 years have altered the political, historical, and constitutional assumptions that prevailed at the time of *Holland*. Global interdependence, the emergence of human rights norms as binding international obligations, proliferation of treaties, an expanded

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8. *Id.* at 433–35.

9. *See infra*, notes 10, 31, 256 and accompanying text on the controversies generated by the Bricker Amendment.

10. *See, e.g.*, DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP 40 (1988); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995). In the 1950's Senator John Bricker took the initiative to propose an amendment to the Constitution to "make certain that no treaty or executive agreement will be effective to deny or abridge [American people's] fundamental rights." Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 HUM. RTS. Q. 309, 313 (1988). Bricker hoped that the amendment would counter the effect of *Holland* and similar cases which in his view rendered the Tenth Amendment a dead letter. *Id.* at 315–16. Section 2 of the proposed amendment stated: "No treaty shall authorize or permit any foreign power or any international organization to supervise, control, or adjudicate rights of citizens of the United States within the United States enumerated in this constitution or any other matter essentially within the domestic jurisdiction of the United States." *Id.* at 315. In exchange for tabling the amendment, the Eisenhower administration agreed not to ratify the Genocide Convention. *Id.* at 320.

11. 252 U.S. 416 (1920).

12. For a thorough discussion of *Holland* and the statute involved, see *infra*, notes 304–23 and accompanying text.

13. *Holland*, 252 U.S. at 433. For ease of reference, I will refer to this proposition as the *Holland* caveat.

concept of the Nation-state, and a transformation in domestic and international institutions, all combine to call into question the continuing validity of Justice Holmes's declaration. Whether these changes should alter the proposition that the Tenth Amendment does not limit implementing legislation is a question that needs exploring. The Supreme Court has never addressed the *Holland* caveat, and some commentators argue that because of the significant structural implications of judicial involvement, the Court may choose not to face it in the foreseeable future,<sup>14</sup> or ever.<sup>15</sup>

A reconsideration of *Holland's* holding would be constructive not only because of transformations in the international landscape, but also because the sweeping and institution-altering changes the Rehnquist Court has made to the allocation of power between Congress and the states,<sup>16</sup> some argue, may (or should) lead to the narrowing or overruling of *Holland*.<sup>17</sup>

The Rehnquist Court, with its distinctive brand of "first principles" federalism doctrine, has expertly embossed significant new constitutional limits on congressional legislative powers.<sup>18</sup> The "invisible

14. See, e.g., Peter J. Spiro, *Missouri v. Holland: Beside the Point?*, 94 AM. SOC'Y INT'L L. PROC. 140–141 (2000); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003); see also Althouse, *supra* note 1, at 790–94.

15. This would require treating the question as non-justiciable. See *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (holding that foreign policy matters are not within the judiciary's competence); see also *American Insurance Assn. v. Garamendi*, 539 U.S. 2374, 2386–87 (2003). Though a preemption case, the Court explicitly reaffirmed the power of the President to conduct foreign relations. *Garamendi* strongly suggests that the Court would be more inclined to consider validity of a treaty a non-justiciable matter than to intervene.

16. Some commentators however view the Rehnquist Court's federalism decisions in a less transforming way. For example, Professor Vicki Jackson proposes that the changes federalism has created, though significant, are really part of a constitutional dialogue that has existed all along. Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 223–233 (2001).

17. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 395 (1998) [hereinafter *Federalism I*]; Curtis Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000) [hereinafter *Federalism II*] (responding to Professor Golove's Article, *Historical Foundations*, *infra* this note); Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675 (1998); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) [hereinafter *Globalism and the Constitution*]. For a thoughtful response to Professor Bradley and an extensive exploration of the history of the treaty power, see David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1083 (2000) [hereinafter *Historical Foundations*].

18. The Rehnquist Court has used the term "first principles" to describe a government structure in which there ought to exist meaningful limits to national power in a system in which the states occupy a semi-sovereign role. See *United States v. Lopez*, 514 U.S. 549, 552–53 (1995). Chief Justice Rehnquist, writing for the Court, referred to the following "first principles" as guiding the decision:

radiations” of the Tenth Amendment have taken on a very visible form in the Court’s jurisprudence. These can be identified as: (1) Tenth Amendment prohibitions on Congress’s ability to commandeer the legislative or executive processes of the states;<sup>19</sup> (2) Eleventh Amendment and structural limitations on Congress’s power to create private causes of action against the states;<sup>20</sup> (3) Fourteenth Amendment limitations on Congress’s

The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite.” The Federalist No. 45, pp. 292–293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority “was adopted by the Framers to ensure protection of our fundamental liberties.” *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotation marks omitted). “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the states and the Federal Government will reduce the risk of tyranny and abuse from either front.”

*Id.* I use the term “first principles federalism” as shorthand for the Rehnquist Court’s federalism decisions that have changed dramatically the balance of power between Congress and the Federal Courts. This jurisprudence resulted in the cropping of congressional power in a number of spheres – most notably under the Commerce Clause and under Section Five of the Fourteenth Amendment. For a more thorough analysis of this point, see Ana Maria Merico-Stephens, *Of Maine’s Sovereignty, Alden’s Federalism, and the Myth of Absolute Principles*, 33 U.C. DAVIS L. REV. 325, 329–330 (2000) (describing first principles federalism as “mystical categorical federalism”); Ana Maria Merico-Stephens, *United States v. Morrison and the Emperor’s New Clothes*, 27 J.C. & U.L. 735 (2001) (exploring the institutional implications of *United States v. Morrison*, 529 U.S. 598 (2000)).

19. See *Printz v. United States*, 521 U.S. 898 (1997) (striking down portions of the Brady Handgun Violence Prevention Act because it commandeered local enforcement officers to carry out federal policy); *New York v. United States*, 505 U.S. 144 (1992) (striking down the Take-Title provisions of the Low-Level Radioactive Waste Policy Amendments Act on the ground that the Tenth Amendment prohibited Congress from commandeering state legislatures to enact federal compliance policies, even if the Commerce Clause permitted the enactment of the Act itself).

20. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (striking down a portion of the Indian Game Regulatory Act on the grounds that the Eleventh Amendment limited Article I powers and prevented Congress from abrogating state sovereign immunity to create private causes of action in federal court); *Idaho v. Coeur D’Alene*, 521 U.S. 261 (1997) (dismissing an injunctive relief action against Idaho on Eleventh Amendment grounds); *Alden v. Maine*, 527 U.S. 706 (1999) (applying *Seminole* to hold that Congress is prohibited from abrogating state sovereign immunity in state courts); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (striking down a portion of the Age Discrimination in Employment Act as violating the Eleventh Amendment and being beyond the scope of Congress’s power under Section Five of the Fourteenth Amendment); *Fla. Prepaid Postsecondary Educ. v. Coll. Savings Bank*, 527 U.S. 627 (1999) (holding that a federal law that abrogated state sovereign immunity for patent infringement claims violated the Eleventh Amendment and was beyond Congress’s powers under Section Five of the Fourteenth Amendment to create new property rights); *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding unconstitutional the abrogation of states’ sovereign immunity to create private causes of action under the American with Disabilities Act as exceeding Congress’s Section Five, Fourteenth Amendment powers); *Fed. Mar. Comm’n v. S.C.*

ability to enact remedial legislation pursuant to Section Five,<sup>21</sup> and (4) Commerce Clause limitations on the scope of Congress's power to regulate subjects that are not exclusively economic and that interfere with state prerogatives.<sup>22</sup>

These considerable restrictions have energized the dialogue about what is the nature of American government.<sup>23</sup> The context of the debate is whether any of the limitations identified above should also limit the treaty making power. Commentators have written prolifically about this question, arguing that the treaty power ought to be similarly limited,<sup>24</sup> that it is not (or should not be) limited at all,<sup>25</sup> that it is only conditionally limited,<sup>26</sup> or that the question is beside the point.<sup>27</sup> Most agree, however, that the question is an important one that merits exploring. The

State Ports Auth., 535 U.S. 743 (2002) (holding that Congress lacks the power to abrogate states' sovereign immunity for private causes of action brought in Article I tribunals); *Nevada v. Hibbs*, 123 S. Ct. 1972 (2003) (upholding congressional abrogation of states' Eleventh Amendment immunity pursuant to Section Five of the Fourteenth Amendment, used as the source of power for enacting the Family Medical leave Act). *Hibbs* is the first in this line of cases to uphold congressional power to abrogate sovereign immunity. It is also the first case to meet the strict "congruence and proportionality" test established by *City of Boerne v. Flores*, 521 U.S. 507 (1997). See *infra*, note 21.

21. In addition to the cases cited *supra*, notes 19–20, see also *Morrison*, 529 U.S. at 598 (holding unconstitutional the civil remedy provision of the Violence Against Women Act as exceeding Congress's Commerce Clause and Fourteenth Amendment remedial powers); *Flores*, 521 U.S. at 507 (holding unconstitutional the Religious Freedom Restoration Act of 1993 as exceeding Congress's power under Section Five of the Fourteenth Amendment).

22. See *Lopez*, 514 U.S. at 549 (striking down the Gun Free School Zones Act as exceeding the permissible scope of the commerce power); *Morrison*, 529 U.S. at 607–19.

23. By an American form of government, I mean descriptively to capture the notion that in a government of limited and enumerated powers, where the states exist within a sphere of doctrinally created sovereignty prerogatives, what the federal government can do is limited not so much by any explicit provision of the Constitution, as it is by the structure of government itself.

24. See *Federalism I*, *supra* note 17.

25. See Martin S. Flaherty, *Are We to Be a Nation?: Federal Power vs. "states' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1296–97 (1999); *Historical Foundations*, *supra* note 17; Stephens, *supra* note 16; Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENTARY 33, 46 (1997) [hereinafter *Global Dimension*]; Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited* 99 COLUM. L. REV. 1630, 1645–47 (1999) [hereinafter *Civil Liberties*]; Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997) [hereinafter *Sense and Nonsense*]; Jordan Paust, *Customary International Law and Human Rights Treaties Are the Law of the United States*, 20 MICH. J. INT'L L. 301 (1999) [hereinafter *Customary International Law*]; Jordan Paust, *Human Rights Purposes of the Violence Against Women Act and International Law's Enhancement of Congressional Power*, 22 HOUS. J. INT'L L. 209 (2000) [hereinafter *VAWA*].

26. See Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT'L L. 713 (2002) (suggesting that the treaty power is limited by Eleventh Amendment doctrine); Swaine, *supra* note 14 (proposing a "treaty-compact" device to address federalism constraints on the treaty power).

27. See Spiro, *supra* note 14, at 140, 141.



contributions are impressive and perhaps reflect the importance of sorting out the implications of doctrinal cross-fertilization. Whether federalism limitations, in the form and with the presumptions of the doctrine described above, alter the nation's ability to comply with international obligations.

What these discussions reveal is that federalism, as an underdeveloped doctrine, offers little guidance to the unresolved question of the *Holland* caveat. Some scholars, in the process of dusting off reflections from eras past, as well as revisiting our post-ratification political and doctrinal history,<sup>28</sup> advocate limitations to Congress's exercise of the treaty power that seem oddly anachronistic and disconnected from the implications of their own theories. By this last comment I mean to suggest that theorizing about what modern doctrinal limits, if any, ought to be in place to restrain potential abuses of the treaty power, is an unsatisfactory analysis of the problem. The implications of imposing federalism limits on treaty makers are significant and should be factored into the theory. The merger of doctrine, theory, and a changed global landscape renders these theories incomplete.

Concerned with a potentially boundless power, commentators invoke the neo-federalism of the Rehnquist Court as evidence that the most legitimate<sup>29</sup> reading of the Constitution ought to incorporate the structural concerns expressed by the Court.<sup>30</sup> They propose new, provocative,

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28. See EDWARD S. CORWIN, *NATIONAL SUPREMACY: TREATY POWER VS. STATE POWER* 291 (1913); TANANBAUM, *supra* note 10; Charles H. Burt, *The Treaty-Making Power of the United States and the Methods of its Enforcement as Affecting the Police Powers of the states*, 51 *PROC. AM. PHIL. SOC'Y* 270, 339-356 (1912) (explaining case law invalidating state laws inconsistent with assumed treaty obligations); George A. Finch, *The Need to Restrain the Treaty-Making Power of the United States within Constitutional Limits*, 48 *AM. J. INT'L L.* 577 (1954); William E. Mikell, *The Extent of the Treaty-Making Power of the President and the Senate of the United States*, 57 *U. PA. L. REV.* 435, 528 (1909); Quincy Wright, *The Constitutionality of Treaties*, 13 *AM. J. INT'L L.* 242, 256 n.51 (1919) (setting forth a comprehensive list of commentators who advocated the supremacy of the treaty power over state power).

29. I use the term "legitimate" here to describe not the theoretical or doctrinal legitimacy of first principles federalism, but only to suggest that what the majority of the Rehnquist Court has held is a legitimate interpretation of the Constitution is the measure by which the arguments must be constrained.

30. Scholars explain treaty limitations in normative terms rather than based on a descriptive, originalist, authoritative understanding of the Constitution. This desire of what ought to be rather than what is may fairly be described as revisionist. I do not critique the revisionist nature of the dialogue, for my own view is revisionist. Revisionism, by its very nature, opens up the normative debate to a whole spectrum of perspectives, none of which can claim superiority to an authoritative view of what ought to be. However, if a claim is made to alter the status quo, the heavier burden ought to lie on those claiming settled understandings ought to be altered.

though ultimately normative approaches to this ageless debate.<sup>31</sup> First principles federalism, no doubt, provides the so-called “revisionists” with enough fodder to construct a powerful argument that the treaty power should not be exempted from federalism limitations as an abstract matter.

This “treaty power exceptionalism” offensive on settled doctrine has triggered powerful retorts. These responses, labeled as “nationalist” by those who disagree, argue that the treaty power is not limited as suggested by revisionists, but rather that it operates as a plenary power as confirmed by history and doctrine. Structural federalism restraints, these scholars argue, are inconsistent with this conception, while political safeguards have proven to be more robust than revisionists propose.<sup>32</sup> As thoughtful and provoking as much of the literature is, one is left with a sense that something is missing from the discourse. At the end of the day, the Quixotic quest for an answer seems elusive. Perhaps, as Professor Epstein suggests, “[l]oose ends always remain loose.”<sup>33</sup>

My modest contribution here recognizes as a starting point that whether federalism limitations ought to apply to the treaty power is ultimately an interpretive and a normative preference. It seems unhelpful to suggest structural arrangements that are dogmatic, or that fail to take into account the practical consequences of the normative choice. The very nature of the treaty power counsels that arguments relating to its scope should bolster, rather than subsume, its role in maintaining principles of international law. Its scope cannot be evaluated solely from the perspective of domestic constitutional law for it is not an internal power; it ought to take into account the international context in which operates.<sup>34</sup> In the

31. See Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1 (1979); *Civil Liberties*, *supra* note 25, at 1645–47; *Customary International Law*, *supra* note 25; *Federalism I*, *supra* note 17, at 395; *Federalism II*, *supra* note 17; Flaherty, *supra* note 25, at 1296–97; *Global Dimension*, *supra* note 25, at 46; *Globalism and the Constitution*, *supra* note 17; *Historical Foundations*, *supra* note 17, at 1083; *Sense and Nonsense*, *supra* note 25; VAWA, *supra* note 25; Carlos Manuel Vázquez, Breard, Printz, and the Treaty Power, 70 U. COLO. L. REV. 1317, 1343 (1999) [hereinafter Breard, Printz]; Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2162 (1999) [hereinafter *Treaties*]; John C. Yoo, *Treaties and Public Law Making: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2219 (1999) [hereinafter *Treaties and Public Law Making*]; see also Lori Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI.-KENT L. REV. 515, 530 (1991); Henkin, *supra* note 10; Tushnet, *supra* note 5.

32. See, e.g., *Historical Foundations*, *supra* note 17, at 1083–86; Flaherty, *supra* note 25; see also *supra* notes 5, 25 and accompanying text.

33. Richard A. Epstein, *Smoothing The Boundary Between Foreign and Domestic Law: Comments on Professors Dodge, Golove, and Stephan*, 52 DEPAUL L. REV. 663, 664 (2003).

34. See Peter J. Spiro, *Contextual Determinism and Foreign Relations Federalism*, 2 CHI. J. INT’L L. 363, 363 (2001) [hereinafter *Contextual Determinism*]; see also Robert

absence of an international law regime, the treaty power serves no purpose. Deliberations about its scope that eliminate this international dimension from the discourse, or that only give a cursory reference to it, are incomplete. For this power, if it is anything at all, it is the instrument that facilitates the United States' participation in the global community.

This Article discusses the scope of the treaty power from a different perspective than what has been offered. Whatever the virtuousness or iniquitousness of first principles federalism, it offers very little to answer the *Holland* caveat. I suggest here that the obligations that attach to international participation should be given some weight, and I offer a concrete example of one such obligation, through which practical framework one can test the principles here discussed. I consider whether the civil remedy provision of the Violence Against Women Act (VAWA),<sup>35</sup> struck down in *Morrison*,<sup>36</sup> could be reenacted as implementing legislation for the International Covenant on Civil and Political Rights (Covenant),<sup>37</sup> and conclude that it could have. I have chosen *Morrison* and the VAWA because together they highlight, in direct and practical terms, the conflicts that arise from isolated considerations of federalism theories.

Part I sets forth the recognition of gender-motivated violence as a human rights concern. This discussion is followed by exploring the obligations the United States has assumed under the Covenant. Specifically, it explores the equality and nondiscrimination provisions of the Covenant with respect to the United States' response to the international community on the steps it has taken to implement these. In this context, this Section discusses the international law of state responsibility and considers whether these principles may require the United States to adopt implementing legislation along the lines proposed in the VAWA.

This discussion is a helpful one even for those skeptical of the normative legitimacy of international human rights law as a pressure factor on national power. My argument does not depend on accepting the value of complying with human rights obligations for understanding the importance of their inclusion in an exchange of ideas with respect to the

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Anderson IV, 'Ascertained in a Different Way': *The Treaty Power at the Crossroads of Contract, Compact, and Constitution*, 69 GEO. WASH. L. REV. 189 (2001) (suggesting a contractual understanding of the treaty power wherein contracting parties agree to the terms without consideration of state interests); Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999 (2003).

35. Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1941-1942 (codified as amended in scattered Sections of 42 U.S.C.) [hereinafter VAWA].

36. *United States v. Morrison*, 529 U.S. 598 (2000).

37. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, S. EXEC. DOC. NO. 95-2 (1978), 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

scope of the treaty power. I acknowledge, however, that ultimately the conversation stems from an interest in empowering the federal government to adopt these kinds of regimes because one favors them.

Part II explores the treaty power along historical, doctrinal, and theoretical dimensions. It discusses the historical understandings, misunderstanding, and silences surrounding the adoption of the Treaty Clause. It concludes that the framers understood the power of the United States to enter into and enforce treaties to be complete and urgently compelled by the failure of the Articles of the Confederation to force states to comply with international obligations. The treaty power's outer reach was not tethered to the federalism limitations advocated by some scholars. The country's international obligations and the global expectations that arise with respect to these seem to be inseparable constituent elements of a power designed to speak to these concerns.

The Article concludes with some thoughts on how one can conceptualize differently what role federalism can play in protecting the structural guarantees with respect to proper allocations of power between the states and the federal government. I suggest that doctrinal collisions are neither self-evident nor compelled. Because the treaty power inherently involves this country's international commitments, and the capacity or lack thereof to fulfill those, what the treaty power means today or what the limitations to its application are, cannot be answered without understanding what our international obligations have become and what they demand.

## I. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, VAWA, AND IMPLEMENTING LEGISLATION

### *A. The Recognition of Gender-Motivated Violence and Sex Discrimination as an International Human Rights Problem*

#### 1. Introduction

Human rights are a legitimate subject of international concern, and how a state treats its citizens is no longer a matter within its exclusive jurisdiction.<sup>38</sup> The very concept of human rights is revolutionary because it contradicts the notion of sovereignty.<sup>39</sup> But the atrocities perpetrated during World War II brought about a fundamental change in how nations' jealously guarded domestic domains ought to be conceived under international law. Though state sovereignty remains, inherently,

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38. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES at 144–45, introductory note (1987).

39. See DAVID P. FORSYTHE, HUMAN RIGHTS AND WORLD POLITICS 6 (2d ed. 1989).

the organizing principle of an international legal regime,<sup>40</sup> the human rights discourse in customary and treaty law has pierced the sovereignty shield. The modern dialogue explicitly contextualizes the state as an instrument for advancing fundamental human values rather than as one possessing unchecked control over its citizens.<sup>41</sup>

Although the United Nations Charter recognized the global imperative of “faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women,”<sup>42</sup> traditional deliberations about human rights developed largely without considering the impact upon women.<sup>43</sup> Only recently has equality been accepted as an issue that international law ought to address.<sup>44</sup>

The formal journey formally to recognize equality as a fundamental right has not been a sprint along an undemanding road. Recognizing gender-motivated violence as a transgression of a fundamental human right in particular, has not been intuitive, self-developing, or inherently accepted. Indeed, as late as 1990, women’s rights issues were on the margin of the human rights agenda. The serious problem of violence against women was not addressed officially until much later.<sup>45</sup>

Historically, violence against women was considered (and many continue to consider it) a matter of purely local or private concern.<sup>46</sup> This translates into the state not assuming a role or responsibility to address

40. See, e.g., S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 39 (2000). Professor Anaya explains that the norms and principles of international law, including of course its procedures, remain largely a product of the state sovereignty rhetoric. This reality is the result of the very nature of the international legal system whose legitimacy still depends on and is shaped by the constitutive theory of statehood. “In practical terms, recognition by a preponderance of actors on the international plane remains crucial to a state’s capacity to invoke or benefit from the principles and procedures of international law.” *Id.* at 40; see also Louis Henkin, *Human Rights and State “Sovereignty”*, José E. Alvarez, *Multilateralism and its Discontents*, 11 *EUR. J. INT’L L.* 393, 394–95 (2000) (explaining that “sovereignty remains the single most important international institution in existence”); Keynote Address in Sibley Lecture (March 1994), in 25 *GA. J. INT’L & COMP. L.* 31, 33–35 (1995/1996) [hereinafter Sibley Lecture].

41. See ANAYA, *supra* note 40, at 40 (explaining that the modern dialogue about human rights has taken on the form of classic era naturalism, focusing on what law ought to be rather than on what it is).

42. U.N. CHARTER pmb1.

43. See Felipe Gomez Isa, *The Optional Protocol for the Convention on the Elimination of All Forms of Discrimination Against Women: Strengthening the Protection Mechanisms of Women’s Human Rights*, 20 *ARIZ. J. INT’L & COMP. L.* 291, 294 (2003).

44. See Henkin, *supra* note 40, at 60.

45. See Rhonda Copelon, *International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking*, 11 *AM. U. J. GENDER SOC. POL’Y & L.* 865, 866 (2003).

46. See, e.g., Henkin, *supra* note 40, at 1119; Judith Resnik, *Feminist Justice, at Home and Abroad: Reconstructing Equality: of Justice, Justicia, and the Gender of Jurisdiction*, 14 *YALE J.L. & FEMINISM*, 393, 398–399 (2002) [hereinafter *Reconstructing Equality*]; see also *infra*, notes 97–159, and accompanying text discussing the private/public distinctions.

the problems inherent in this societal construction. Against this backdrop, it is nothing short of remarkable that women have been able to achieve the significant victories they have secured at the international level, and if only briefly, at the national level through the VAWA.<sup>47</sup>

Credit belongs at least in part to a burgeoning international feminist movement that has enriched, strengthened, and propelled the evolution of human rights norms and their codification.<sup>48</sup> Of the many human rights causes that have been championed during the past decade, women's groups have attempted to place the human rights of women at the center of the discourse. Supporters of women's issues have worked at the local, national, and international levels to raise awareness about the problems of gender inequality and to create remedial schemes that adopt equality as their driving force.<sup>49</sup> They have pressed indefatigably to bring gender-motivated violence to the attention of the international community.<sup>50</sup>

The 1993 Vienna Conference on human rights is considered a defining moment for women's rights,<sup>51</sup> specifically with regards to violence against women. Participants successfully lobbied for, and obtained the first official recognition that violence against women ought to be addressed as a human rights problem.<sup>52</sup> This recognition launched a process of placing women's rights and gender equality at the forefront of

47. See *Reconstructing Equality*, *supra* note 46, at 398 (pointing out that obtaining the national consensus for the passage of VAWA was difficult, the process lengthy, and it survived only for a short time).

48. See Copelon, *supra* note 45, at 866.

49. See Barbara Stark, *Domestic Violence and International Law: Good-Bye Earl (Hans, Pedro, Gen, Chou, Etc.)*, 47 *LOYOLA L. REV.* 255, 264 (2001) (describing the central role women's issues took in developing the human rights agenda). For example, the Women's Rights Project of Americas Watch on violence against women in Brazil has brought international attention to the problem of wife-murder in Brazil. Hilary Charlesworth, *What are "Women's International Human Rights"?*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 58, 72 (Rebecca Cook ed., 1994) [hereinafter *HUMAN RIGHTS OF WOMEN*] (citing *HUMAN RIGHTS WATCH, CRIMINAL INJUSTICE: VIOLENCE AGAINST WOMEN IN BRAZIL; AN AMERICAS WATCH REPORT* (1991)). Americas Watch found that Brazil was responsible under international law because of the pattern of discriminatory state response to domestic violence. *Id.* at 72-73; see also Catharine MacKinnon, *Are Women Human?*, in *REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A FIFTIETH ANNIVERSARY ANTHOLOGY* 17 (Barend Van Der Heijden & Bahia Tahzib-Lie, eds., 1998); Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in *HUMAN RIGHTS OF WOMEN*, *supra*, at 95 (explaining that the efforts of feminist activists contributed to the characterization of violence against women as a public crime).

50. See, e.g., Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Rights to state Protection from Domestic Violence in the Americas*, 34 *HARV. INT'L L.J.* 507, 509 (1993).

51. See Copelon, *supra* note 45, at 867.

52. *Id.*

the international system.<sup>53</sup> A significant achievement was the 1993 Declaration on the Elimination of Violence Against Women.<sup>54</sup> Although aspirational and nonbinding, it placed the subject explicitly in an international forum and sought accountability from states. Its provisions recognized violence against women as a human rights problem and called the attention of all nations to face this issue.<sup>55</sup>

The events put in motion by the Vienna Conference were significant in many other respects as well. To assert that a particular social claim is a human right is to vest it emotionally and morally with an especially high order of legitimacy.<sup>56</sup> The new legitimacy thrust the U.N. Human Rights Commission to appoint the first Special Rapporteur<sup>57</sup> on Violence Against Women-Its Causes and Consequences,<sup>58</sup> who was to study the status of violence against women and report back annually to the Commission. It, in turn, has accepted the reports of Special Rapporteur Radhika Coomarasawamy by annual resolutions.<sup>59</sup>

The recognition of gender-motivated violence as a human rights problem is only the first step, however. The creation of effective remedies for noncompliance with or transgressions of these rights is perhaps more fundamental than the first. Though human rights law disputes traditional notions of state sovereignty, the latter still saddles remedial schemes with historical, legal, and political obstacles.<sup>60</sup> Still, the interna-

53. *Id.*

54. *Declaration on the Elimination of Violence against Women*, G.A. Res. 48/104, U.N. GAOR 3d Comm., 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/RES.48/104 (1994) [hereinafter *Declaration*].

55. Over 175 states adopted the Declaration, accepting domestic violence as a human rights problem. Some commentators point out, however, referring to national laws specifically, that "campaigns for women's legal rights are at best a waste of energy and at worst positively detrimental to women." Charlesworth, *supra* note 49, at 60-61 (citing the critique advanced by the Critical Legal Studies movement). Charlesworth also indicates, however, that feminist critiques of rights are extraordinarily uncommon with regards to the rights of women in the international context. *Id.* at 61.

56. See Richard B. Bilder, *Rethinking International Human Rights Law: Some Basic Questions*, 1969 WIS. L. REV. 171 (1969); see also Romany, *supra* note 49, at 85.

57. A Rapporteur, a French word for reporter, is an investigator with a mandate from a United Nations organ to engage in a fact-finding mission, usually with regards to investigating compliance with human rights instruments.

58. C.H.R. Res. 1994/45, U.N. ESCOR, 50th Sess., U.N. Doc. E/1994/24-E/CN4/1994/132 (1994).

59. See Copelon, *supra* note 45, at 869; see also *Preliminary Report on Violence Against Women, its Causes and Consequences, submitted by Ms. Radhika Coomarasawamy, Special Rapporteur*, U.N. ESCOR Commission on Human Rights, 50th Sess., U.N. Doc. E/CN.4/1995/42 (1994) [hereinafter *Coomarasawamy Report*]; *infra* notes 93, 100-01, 107-10, 118, 122-24 and accompanying texts on Rapporteur Coomarasawamy's observations.

60. For example, the International Law Commission (ILC)'s draft Articles on state Responsibility do not mention individuals as participants in the legal relationships causing breaches of international law. Christian Tomuschat, *Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law*, in STATE

tional human rights law regime provides individuals who rarely have access to the international legal system the modest possibility of raising legal claims in domestic courts for breaches of norms protected at the international level.<sup>61</sup>

For example, *The Declaration on the Elimination of Violence Against Women* recognizes a state's duty of "due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons."<sup>62</sup> The *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*,<sup>63</sup> also recognizes that women have the right to be free from violence,<sup>64</sup> the right to life,<sup>65</sup> the right to physical, mental, and moral integrity,<sup>66</sup> the right to sexual non-discrimination,<sup>67</sup> the right to liberty and security,<sup>68</sup> the right to equal protection under the law,<sup>69</sup> and the right to judicial protection.<sup>70</sup> These rights, in turn, must be protected by the state and breaches of its norms remedied in domestic courts.<sup>71</sup> In Section 3 below, I discuss specific elements of state responsibility and compliance with treaty obligations codifying individual human rights norms.

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RESPONSIBILITY AND THE INDIVIDUAL 1 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999) (citing the Report of the International Law Commission on the Work of its Forty-Eighth session, U.N. GAOR, 51st Sess., Supp. No. 10, at 125, U.N. Doc. A/51/10 (1996)).

61. See Charlesworth, *supra* note 49, at 58.

62. *Declaration*, *supra* note 54, art. 4(c).

63. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *opened for signature* June 9, 1994, 33 I.L.M. 1534 (entered into force Mar. 5, 1995).

64. *Id.* art. 3, 33 I.L.M. at 1535.

65. *Id.* art. 4(a), 33 I.L.M. at 1535.

66. *Id.* art. 4(b), 33 I.L.M. at 1535.

67. *Id.* art. 6(a), 33 I.L.M. at 1535.

68. *Id.* art. 4(c), 33 I.L.M. at 1535.

69. *Id.* art. 4(f), 33 I.L.M. at 1535.

70. *Id.* art. 4(g), 33 I.L.M. at 1535.

71. *Id.* art. 7, 8, 33 I.L.M. at 1536. Among duties of states under the Convention are to "include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary" *Id.* art. 7(c), 33 I.L.M. at 1536; to "establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures" *Id.* art. 7(f), 33 I.L.M. at 1536; to "establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies" *Id.* art. 7(g), 33 I.L.M. at 1536; and "to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women." *Id.* art. 8(b), 33 I.L.M. at 1536.



## 2. The Role of the *International Covenant on Civil and Political Rights*

The Covenant explicitly recognizes that gender discrimination is a violation of a fundamental human right.<sup>72</sup> It grants the citizens of signatories the right to gender and race equality through nondiscrimination and equal protection provisions.<sup>73</sup> Importantly, it translates previously held aspirations into binding treaty language through which victims may now seek recourse.

The Covenant is, perhaps, one of the most important international human rights treaties ever ratified,<sup>74</sup> containing 53 Articles addressing numerous civil and political rights. It opened for signature on December 16, 1966, entered into force in 1976, and as of November 2003 includes 151 state Parties, including the United States.<sup>75</sup> The Covenant and the International Covenant on Economic, Social, and Cultural Rights<sup>76</sup> comprise the International Bill of Rights. These documents were created to assure that the principles embraced by the Universal Declaration of Human Rights of 1948 would transcend the initial aspirational commitment.<sup>77</sup>

The Covenant is not merely aspirational, but has concrete directives to each signatory to undertake “the necessary steps, in accordance with its constitutional processes . . . [and] to adopt such legislative or other

72. Article 2(1), for example, requires a signatory state “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights” set forth in the Covenant, “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” ICCPR, *supra* note 37, 999 U.N.T.S. at 173–74, art. 2(1), 6 I.L.M. at 369. Article 3 further requires state parties “to undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.” *Id.* art. 3, 999 U.N.T.S. at 174, 6 I.L.M. at 369.

73. In addition to Articles 2 and 3, Article 14 provides that everyone “shall be equal before the courts and tribunals.” ICCPR, *supra* note 37, art. 14, 999 U.N.T.S. at 176–77, 6 I.L.M. at 372–73. Article 26 also sets forth that all “persons are equal before the law and are entitled without any discrimination to equal protection of the law.” *Id.* art. 26, 999 U.N.T.S. at 179, 6 I.L.M. at 375.

74. See David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1183 (1993) (“Considered by many to be the single most important human rights treaty, the Covenant guarantees those basic rights and freedoms which form the cornerstones of a democratic society.”). For a less celebratory view on the importance of the Covenant, see Jack Goldsmith, *Should International Law Trump U.S. Domestic Law?*, 1 CHI. J. INT’L L. 327, 329 (2000) (referring to the provisions of the Covenant as ultimately “non-binding”).

75. See Office of the United Nations High Commissioner for Human Rights, *Status Of The Ratifications Of The Principal International Human Rights Treaties*, at <http://www.unhchr.ch/pdf/report.pdf> (last visited Mar. 29, 2004).

76. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3.

77. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]; see also *Global Dimension*, *supra* note 25, at 41.

measures as may be necessary to give effect to the rights recognized in the present Covenant.”<sup>78</sup> Also, it does not just focus on negative obligations of states, but requires affirmative steps to implement changes designed to give effect to rights they agreed to protect. This is apparent, for example, in Article 2, which requires each state Party “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”<sup>79</sup>

The obligations states assume under the Covenant are of two kinds: substantive and procedural.<sup>80</sup> The substantive obligations address the type of treatment a signatory owes its citizens and the rights it guarantees on their behalf. The procedural obligations encompass submitting periodic reports to the Human Rights Committee,<sup>81</sup> the organ charged with overseeing compliance with the Covenant. The reporting requirement includes a description of measures taken to make effective and protect the rights guaranteed in the instrument.<sup>82</sup> Because the Covenant lacks the institutional structure, aside from its reporting mechanisms, to enforce the rights it guarantees, the provisions put a great deal of weight on state domestication.<sup>83</sup> It is, in this sense, sovereignty friendly.

These procedural and substantive obligations have explicit compliance requirements. For example, the Covenant prohibits torture, and cruel, inhuman, or degrading treatment or punishment,<sup>84</sup> guarantees equality before the law,<sup>85</sup> and requires state signatories to ensure that all rights be recognized without “distinction of any kind, such as race, colour, or sex.”<sup>86</sup> States are obligated to “ensure that any person whose rights or freedoms as herein recognized . . . are violated shall have an effective remedy . . . .”<sup>87</sup> That is, compliance requires effective domestic remedies

78. *Global Dimension*, *supra* note 25, at 41 (citing ICCPR, *supra* note 37, art. 2(2), 999 U.N.T.S. at 173–74, 6 I.L.M. at 369).

79. ICCPR, *supra* note 37, art. 2(1), 999 U.N.T.S. at 173, 6 I.L.M. at 369.

80. See Oscar M. Garibaldi, *The Principles of Non-Discrimination And Equality Before the Law*, in AM. SOC'Y OF INT'L L., U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 54 (Hurst Hannum & Dana D. Fischer eds., 1993) [hereinafter U.S. RATIFICATION].

81. ICCPR, *supra* note 37, art. 40, 999 U.N.T.S. at 181–82, 6 I.L.M. at 378.

82. *Id.* art. 40(1), 999 U.N.T.S. at 181, 6 I.L.M. at 378.

83. See Article 2(2) for example, where each state Party is instructed “to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” *Id.* art. 2(2), 999 U.N.T.S. at 173–74, 6 I.L.M. at 369.

84. *Id.* art. 7, 999 U.N.T.S. at 175, 6 I.L.M. at 370–71.

85. *Id.* art. 14(1), 999 U.N.T.S. at 176, 6 I.L.M. at 372.

86. *Id.* art. 2(1), 999 U.N.T.S. at 173, 6 I.L.M. at 369.

87. *Id.* art. 3, 999 U.N.T.S. at 174, 6 I.L.M. at 369.

for treaty violations. For example, a state's failure to under-enforce domestic violence laws is a violation of Articles 3 and 26 of the Covenant.<sup>88</sup>

Particularly relevant to this discussion are the Covenant's antidiscrimination provisions set forth in Articles 2(1), 3, and 26. The international community, in signing the Covenant, has determined that the requirement of equal protection, among others, is so fundamental a human right, that the failure of a state to promote equality or prevent inequality may be considered a violation of international law, which would trigger the requirement of reparations for a breach of treaty obligations.<sup>89</sup> For example, commentators have explained that the Covenant's right to equality before the law requires an *absence* of unequal treatment. Unequal treatment occurs when rights are conferred, or duties are imposed, on some persons but not on others.<sup>90</sup> Another example of a potential treaty breach is the unequal application of the law, or the enactment of discriminatory laws. This understanding is similar to American equal protection doctrine. The doctrine only allows certain individuals or types of cases meeting specific criteria to gain access to remedies through the court system.<sup>91</sup>

Gender violence is considered inherently discriminatory under international law because it reflects inequality and it perpetuates it.<sup>92</sup> The Covenant's anti-discrimination provisions thus include violence against women as a wrong for which reparations are mandated. That is, even when it is an individual actor who commits an act of violence against women, the state is complicit in this violation if it fails to provide an effective remedy. The Human Rights Committee, charged with monitoring compliance with the Covenant, has also placed the issue of violence against women directly at the feet of the states.<sup>93</sup> How the state assumes an obligation for wrongs perpetrated by individual actors is the focus of the next Section.

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88. For the text of Article 3, see *supra*, note 72. For the text of Article 26, see *supra*, note 73.

89. See Michele E. Beasley & Dorothy Q. Thomas, *Domestic Violence as a Human Rights Issue*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 323 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) [hereinafter *Domestic Violence*].

90. See Garibaldi, *supra* note 80, at 63.

91. *Id.*

92. See Copelon, *supra* note 45, at 869.

93. See *Coomarasawamy Report*, *supra* note 59, para. 5. The Commission on Human Rights has also emphasized "the duty of Governments to take appropriate and effective action concerning acts of violence against women, whether those acts are perpetrated by the state or by private persons." *Id.* The *Coomarasawamy Report* also specifies that "gender bias in the administration of justice" is an example of violence against women. *Id.* para. 7.

### 3. International State Responsibility Under the Covenant

The principle of state responsibility under the Covenant is discussed here to provide background and context to the potential congressional interest in domesticating the equality provisions of the Covenant. This interest is inextricably tied to the broader, abstract question of whether federalism limitations ought to apply to the treaty power. I think it imprudent to present a normative theory of the latter without considering the former, for any answer, however persuasive, would be incomplete.<sup>94</sup> What follows is not intended as an enumeration of the potential ways in which the United States may or may not be in violation of its treaty obligations. It is rather meant to inform the reader about the plethora of foreign policy<sup>95</sup> implications bound up in a congressional decision to implement a treaty, in whatever form. In the next part, I add to this discussion the additional implication of judicial involvement in the management of foreign policy choices.<sup>96</sup>

Effective implementation of human rights norms is a daunting undertaking, particularly in the area of state responsibility for individual actions. The nature of international law, organized around and based almost entirely on the sovereignty of states, aims to protect individuals and groups from state transgressions rather than individual ones.<sup>97</sup> That is, the state cannot be found responsible for acts committed by private individuals unless there is some failure on the part of the state to prevent those transgressions, or they are undertaken by agents of the state.

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94. See, e.g., Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L. J. 1765, 1767 (1997) (proposing that theories of constitutional law must have normative attractiveness as well as descriptive accuracy). Referring to history in particular, Professor Dorf thoughtfully suggests that to make sense of the text, one must be familiar with the context. *Id.*

95. Throughout this Article, I use the terms foreign policy as interchangeable with foreign relations and foreign affairs. Professor Ramsey has helpfully defined "foreign relations law" as "the domestic legal constraints upon the conduct of U.S. foreign policy . . . [which] mostly arise, directly or indirectly, from the U.S. Constitution . . . ." Michael Ramsey, *Review Essay: Textbook Revisionism: Curtis A. Bradley & Jack L. Goldsmith, Foreign Relations Law: Cases and Materials*, 43 VA. J. INT'L L. 1111, 1113 (2003).

96. Commentators who advocate a neo-federalist concept of the treaty power, one urging judicial management through the extrapolation of first principles federalism, ought to be concerned about the implications of that proposal. Though some of the normative propositions have intuitive appeal, the theories' implications have not been addressed. Yet, judicial involvement implies that the federalism limitations proposed should perhaps run out of steam. See *infra*, notes 226–34, 363–69 and accompanying text.

97. See Christine Chinkin, *A Critique of the Public/Private Dimension*, 10 EUR. J. INT'L L. 387, 387 (1999).

Though the comparison is imperfect, the structure of state responsibility resembles Section 1983 liability.<sup>98</sup>

The theory of state responsibility for failure to protect against violence against women or to provide effective remedies for its redress is premised on the principle that the beneficiaries of the protections to which countries have committed are individuals and not the state.<sup>99</sup> From this recognition, it follows that states may be responsible for failing to meet international obligations even when those violations originate in the conduct of private individuals.<sup>100</sup> The obligation the state has assumed is one of protection, of prevention, and of redress.

This view is not only anticipated by customary international law, but is also codified in numerous human rights treaties. Generally, states are held legally responsible for acts or omissions of private persons: (1) when the person is an agent of the state; (2) when the private acts are covered by provisions of a treaty as is the case with the Covenant; (3) when there is state complicity in the wrongs perpetrated by private actors; and (4) when the state fails to exercise due diligence in the control of private actors.<sup>101</sup>

The dualism between state conduct and private action and how they are treated under international law is eroding at a reticent pace. Human rights activists, largely through the efforts of feminist scholars and individuals having suffered atrocities at the hands of the authoritarian regimes of Latin America during the 1970s and 80s,<sup>102</sup> have contributed

98. See, e.g., *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978) (stating that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983"). Other opinions require "an affirmative link between the policy and the particular constitutional violation alleged." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) (plurality opinion). The analogy to international law is still helpful conceptually. One could say that when a state fails to put into place effective mechanisms to safeguard the rights of its citizens or to provide for effective remedies, it becomes complicit in the aggrieving conduct. In this sense, every perpetrator is an agent of the state when the state creates conditions that facilitate violations.

99. See Romany, *supra* note 49, at 97 (quoting Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT'L L.J. 1, 14 (1988)).

100. See *Coomarasawamy Report*, *supra* note 59, para. 102.

101. *Id.* The Report also states:

The obligations of the state with regard to the elimination of violence against women are comprehensively spelt out in Article 4 of the Declaration on the Elimination of Violence against Women. The state is obliged to condemn violence against women and is expected not to invoke custom, tradition, or religion to avoid the obligation; the state is expected to pursue all 'appropriate means,' 'without delay' in adopting a policy of eliminating violence against women.

*Id.* para. 108.

102. See, e.g., IAIN GUEST, *BEHIND THE DISAPPEARANCES: ARGENTINA'S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS* (1990) (documenting Argentina's dirty

enormously to bridging the gap created between those acts considered public and those considered private and how state responsibility should be viewed in this realm.

Commentators believe that there is a symbiotic relationship between a state's responsibility for domestic violence and the perpetration of it.<sup>103</sup> That is, the barrier created to prevent state involvement in the so-called private sphere of gender-motivated violence is harmful, artificial, and serves to perpetuate the problem. The aggregate of human rights instruments, such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)<sup>104</sup> and the International Covenant on Civil and Political Rights,<sup>105</sup> recognize the artificiality of the public/private dichotomy and situate domestic violence "within three universally held norms. First, that it violates basic human rights. Second, that it constitutes gender discrimination and third, that states must take affirmative steps to protect and prevent against such violence."<sup>106</sup>

This is an important step. The Special Rapporteur states that the greatest cause of violence against women is government inaction.<sup>107</sup> She affirms that states are under a positive duty to prevent, investigate, and punish crimes associated with violence against women,<sup>108</sup> even when perpetrated by private actors. This conclusion stems from the premise that the gender bias socially ingrained in the fabric of society, if unchallenged, becomes a social or cultural norm seen as beyond the purview of state responsibility rather than as a violation of a woman's human right for which the state ought to be accountable under international law.<sup>109</sup>

war and the United Nations' failure to intervene); INTERNATIONAL HUMAN RIGHTS LAW GROUP, CHILE: THE PLEBISCITE AND BEYOND (1989) (describing the human rights abuses in Chile); LAWRENCE WESCHLER, A MIRACLE, A UNIVERSE (1990) (describing the human rights abuses in Brazil and Uruguay).

103. See Chinkin, *supra* note 97, at 388–89.

104. Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]. Arguably, this is the most important of all human rights treaties in the area of protection of women's rights. The United States has not yet ratified it. Interestingly, CEDAW does not expressly prohibit violence, but recognizes violence against women as a type of gender discrimination, which is in itself prohibited. *General Recommendation 19*, UN GAOR Committee on the Elimination of all Forms of Discrimination Against Women, 11th Sess., art. 1, U.N. Doc. A/47/38 (1992).

105. ICCPR, *supra* note 37.

106. G. Kristian Miccio, *With All Due Deliberate Care: Using International Law and the Federal Violence Against Women Act to Locate the Contours of state Responsibility for Violence Against Mothers in the Age of Deshaney*, 29 COLUM. HUM. RTS. L. REV. 641, 681–82 (1998).

107. Coomarasawamy Report, *supra* note 59, para. 72.

108. *Id.*

109. See, e.g., Coomarasawamy Report, *supra* note 59, para. 72; Rebecca J. Cook, *Women's International Human Rights Law: The Way Forward*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 3, 4 (Rebecca J. Cook ed., 1994); Miccio, *supra* note 106, at 656–68; *Domestic Violence*, *supra* note 89, at 323–27; Dorothy Q. Thomas & Michele E. Beasley, *Symposium On Reconceptualizing Violence Against Women By Intimate*

Although the act of violence may well be a private issue, in the sense that the state itself did not commit the violence, the state's failure to prosecute stands on equal footing as the crime itself. It victimizes the victim twice. The denial of equal protection to victims of domestic violence is a public concern and violation of an accepted international obligation.<sup>110</sup>

Although important derogations from traditional notions of state sovereignty have so far been undertaken,<sup>111</sup> progress has been slow. Recognition of state responsibility for private conduct has furthermore not followed a logical or uncontroversial path. No doubt, enforcement of international obligations has always been the most difficult aspect of the international legal system, and it is surely the weak link of international human rights law.<sup>112</sup> For all the revolutionary advances in the recognition of human rights, the law still has to develop a coherent theory or consistent practice for reparation for violations of the rights it protects.<sup>113</sup> What exists is a patchwork of doctrine, practices, declarations, and pronouncements.<sup>114</sup> These can be summarized, if at all, by the proposition that state responsibility for human rights violations, as a breach of international law, necessitates making reparations.<sup>115</sup> A breach, in turn, encompasses both affirmative acts and omissions to act.<sup>116</sup>

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*Partners: Critical Issues: Domestic Violence As A Human Rights Issue*, 58 ALB. L. REV. 1119 (1995).

110. See, e.g., *supra*, note 109. When investigating the status of women in various countries, the Special Rapporteur observed not only a permissive attitude towards violence against women, but a tolerance on part of the state for the perpetrators, especially when the violence occurred within the home sphere. As was reported to the Senate Committee when deliberating the passage of VAWA, the seriousness of gender-motivated crime in the US as in other countries is rarely acknowledged. *Coomarasawamy Report*, *supra* note 59, at para. 72. There exists also non-recognition of such crimes in the laws of many countries, especially in relation to domestic violence, marital rape, sexual harassment, and violence associated with traditional practices. But even when crimes of violence against women are prosecuted, it is rarely done seriously or with the adequate forcefulness accorded other violent crimes. Ms. Coomarasawamy concludes that in the context of norms recently established by the international community, a state that does not act against crimes of violence against women is as guilty as the perpetrators. *Id.*

111. See Sibley Lecture, *supra* note 40, at 32–33; see also Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 11–12 (1999).

112. See Sibley Lecture, *supra* note 40, at 41.

113. DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* (1999).

114. See *infra* notes 122–25 and accompanying text. For one of the pioneering cases holding a government responsible for acts of individuals, see *Velaquez Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No.4 (1988).

115. Dinah L. Shelton, *Private Violence, Public Wrongs, and the Responsibility of states*, 13 FORDHAM INT'L L. J. 1, 17 n.93 (1990).

116. *Id.*

Against this backdrop, the Covenant takes some modest steps in bridging the gap between rights and remedies. It breaks new ground in providing a structure that recognizes that some private acts can be attributable to the state. By stating that states have a duty to “take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized” within it,<sup>117</sup> the Covenant recognizes that a state has a duty of due diligence.<sup>118</sup> Applied to the gender violence context, this obligation of conduct<sup>119</sup> signifies that a signatory must establish a system designed to prevent gender-motivated violence and sex discrimination. An “obligation of conduct” is equivalent to an obligation to protect and fulfill the expectation of a treaty.<sup>120</sup> It refers to an affirmative conduct that a state should follow, or refrain from engaging in it;<sup>121</sup> it is process-based.

An “obligation of result” translates into the responsibility to provide “effective remedies” when a violation sought to be prevented in fact occurs. This obligation looks to the results that a signatory should achieve rather than the process used to achieve it. These obligations, then, impose an affirmative responsibility not only to create an appropriate regulatory scheme aimed at addressing and preventing gender discrimination, for example, but also to introduce judicial remedies for those rights considered justiciable.<sup>122</sup>

In fact, the “respect and ensure” provision of Article 2 “embodies an immediate obligation” to provide effective remedies.<sup>123</sup> states, according to this provision, “are required, by standards of due diligence, to prevent as well as punish crimes of violence which take place in the private

117. ICCPR, *supra* note 37, art. 2(2), 999 U.N.T.S. at 173–74, 6 I.L.M. at 369.

118. *Coomarasawamy Report*, *supra* note 59, para. 2.

119. For more on the specific nature of state obligations under the ICCPR, see Egon Schwelb, *The Nature of the Obligations of the states Parties to the International Covenant on Civil and Political Rights*, in 1 AMICORUM DISCIPULORUMQUE LIBER: PROBLÉMS DE PROTECTION INTERNATIONALE DES DROITS DE L'HOMME 301, 302 (René Cassin ed., 1969) (“[T]he Covenant on Civil and Political Rights imposes the obligation to ensure the rights recognized in it *immediately and not only progressively*.”). For a description of the distinction between obligation of conduct and obligation of result, see Anja Seibert-Fohr, *Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its Article 2 para. 2*, 5 MAX PLANCK Y.B. U.N. L. 399, 401–03 (2001).

120. See generally Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 7 (Jan. 22–26, 1997), at [http://www1.umn.edu/humanrts/instreet/Maastrichtguidelines\\_.html](http://www1.umn.edu/humanrts/instreet/Maastrichtguidelines_.html) (last visited Apr. 9, 2004).

121. See ECONOMIC AND SOCIAL COUNCIL, RIGHT TO ADEQUATE FOOD AS A HUMAN RIGHT § 14, U.N. Sales No. E.89.XIV.2, §§ 70–71 (1989); see also Beasley & Thomas, *supra* note 89 (discussing the positive and negative rights component of obligations of conduct and obligations of result).

122. *Coomarasawamy Report*, *supra* note 59, para. 5

123. *Id.* para. 9.



domain.”<sup>124</sup> Judicial remedies or the creation of a private cause of action for breach of the rights protected, are considered an efficient and preferred mechanism. The failure of a state to do so is a violation of an affirmative obligation.

An omission to act can result from a choice of inaction: not to provide a system of effective remedies. The theory is that the failure to protect women against gender-based violence, which protection includes establishing a system of effective legal remedies, results in complicity on the part of the state:

In effect, the state creates a parallel government in which women’s rights are systematically denied. The state thus functions as an accomplice to the actual human rights violations and can be held responsible for them. Second, the state can be responsible for failing to fulfill its obligation to prevent and punish violence against women in a nondiscriminatory fashion, a failure denying women the equal protection of the law.<sup>125</sup>

The obligation may require the enactment of laws shielding rights against certain forms of interference from private parties as well as from the government itself. In addition, Article 2 requires the assurance of an “effective remedy” for the violation of covered rights,<sup>126</sup> to be determined by a “competent authority,”<sup>127</sup> and encourages states parties “to develop the possibilities of judicial remedy.”<sup>128</sup> A comparison can in fact be drawn between state responsibility to protect foreign nationals without regards to whether the violation has taken place in the public or private sphere and that to redress violations of women’s rights.<sup>129</sup>

This principle of state responsibility for complicity in “private” wrongs had its genesis in the “respect and ensure” provision of the

124. *Id.* para. 70.

125. Romany, *supra* note 49, at 99.

126. ICCPR, *supra* note 37, art. 2(3)(a), 999 U.N.T.S. at 174, 6 I.L.M. at 369.

127. *Id.* art. 2(3)(b), 999 U.N.T.S. at 174, 6 I.L.M. at 369.

128. *Id.*

129. See Romany, *supra* note 49, at 102. For example, Romany states that:

Contextualization is crucial to understanding the nature of state responsibility for the violation of women’s human rights. The systematic exclusion of women by international law structures becomes a normative link in bridging the gap between norms of state responsibility for redressing injury to aliens and human rights violations. The exclusion of women from formulating norms that encompass the private sphere, that area of life in which their most basic rights are systematically violated, makes them the paradigmatic *alien*—the outsider, the foreigner, the stateless subject.

American Convention on Human Rights<sup>130</sup> as interpreted by the Inter-American Court of Human Rights in *Velazquez Rodriguez v. Honduras*.<sup>131</sup> The Court held that, under Article 1(1) of the American Convention, requiring the state to “ensure . . . the free and full exercise of . . . rights and freedoms,”<sup>132</sup> the Honduran government was responsible for politically motivated disappearances not overtly carried out by government officials.<sup>133</sup> The Court thus articulated a doctrine of state responsibility that derived its normative foundations from the obligation to domesticate human rights protections, by focusing on “effectiveness” as a substantial analytical component.<sup>134</sup>

Honduras had argued that it was not responsible for the disappearances because it was not cognizant of them nor did it take part in their occurrence.<sup>135</sup> The Court rejected this argument and held Honduras responsible. It reasoned that Honduras’s failure to prevent the disappearances or to punish those responsible rendered the country complicit in the violations.<sup>136</sup>

Similarly, the Inter-American Court of Human Rights, charged with enforcing the provisions of the American Convention on Human Rights<sup>137</sup> in those cases in which state signatories to the Convention have accepted its jurisdiction,<sup>138</sup> has stated that Article 25(1) requires procedural systems to be effective in remedying violations:

[I]t is not sufficient that [a remedy] be provided for the Constitution or by law or that it be formally recognized, but rather it must be truly

130. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 123 (entered into force July 18, 1978) [hereinafter American Convention].

131. *Velazquez Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988).

132. American Convention, *supra* note 130.

133. *Rodriguez*, Inter-Am. Ct. H.R. (Ser. C) No. 4 at 159.

134. *See Romany*, *supra* note 49, at 101.

135. *Rodriguez*, Inter-Am. Ct. H.R. (Ser. C) No. 4 at 133.

136. *Id.* at 156–58; *see also Romany*, *supra* note 49, at 102.

137. American Convention, *supra* note 130.

138. *Id.* art. 62, 1144 U.N.T.S. at 159, 9 I.L.M. at 691–92. The United States has not accepted the jurisdiction of the Inter-American Court. *See* Press Release No. 21/98, Inter-Am. C.H.R., Acceptance of the Obligatory Jurisdiction of the Inter-American Court by Brazil and Mexico (Dec. 15, 1998), available at <http://www.cidh.oas.org/press.htm>. Unconditional acceptances of the court’s contentious jurisdiction have been made by Argentina, Bolivia, Brazil, Colombia, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. *Id.* The Dominican Republic acceded on February 22, 1999. *See* Press Release No. 7/99, Inter-Am. C.H.R. para. 27 (Mar. 16, 1999), available at <http://www.cidh.oas.org/Comunicados/English/1999/Press.htm>. The United States cannot accept the jurisdiction of the Court because it has not ratified the Convention. *See Signatures and Current Status of Ratifications, American Convention on Human Rights*, in ORGANIZATION OF AMERICAN STATES, INTERAMERICAN COMMISSION ON HUMAN RIGHTS, 1996 ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 771, O.A.S. Doc. OEA/Ser.L/V/II.95 Doc. 7 rev. (1997).

effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective.<sup>139</sup>

Unaddressed domestic violence becomes a problem of the state under international law when there is a systemic failure to prosecute, prevent, or protect, and where such omissions constitute discrimination prohibited by an international agreement.<sup>140</sup> As an example of accrued state responsibility for acts of omission amounting to discrimination, the Human Rights Committee, charged with reviewing individual petitions under the Optional Protocol to the Covenant<sup>141</sup> and issuing recommendations, found that Peruvian legislation discriminated on the basis of sex by prohibiting married women from filing civil suits and thus violated the Covenant's provisions on equality.<sup>142</sup> Similarly, in the *Neer* claim, the General Claims Commission of the United States and Mexico found that "international standards obligated governmental authorities to take affirmative actions to investigate and apprehend a wrongdoer and that failure to do so would be a breach of a legal duty, giving rise to international responsibility."<sup>143</sup>

These cases exemplify that the theory of "unequal legal applicability"—a violation of the Equal Protection provision—demands greater diligence in the implementation and protection of human rights norms.<sup>144</sup> Inattention constitutes not only a violation of the antidiscrimination provisions of the Covenant but also evidence of the complicity needed to make out a substantive violation.<sup>145</sup>

The failure of equal protection, then, is the jurisdictional hook that turns "private" domestic violence into a public international law enforceable issue.

Non-prosecution of the crimes of private individuals becomes a human rights issue (assuming no state action or direct complicity) *only* if the reason for the state's failure to prosecute can be shown to be rooted in discrimination along prohibited lines, such

139. *Advisory Opinion No. 9*, Inter-Am. C.H.R. 33, OEA/ser.A, OC-9/87 (1987).

140. *See Miccio, supra* note 106, at 661; *see also Culliton, supra* note 50, at 513.

141. Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976) [hereinafter *Optional Protocol*].

142. Culliton, *supra* note 50, at 542 (citing *G. Ato del Avellanal v. Peru*, *Report of the Human Rights Committee*, 34th Sess., U.N. Doc. A/44/40, Communication No. 202/1986 (1989)).

143. Shelton, *supra* note 115, at 24 (citing *Neer Claim*, 4 R.I. A. A. 60 (U.S.-Mex. Gen. Claims Comm'n 1926)).

144. *Id.*; *see also Cook, supra* note 109, at 22.

145. Shelton, *supra* note 115, at 24.

as those set forth in Article 26 of the Covenant on Civil and Political Rights.<sup>146</sup>

The state's international obligation is to protect citizens' lives, liberty, and security against private acts in an equal manner, devoid of discrimination on forbidden grounds.<sup>147</sup>

The point of this discussion is not to argue that the United States is in violation of its treaty obligations, for I do not think a substantive case could be made for that proposition. But the discussion illustrates that the principles of state responsibility are particularly relevant to Congress's enactment of the VAWA against the evidentiary backdrop of widespread discriminatory practices on the part of the states. There need not be an international transgression for the treaty-makers to domesticate treaty provisions that take into account the principles discussed. The treaty power allows at least this policy judgment.

### B. The VAWA as Implementing Legislation for the ICCPR

#### 1. The Violence Against Women Act and *United States v. Morrison*

The United States still has to ratify the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),<sup>148</sup> and the United States Supreme Court has not been hospitable to congressional legislation addressing violence against women, such as the Violence Against Women Act (VAWA).<sup>149</sup> VAWA was a symbolic victory for women's equality,<sup>150</sup> and represented to at least one official source an effort to implement the equality and nondiscrimination provisions of the Covenant.<sup>151</sup> It signified the federal government's first official attempt at a comprehensive response to the social and legal problems posed by various forms of gender-motivated violence.<sup>152</sup>

146. See *Domestic Violence*, *supra* note 89, at 327.

147. *Id.*

148. CEDAW, *supra* note 104.

149. VAWA, *supra* note 35.

150. Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 57 (2000). The VAWA was not free of controversy, however. It was a legislative compromise above all. Proponents were discontent with the model being too exclusive, the remedial provisions being too narrow and underinclusive, and the adverse effects the civil remedy provision could have on men of color, among other concerns. *Reconstructing Equality*, *supra* note 46, at 403–04.

151. See *infra* notes 192–97 and accompanying text.

152. See Goldfarb, *supra* note 150, at 5–6. Congress enacted the statute in 1994 as part of an omnibus crime measure, which passed the House by a vote of 235 to 195 and the Senate by a vote of 61–38. Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The*

The Act was a comprehensive measure that provided over \$800 million in grants to the states to improve law enforcement efforts and the prosecution of crimes of gender-motivated violence, as well as to enhance education and services in the domestic abuse area.<sup>153</sup> It was enacted to remedy states' inaction in domestic violence cases and to help victims overcome the ingrained societal notions that "violence was chosen by choosing a relationship."<sup>154</sup> By creating a federal cause of action against gender-motivated violence, the Act treated violence against women as a discrimination issue rather than as a private harm.<sup>155</sup> According to Professor Goldfarb, "one of the primary goals of the supporters of the Act was to overcome centuries of assumptions about the public and private spheres that have operated to deny women the full equality under the law."<sup>156</sup>

Most importantly, the Act created a federal civil remedy provision that established a substantive right to be free of gender-motivated violence and provided for enforcement of this right.<sup>157</sup> This legislative choice placed the issue of violence against women squarely in the domain of public law, rather than relegating it to private law remedies or no legal remedies at all.<sup>158</sup> Section 13981 allowed a victim to bring a federal claim for "any act that would be considered a felony, including rape and spouse abuse, regardless of whether any criminal charges have been

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*Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1, 36 (1996); Holly Idelson & David Masci, *Crime Bill Provisions*, 52 CONG. Q. WKLY. REP. 3526 (Dec. 10, 1994). It was signed into law as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

153. See 42 U.S.C.A. § 3786 (2003); 42 U.S.C.A. § 3793 (2003); see also *Violence Against Women Act Of 1994* tit. IV, Pub. L. No. 103-322, 108 Stat. 1902 (1994); 42 U.S.C. § 10148 (1995).

154. Nourse, *supra* note 152, at 4.

155. See Goldfarb, *supra* note 150, at 7.

156. *Id.* at 7-8. The statute criminalizes committing domestic violence or violating a protection order across state lines, requires states to accord full faith and credit to protection orders issued in other states, authorizes federal grants to increase the effectiveness of police, prosecutors, judges, and victim services agencies in cases of violent crime against women, provides funding for national toll-free domestic violence hotline, increases federal financial support for battered women's shelters, reforms immigration law to protect battered immigrant women, amends the Federal Rules of Evidence to extend rape shield protection to civil as well as criminal cases, and calls for expanded research and record-keeping on violence against women. VAWA, *supra* note 35.

157. See 42 U.S.C. § 13981 (2000). Subsection (a) states that the purpose of the provision is "to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender." *Id.* § a.

158. See Goldfarb, *supra* note 150, at 57.

brought.”<sup>159</sup> The victim could seek compensatory and punitive damages, and injunctive and declaratory relief.<sup>160</sup>

Congress compiled an impressive record on the economic effects of gender-motivated violence. Four years of congressional hearings uncovered widespread failure of states to address the harms of inequality in the charging and prosecution of and under-enforcement of penalties for violent crimes against women. It set forth several reasons for enacting the statute: gender-motivated violence is an issue national in scope that should be addressed at the federal level;<sup>161</sup> the gender-gap in civil rights laws should be closed with the creation of a civil remedy provision addressing gender-motivated violence explicitly and exclusively;<sup>162</sup> and that there is a need to rectify the systemic problem of gender discrimination taking place in the criminal justice system.<sup>163</sup>

The economic evidence was poignant. A “partial estimate” revealed that violent crimes against women cost this country between 5 and 10 billion dollars a year.<sup>164</sup> This was because violence against women deterred them from traveling interstate, caused women to miss work and accrue more medical bills and other related costs, and decreased demand and supply for interstate products.<sup>165</sup> This evidence was a direct challenge to long-standing assumptions that gender-motivated violence had no impact on society,<sup>166</sup> as well as to the private/public dichotomy.

Congress also documented extensive state inaction in protecting women against domestic violence. This inaction ranged from failure to prosecute violence and under-enforcement of criminal laws, to misclassification of domestic battering as simple assault.<sup>167</sup> The Senate Judiciary Committee reported a “widespread gender bias in the courts, particularly

159. See Henry J. Reske, *An Untested Remedy for Abused Women*, A.B.A. J., Jan. 1995, at 20.

160. See 42 U.S.C. § 13981(c). It states:

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any state) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this Section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

*Id.*

161. S. REP. NO. 103-138, at 37 (1993).

162. S. REP. NO. 101-545, at 41 (1990).

163. S. REP. NO. 103-138, at 49; H.R. CONF. REP. NO. 103-711, at 385 (1995), *reprinted in* 1994 U.S.C.C.A.N. 1803, 1853.

164. S. REP. NO. 103-138, at 41 (1993).

165. H.R. CONF. REP. NO. 103-711, at 385 (1995).

166. See Goldfarb, *supra* note 150, at 49.

167. S. REP. NO. 103-138, at 41.

in cases of rape and domestic violence.”<sup>168</sup> The legislative record showed that state remedies (where available) failed because legal rules and practices continued to shine a spotlight of suspicion on the victim, rather than focus on the seriousness of the crime. There existed, as well, a widespread pattern of gender bias in police practices, in prosecutorial discretion, and in the attitude of judicial officers.<sup>169</sup>

The Senate concluded, based on numerous commissioned studies by various state task forces, that crimes against women were treated less seriously than similar crimes perpetrated against men.<sup>170</sup> Unequal treatment resulted from police refusing to take reports and taking accusations less seriously than they did with other crimes, prosecutors encouraging defendants to plead to minor offenses, and judges ruling against victims on evidentiary issues.<sup>171</sup> This evidence showed, in the Judiciary Committee’s judgment, that “gender bias permeates the court system and that women are most often its victims.”<sup>172</sup> VAWA and its civil remedy provision in particular were thus deemed necessary to counter at least in part the prevalent discrimination that abused women faced.

However, in *United States v. Morrison*,<sup>173</sup> the Supreme Court struck down Section 13981 as an unconstitutional exercise of the Commerce Power and as improper legislation under the Fourteenth Amendment.<sup>174</sup> The Court held that gender-motivated violence was not an “economic” activity that Congress could reach through the Commerce Clause.<sup>175</sup> The Court rejected the voluminous record documenting the aggregate economic effects of domestic violence, because it feared that such inferential reasoning could lead Congress to over-regulate almost any area.<sup>176</sup> It stated, “[t]he regulation and punishment of intrastate violence

168. *Id.* at 44.

169. *Id.* at 42–47.

170. *Id.* at 49 n.52.

171. *Id.* at 42.

172. *Id.* at 49 (quoting Lynn Hecht Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, TRIAL, Feb. 1990, at 28). The Committee further stated:

Other remedies have proven inadequate to protect women against violent crimes motivated by gender animus. Women often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination . . . . Study after study has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes affecting men.

*Id.* This conclusion derived from evidence submitted by seventeen commission studies task force reports on gender bias in state supreme courts. *Id.*

173. 529 U.S. 598 (2000).

174. *Id.* at 617–18, 621.

175. *Id.* at 613.

176. *Id.* at 615–16.

that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the states.”<sup>177</sup>

The Court also rejected the provision as inappropriate legislation under Section Five of the Fourteenth Amendment because the requisite “state action” requirement was missing.<sup>178</sup> Although Congress claimed that there was widespread discrimination at the state level, the Court reasoned that the civil remedy provision was targeted at individuals and visited no consequences on the state or state officials alleged to be involved.<sup>179</sup>

Thirty-six states and Puerto Rico submitted an amicus brief supporting Congress’s power to enact the VAWA.<sup>180</sup> Amici states urged to Court to uphold Section 13981 because the states were deeply affected by the economic and social costs that domestic violence exacted.<sup>181</sup> The states asserted that the VAWA, with its cooperation provisions, “has changed the way the nation addresses the crimes of domestic violence and sexual assault and has made a positive difference in thousands of women’s lives.”<sup>182</sup> But the civil remedy provision ceased to be. It led a very short, though significantly influential life.

## 2. The Foreign Policy and International Human Rights Law Considerations

Envision a foreign policy doctrine that would have the effect of putting the United States in breach of its international obligations in deference to a state rights doctrine of recent vintage.<sup>183</sup> Imagine further a legal landscape that would require, by judicial fiat, the President and the Senate to ignore general principles of international law that require parties to perform their treaty obligations notwithstanding inconsistent domestic law provisions. In its judicial incarnation, this hypothetical foreign policy doctrine would require a court to parse through the provisions of a multi-lateral agreement to ascertain whether there are any bargained-for commitments that interfere with a state prerogative, which

177. *Id.* at 618.

178. *Id.* at 621.

179. *Id.*

180. See *Brief of Amici Curiae States of Arizona et al., United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-0005, 99-0029), available at 1999 WL 1032809 [hereinafter *States’ Brief*]. A group of law professors also filed an amicus brief urging the Court to sustain the VAWA as permissible implementing legislation for the International Covenant on Civil and Political Rights. See *Brief of Amici Curiae International Law Scholars and Human Rights Experts, United States v. Morrison*, 529 U.S. 598 (2000) (No. 99-0005, 99-0029), available at 1999 WL 1032805 [hereinafter *Scholars’ Brief*].

181. *States’ Brief*, *supra* note 180, at \*1.

182. *Id.*

183. See JOHN NORTON MOORE, TREATY INTERPRETATION, THE CONSTITUTION, AND THE RULE OF LAW (2001). Professor Moore prods one to consider this question against the backdrop of the international law principles of *pacta sunt servanda* and mutuality of obligation. *Id.*



finding should presumably lead to a declaration that the treaty itself (or the offending provision) is unconstitutional on first principles federalism grounds.

As self-serving as the above hypothetical is, it illustrates a point. It highlights the potential liabilities stemming from a federalism doctrine that limits the treaty making power, and/or treaty implementing legislation, without considering the context in which that power resides and operates. This might lead to building a Chinese wall between the country's foreign policy reality and the academic prescriptions of what ought to be the norm of domestic constitutional law with respect to treaty making. The foreign policy of the United States is, in part, inextricably tied to its accession to treaties. Treaty ratification is, uniquely, a statement about the country's foreign policy choices, and the ratification of the Covenant is no exception. The obligations assumed under the Covenant, as well as responses of the international participants to that treaty regime, ought to be considered, more than with a passing nod, when searching for an answer to the *Holland* caveat.

The United States ratified the Covenant in 1992,<sup>184</sup> 14 years after it was first presented to the Senate.<sup>185</sup> It consented to the treaty with five reservations,<sup>186</sup> five understandings,<sup>187</sup> and four

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184. Former President Bush, in urging the Senate to ratify the Covenant, stated that ratification would "strengthen our ability to influence the development of appropriate human rights principles in the international community and provide an additional and effective tool in our efforts to improve respect for fundamental freedoms in many problem countries around the world." S. EXEC. REP. NO. 102-23, at 25 (1992); see also *Civil Liberties*, *supra* note 25, at 1649.

185. The United States was slow to ratify the Covenant. President Jimmy Carter originally sent it to the Senate for its advice and consent in 1978, 12 years after it opened for signature. S. EXEC. REP. NO. 102-23, at 2; see also *International Covenant on Civil and Political Rights: Hearing before the S. Comm. on Foreign Relations*, 102d Cong. (1991).

186. The Vienna Convention on the Law of Treaties defines a reservation as a "unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 2(1)(d), 1155 U.N.T.S. 331, 333, 8 I.L.M. 679, 681. A reservation effectively alters the relationship between the state making the reservation and other states party to the treaty. Dinah Shelton, *International Law*, in U.S. RATIFICATION, *supra* note 80, at 30. See Appendix for the full text of the United States' reservations to the Covenant. The Human Rights Committee concluded that the United States reservations to Articles 6(5) (juvenile offenders subjected to the death penalty) and Article 7 (prohibition of torture, and cruel, inhuman, and degrading treatment or punishment) were incompatible with the purposes of the Covenant. See *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Comments of the Human Rights Committee*, U.N. GAOR, 53d Sess., 1413th mtg., U.N. Doc. CCPR/C/79/Add. 50 (1995) [hereinafter *Comments of the Human Rights Committee*]. Finland, The Netherlands, France, Germany, Norway, Portugal, Spain, and Sweden also objected to the United States' reservations to the ICCPR. *Id.*

187. An understanding, unlike a reservation, does not change the substantive provisions of a treaty. Rather, it is offered as a clarification or explanation of a treaty provision, related to

declarations<sup>188</sup> (RUD's), and declared the treaty to be non-self-executing.<sup>189</sup> There were several indications that both Congress and the Executive Branch were aware of the international dimensions of violence against women when enacting the VAWA.<sup>190</sup> Against the background of the preceding discussion and what follows, the civil remedy provision could have been upheld as constitutionally permissible legislation to implement several provisions of the Covenant.

The United States, through its officials, represented to the international community that the domestic protection of women's rights was at the center of its human rights agenda. In its mandatory 1994 report under the Covenant, it indicated to the Human Rights Committee<sup>191</sup> that the

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its significance and meaning in the domestic context. See Anne M. Williams, *United States Treaty Law*, in U.S. RATIFICATION, *supra* note 80, at 41; see also Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI. KENT L. REV. 571, 585 (1991) (defining understandings as simply statements of interpretation assumed to be consistent with a treaty (citing S. EXEC. REP. NO. 96-14, at 34 (1979)). For the full text of the United States' understandings to the Covenant, see the Appendix.

188. A declaration is a statement by the signatory state reflecting a particular domestic preoccupation not openly related to the treaty's meaning or to the substance of the international duties assumed under the treaty. Williams, *supra* note 187, at 42. At least under international law standards, a condition imposed unilaterally is not part of the treaty, and it is thus not the "supreme law of the land," although it may have legal effect domestically. *Id.* at 42-43. For the full text of the United States' declarations, see the Appendix.

189. See Declaration 1, 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992). The Bush administration's stated, *inter alia*, that "The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts." S. EXEC. REP. No. 102-23, at 19 (March 24, 1992).

190. See VAWA, *supra* note 25, at 211. Professor Paust points out that certain provisions of the VAWA enable battered immigrant women to obtain protection through domestic courts. *Id.* at 211 (citing 8 U.S.C. § 1154(a)(1)(A)(iii)-(iv) (1994)).

191. The Human Rights Committee established under the Covenant has very little investigative power. The United States did not ratify the first Optional Protocol, which would have enabled victims of human rights violations at the hands of the government to file complaints. See Optional Protocol, *supra* note 141. However, by accepting "the competence of the Human Rights Committee to receive and consider communications under Article 41," the United States opens itself up to complaints by other signatory states. See Declaration 3, 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992). This is a relatively safe move because signatory states are reluctant to lodge complaints against other states in the fear of jeopardizing diplomatic relations. The United States must, however, submit a periodic report to the Committee on its compliance with the provisions of the Covenant. ICCPR, *supra* note 37, art. 40, 999 U.N.T.S. at 181-82, 6 I.L.M. at 378; see also *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Report of the United States of America*, U.N. GAOR Hum. Rts. Comm., 53d Sess., 1401st mtg. para. 38, U.N. Doc. CCPR/C/SR.1401 (1995) [hereinafter *Initial Report*]. The United States was required to submit a second report by September 1998. As of January 1, 2004, it has yet to fulfill that obligation. See Office of the United Nations High Commissioner for Human Rights, *Reporting Status, International Covenant on Civil and Political Rights, United States of America's Reporting Round: 2*, at <http://www.unhcr.ch/tbs/doc.nsf>.

VAWA was a first step toward implementing legislation it was considering in giving full effect to its obligations under the Covenant.<sup>192</sup>

John Shattuck, Assistant Secretary of State for Democracy, Human Rights, and Labor under the Clinton Administration, stated to the Human Rights Committee that the full realization of the rights of women was a central feature of the human rights process in America.<sup>193</sup> He assured the Human Rights Committee that, "our national experience demonstrates that legal guarantees of human rights are a prerequisite to social progress, not the other way around."<sup>194</sup> In this vein, he recognized the ineffectiveness of proclaiming the protection of human rights norms through an international instrument, if those protections cannot meaningfully be realized and enforced domestically.<sup>195</sup> He charged the United States government with the responsibility to implement the international obligations assumed under the treaty.<sup>196</sup> His statements were echoed by another Justice Department official who asserted that violence against women in the United States is "now . . . recognized as [a] violation of our human rights . . ." and that the civil remedy provision is an example of legislation designed to address violations of those rights.<sup>197</sup>

The Committee praised the United States for the quality of its report and for the quality of the American Delegation's presentation of the report. It had many positive comments about the rich constitutional tradition of protecting human rights and freedoms in the United States.<sup>198</sup> And it welcomed the federal government's efforts to take judicial, legislative, and administrative measures to ensure state compliance with human rights and fundamental freedoms, including implementing legislation.<sup>199</sup>

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192. See *Initial Report*, *supra* note 191, para. 29. It stated:

The Administration had also enacted the Violence Against Women Act which was the most comprehensive federal effort in its field. It was particularly noteworthy for its coverage of domestic violence and sexual assault, and federal courts were empowered to order broad restitution measures for the victims against persons convicted of such offences.

*Id.*

193. *Id.* para. 5.

194. John Shattuck, Assistant Secretary of State for Democracy, Human Rights, and Labor, Report of the United States of America Under the International Convention on Civil and Political Rights (September 1994) at <http://dosfan.lib.uic.edu/erc/law/covenant94/02.html>.

195. *Id.*

196. *Id.*

197. VAWA, *supra* note 25, at 213 (citing *Scholars' Brief*, *supra* note 180, citing the statement of Bonnie Campbell, Director of the Violence Against Women Office, Department of Justice, Sept. 12, 1995).

198. *Comments of the Human Rights Committee*, *supra* note 186, at 2-3.

199. *Id.* at 2.

But for all the laudatory statements for the United States' pledging commitment to enact domestic provisions promoting gender equality and countering violations of it, many countries expressed "[c]oncern . . . that United States citizens had received no additional benefit from ratification of the Covenant."<sup>200</sup> The Human Rights Committee pointed to the lack of domestic measures to make the rights effective, and questioned whether the rights were even guaranteed to the people under domestic regimes. It noted that despite the existence of antidiscrimination laws, there remains within American society "discriminatory attitudes and prejudices based on race or gender."<sup>201</sup> United States accession to the treaty appeared in the eyes of the Committee to accomplish nothing but reaffirm what is already part of its law.<sup>202</sup>

The United States had assured the Committee and its members that "[r]atification had already resulted in a comprehensive evaluation of United States legal protections of civil and political rights and had focused public greater attention on the review process."<sup>203</sup> However, it acknowledged remaining impediments to fully protecting gender equality and providing remedies for discrimination.<sup>204</sup>

With respect to gender discrimination, the obstacles manifested themselves in at least two forms: the failure to inform the judiciary about the obligations assumed under the Covenant and the Federalism understanding<sup>205</sup> potentially limiting appropriate implementation at the state level. With respect to the judiciary, the Committee expressed concern that judges, both at the state and federal levels, had not been made aware

200. *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Report of the United States of America*, U.N. GAOR Hum. Rts. Comm., 53d Sess., 1405th mtg. at 2, U.N. Doc. CCPR/C/SR.1405 (1995) [hereinafter *Initial Report Continued*].

201. *Comments of the Human Rights Committee*, *supra* note 186, at 2.

202. *Id.* at 3.

203. *Initial Report Continued*, *supra* note 200.

204. *Id.*

205. See Understanding 5, 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992). This understanding states in part: "to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal System to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant." *Id.* For the effect of this understandings, see Brad R. Roth, *Understanding the "Understanding": Federalism Constraints on Human Rights Implementation*, 47 WAYNE L. REV. 891 (2001). Professor Roth proposes that a fair reading of the Federalism Understanding (taken by the U.S. to the Covenant) would require prevention of the enhancement of federal power at the expense of state power. This suggestion, though helpful, does not clarify the effect of the understanding on domestic law. Congress certainly did not think it was enhancing its power to the detriment of the states when it enacted the VAWA. Professor Neuman, on the other hand, dismisses the argument that the understanding has any significance for domestic law, suggesting that it is wholly circular. *Global Dimension*, *supra* note 25, at 33; see also Stewart, *supra* note 74.

of the obligations the United States assumed under the Covenant.<sup>206</sup> This comment was in response to the United States' assurance that the Covenant's status as a non-self-executing treaty did not prevent courts "from seeking guidance from the Covenant in interpreting American law."<sup>207</sup>

With respect to the "federalism understanding" Congress attached to the Covenant, its report stated that it would not exempt the states or the nation from complying with the Covenant's requirements.<sup>208</sup> Although the "federal government could not dictate the basic form or internal workings of state government, . . . it could establish and enforce uniform standards for the respect of civil and political rights, which could include direct invalidation of any offending laws at the state level."<sup>209</sup> This broad statement about the capacity of federal law to reign in non-complying states seems doubtful under first principles federalism. In any case, the absence of formal mechanisms to ensure appropriate implementation by the states, the Committee noted, would lead to an unsatisfactory application of the obligations assumed.<sup>210</sup> It expressed "regret" that "the report contained few references to the implementation of the Covenant rights at the state level."<sup>211</sup>

The concerns expressed by the Committee should inform the dialogue about the scope of the treaty power and the permissibility of implementing legislation. The status of treaty obligations within domestic law ought to take into account the way nations deal with each other and their subdivisions.<sup>212</sup> According to Professor Bederman, "[f]ar from being peripheral to discussions of foreign policy initiatives-the preserve of elite policymakers and opinion-leaders-international law is seen as increasingly central to the successful conduct of U.S. foreign policy."<sup>213</sup> Conversations between the United States and international bodies reflect the country's policy choices and the international community's reaction. Avoiding the indictment of hypocrisy by the international community, however this community is defined, is a valid consideration for both the President and the Congress. In the area of human rights especially, the United States is greatly susceptible to such indictment.

The United States' position has been one of favoring implementing legislation for human rights treaties despite strong opposition from some members of Congress. President Clinton recognized the country's

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206. *Comments of the Human Rights Committee, supra* note 186, at 3.

207. *Id.*

208. *Initial Report Continued, supra* note 200, at 4.

209. *Id.*

210. *Comments of the Human Rights Committee, supra* note 186, at 2.

211. *Id.* at 1.

212. *Contextual Determinism, supra* note 34, at 367.

213. David J. Bederman, *Globalization, International Law and United States Foreign Policy*, 50 EMORY L. J. 717, 717 (2001).

international obligations through declaring on Human Rights Day 1998 through an executive order that “[i]t shall be the policy and practice of the Government of the United States . . . fully to respect and implement its obligations under the international human rights treaties to which it is a party.”<sup>214</sup>

Implementation of human rights norms has been virtually nonexistent, however. This is a startling statement for international observers given that human rights have become a staple of U.S. foreign policy since the 1970s.<sup>215</sup> The federal government has sought to penalize human rights violating states by ending “economic assistance, withholding diplomatic support, opposing multilateral loans, and refraining from licensing crime control equipment or supplying military assistance and training.”<sup>216</sup> It has explained military interventions in other countries by the need to protect the human rights of the people within the invaded country.<sup>217</sup> The most recent manifestation of this foreign policy initiative is the invasion of Iraq.<sup>218</sup>

Manifesting such concern for protection of human rights in other states, the United States ought to have the legislative capacity to bring its own domestic law in compliance with the international responsibilities it has acquired through a constitutionally established process. As is more fully explained in the next Section, it should be able to do so unimpeded by doctrinal limitations that do not take into account the significant implications of the *Holland* caveat and which do not weigh the political and structural costs of judicial involvement in the management or policing of foreign policy choices. Case reporters are replete with references to the elected branches’ exclusivity over foreign affairs and the Congress’s power to domesticate treaties.<sup>219</sup> However, in practice, the judiciary has not treated these affairs as exclusive to other branches.

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214. Exec. Order No. 13107, 3 C.F.R. 234, 5 U.S.C.A. § 601 (1998).

215. See Hurst Hannum & Dana D. Fischer, *Conclusion* to U.S. RATIFICATION, *supra* note 80, at 286.

216. *Id.*

217. *Global Dimension*, *supra* note 25, at 47.

218. See, e.g., Luis Mesa Delmonte, *Economic Sanctions, Iraq, and U.S. Foreign Policy*, 11 TRANSNAT’L L. & CONTEMP. PROBS. 345 (2001) (describing the United States’ foreign policy with respect to Iraq over an extended period of time). This foreign policy may have triggered instability in the region.

219. See, e.g., *Haig v. Agee*, 453 U.S. 280, 292 (1981) (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (holding that the chief power over foreign relations rests with the President); *Missouri v. Holland*, 262 U.S. 416, 433 (1920); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (holding that the foreign affairs power is assigned to the political branches and the judiciary ought not to intervene in deciding what may be done under this power); *Miller v. Albright*, No. 98-5511, 1998 U.S. App. WL 846653, at \*1 (D.C. Cir. Nov. 30, 1998) (*per curiam*) (refusing to order the Secretary of State

Unlike the Commerce power, Congress need not—and it should not—be required to justify the enactment of treaty implementing legislation or the validity of a treaty in the first instance. Yet, the application of standards announced by cases such as *United States v. Morrison*,<sup>220</sup> *City of Boerne v. Flores*,<sup>221</sup> *Kimel v. Florida Board of Regents*,<sup>222</sup> and *University of Alabama v. Garrett*,<sup>223</sup> for example, would require just that. This is what commentators opposed to treaty power exceptionalism argue must be the coherent doctrinal result.

But consider for a moment what this requirement would entail. If the ratification of the Covenant were challenged on federalism grounds, the President and Congress would have to show for *each* provision negotiated with some 150 states, not only that there is a widespread pattern of human rights abuses across the world and at the state level, but also that the Covenant is a “proportional and congruent” response to these violations, as required by *Boerne*. *City of Borne v. Flores*, 521 U.S. 507 at 520 (1997). Alternatively, the treaty-makers would have to show that each, or all, of the provisions of the Covenant involve some sort of economic activity of the type contemplated in *Morrison*. The Covenant would fail to pass muster on all grounds. The same results would obtain if the validity of the Convention Against Torture<sup>224</sup> or the International Convention on the Elimination of All Forms of Racial Discrimination<sup>225</sup> were challenged.

This result is demonstrably absurd as a constitutional and as a logical matter, and it is certainly not required to preserve a states’ rights doctrine. At minimum, it is an ill-conceived foreign policy choice. At worse, it is an unintelligible and hard to defend legal approach to answering the *Holland* caveat.<sup>226</sup> Whatever the merits of first principles

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to adopt a particular position during negotiations with Germany as “an unwarranted usurpation of the executive’s conduct in foreign relations”).

220. 529 U.S. 598 (2000).

221. 521 U.S. 507 (1997).

222. 528 U.S. 62 (2000).

223. 531 U.S. 356 (2001).

224. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 113, 24 I.L.M. 535.

225. International Convention on the Elimination of all Forms of Racial Discrimination, opened for signature Mar. 7, 1966, S. TREATY DOC. NO. 95-2 (1978), 660 U.N.T.S. 195.

226. All of this assumes, of course, that the question would be justiciable at the threshold, an assumption that is necessary to the theory discussed. Commentators, such as Professor Bradley, reject the political safeguards protection of *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), as an insufficient guarantee. *Federalism I*, *supra* note 17, at 440. Bradley argues, “the limitations imposed by the Senate to date on human rights treaties do not prevent a majority of Congress from relying on the treaties, in conjunction with the Necessary and Proper Clause, as a source of lawmaking power.” *Id.* at 444. This, in his view, is simply an insufficient protection for the states. *Id.* at 445.

federalism, the case has yet to be made that its limitations ought to apply equally across the Constitutional board, and particularly to the treaty context.

The thoughtful discussions of revisionists could not possibly mean to exact this kind of result from the application of their theories. The problem, I think, lies in the advocacy of abstractions without considering the consequences of their implementation, or without taking into account the relevance of international law (whatever one may think about the validity of international human rights law). But the positions advocated leave one puzzled as to what different result these commentators would expect. On the one hand, Professor Bradley argues that “there is a strong case . . . for subjecting the treaty power to the same federalism limitations that apply to Congress’s legislative powers.”<sup>227</sup> This assertion clearly refers to the whole of the treaty power. That is, it is addressed to the President and the Senate’s ability to conclude a treaty.

In a later Article, however, he recharacterizes this assertion by stating that what he had meant was that the “best contemporary construction” of the treaty power, would be “one that would allow the treaty-makers the ability to conclude treaties on any subject but would limit their ability to create supreme federal law to the scope of Congress’s power to do so.”<sup>228</sup> This revised proposition refers to implementing legislation rather than to the treaty power itself. No matter which of the two propositions Professor Bradley endorses, the practical consequences are the same. The Covenant fails as an initial matter or as domesticated. If the result in the hypothetical set out above is not what treaty exceptionalism opponents intend, then I have failed to understand to what limits they refer.

The argument for limitations would require the Court to exact a policy justification for the wisdom of entering into a treaty on a particular subject matter in the first place. The thought of such a judicially created affirmative burden upon the power of the President and the Senate to enter into international agreements appears incongruous. Rather, the reports of human rights abuses here and abroad that led to the ratification of the Covenant and other human rights treaties are offered by way of explaining that it is not an extraordinarily far-reaching idea, nor an unconstitutional usurpation of power, for Congress to implement a portion of the Covenant through the VAWA, or for the United States to ratify the Covenant as an initial matter to comply with its international obligations. Judicial intervention in this sphere, it seems, would be pernicious and

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227. *Federalism I*, *supra* note 17, at 460.

228. *Federalism II*, *supra* note 17, at 100 (responding to Professor Golove’s critique of *Federalism I*, *supra* note 17).



would exact a price the country may not be willing to pay—judicial micromanagement of foreign policy, to the same extent the Rehnquist Court has micromanaged legislative decisions in the federalism cases. No greater protection would result from judicial involvement, than what currently exists under the procedural safeguards the Framers put in place.

### 3. The Sources of Power for Implementing Legislation

The Framers intended the United States to be a sovereign nation with all the appropriate powers entrusted to a government with an appropriate choice of means by which to carry out its delegated powers.<sup>229</sup> The treaty clause was enacted to ensure the supremacy of treaties over state laws and was written with the assumption that ratified treaties would be the law of the land without further congressional intervention.<sup>230</sup> Currently, the default rule appears to be that treaties become the supreme law of the land when declared to be self-executing,<sup>231</sup> though even this proposition is subject to much debate.<sup>232</sup> No one argues that Congress lacks the power to implement treaties. Rather, commentators advocate that federalism limitations apply to the whole of the treaty power,<sup>233</sup> positing that there ought not to be a treaty power “exceptionalism” or that implementing legislation for treaties ought to be subjected to the same restrictions as all Article I legislation. I leave the merits of these propositions to the next Section. I raise them here, however, to contextualize the importance of considering the sources of power to implement treaties. Just as the international context matters, so does the doctrinal and historical context of domestication as a legal principle.

The established understanding is that Congress can take action pursuant to the treaty power of an extent that it may not be able to take pursuant to another power.<sup>234</sup> That is, once a valid treaty is ratified, im-

229. CORWIN, *supra* note 28, at 240.

230. See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 199 (2d ed. 1996).

231. *Treaties*, *supra* note 31, at 2175.

232. See, e.g., David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002); *Treaties*, *supra* note 31, at 2158–61; *Treaties and Public Law Making*, *supra* note 31, at 2219; Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695 (1995); Ann Woolhandler, *Treaties, Self-Execution, and the Public Law Litigation Model*, 42 VA. J. INT’L L. 757 (2002); see also HENKIN, *supra* note 230, at 194–96.

233. See, e.g., Bradley & Goldsmith, *supra* note 17; *Federalism I*, *supra* note 17; *Historical Foundations*, *supra* note 17, at 1083; *Federalism II*, *supra* note 17, at 104–105 (responding to Professor Golove’s Article, *Historical Foundations*).

234. See Flaherty, *supra* note 25, at 1279–80. Professor Flaherty presents an elegant explanation as to why the Commandeering principle of first principles federalism does not and should not extend to the treaty power. He argues that “the standard interpretive materials of

plementing legislation is permitted under the Necessary and Proper Clause even if the subject matter of the statute does not fall within the powers enumerated in Article I.<sup>235</sup> Although the Framers were aware of the potential need for implementing legislation (and agreed with the propriety of treaty-makers making use of this mechanism), the modern practice of domesticating treaties arose not as an inherent requirement of the treaty power itself, but as a result of the judicial doctrine of non-self-execution.

The constitutionality and/or acceptability of the doctrine of non-self-execution, a treaty justiciability question,<sup>236</sup> has been extensively contested.<sup>237</sup> I do not here address the merits of the debate. I proceed from the assumption that the doctrine is a valid form of expressing the treaty-makers' intent regarding the domestic operation of treaties. My interest, rather, is how taking account of this doctrine could shape the answer to the *Holland* caveat.

Early in our history, Chief Justice Marshall declared that treaties are contracts between two nations and not legislative acts.<sup>238</sup> In most cases, he argued, treaties in the United States carry the force of law domestically as soon as they are ratified. For these types of treaties, there is no need for implementing legislation before the courts can take cognizance of their provisions.<sup>239</sup>

However, when parties enter into a treaty in which they "promise to perform a particular act," the political branches, rather than the judiciary, have the obligation to carry out the promise through implementing legislation.<sup>240</sup> Although international law provides standards that determine when a negotiated treaty is or is not self-executing<sup>241</sup> the United States has followed its own practice in this regard. In recent years, the trend has been to declare all treaties non-self-executing, particularly in the area of

text, structure, history, and precedent demonstrate that the states' right assault on federal foreign affairs power is as baseless as it is retrograde." *Id.* at 1278.

235. The classical case is, of course, *Missouri v. Holland*, 252 U.S. 416 (1920).

236. Professor Woolhandler combines questions of domestic applicability of treaties under the doctrine of justiciability. See Woolhandler, *supra* note 232, at 761.

237. See, e.g., Sloss, *supra* note 232; Woolhandler, *supra* note 232; *Treaties and Public Law Making*, *supra* note 31, at 2219; Breard, Printz, *supra* note 31, at 1343; Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995). See also, HENKIN, *supra* note 230, at 194–96.

238. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

239. *Id.*

240. *Id.*

241. See, e.g., David Sloss, *The Domestication of International Human Rights: Non-Self Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 173 (1999); John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1300–01 (1993); Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 522 (1991).

human rights.<sup>242</sup> Some commentators have suggested that this is an acceptable political compromise between the branches entrusted with the treaty power. When the President signs a treaty and the Senate disagrees with certain provisions, the latter can condition its consent on rendering the treaty non-self-executing.<sup>243</sup>

Although this doctrine was not in existence at the time of ratification of the Constitution, history reveals that there is no explicit prohibition on grounding implementing legislation on the Necessary and Proper Clause, or, as other commentators have argued, on the “Punishing Offenses of the Law of Nations” Clause.<sup>244</sup> In fact, the Necessary and Proper Clause originally outlined the explicit power “to enforce treaties.” But it was stricken as deemed redundant.<sup>245</sup>

As Hamilton explained in Federalist No. 75, the treaty power is both executive and legislative in nature, although it might be considered more legislative than executive.<sup>246</sup> On the one hand, the quality of foreign negotiation falls within the executive power, while the operation of treaties as laws renders them legislative in nature. And, the exercise of this legislative aspect of the treaty power, “plead[s] strongly for the participation of the whole or a portion of the legislative body in the office of making them.”<sup>247</sup> James Wilson also stated that the portion of the treaty power which was vested in the Senate was a combination of both executive and legislative powers.<sup>248</sup>

The means to carry out this power, it was understood, would be through the Necessary and Proper Clause. Hamilton reported in Federalist No. 33 that this clause was introduced to:

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242. HENKIN, *supra* note 230, at 201–02. Whether a treaty is declared self-executing or non-self-executing it is still binding on the United States with respect to the other signatories. The need for implementing legislation, if it is not a requirement of the treaty, does not change the nature of the government’s international obligations. If implementing legislation is required as a matter of international law, then the failure to conform to the treaty requirements puts the United States in default of its obligations. *Id.* at 201–204.

243. *Id.* at 202.

244. See Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses Against the Law of Nations”*, 42 WM. & MARY L. REV. 447, 449 (2000) (stating that the Clause is “central” to Congress’s power to regulate through its foreign affairs power in areas traditionally reserved to the states); see also U.S. CONST. art. I, § 8, cl. 10.

245. HENKIN, *supra* note 230, at 481 n.111 (citing 1 BUTLER, THE TREATY POWER 318 n.10).

246. THE FEDERALIST NO. 75, at 450 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

247. *Id.*

248. Statements of James Wilson at the Pennsylvania Ratifying Convention, *reprinted in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 505 (Jonathan Elliot ed., 2d ed. 1937) (1836) [hereinafter Statements of James Wilson].

guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the union. The Convention probably foresaw, that it has been a principal aim of these papers to inculcate, that the danger which most threatens our political welfare is, that the state governments will finally sap the foundations of the union; and might therefore think it necessary, in so cardinal a point, to leave nothing to construction.<sup>249</sup>

James Madison, too, was well aware that some treaties required internal regulations, though he spoke of the objects of treaties as being external.<sup>250</sup> Historical accounts of the ratification of the Constitution evidence James Madison's discomfort with a broad interpretation of the Necessary and Proper Clause, particularly in the context of Congress's power to create a national bank, the subject of debate preceding *McCulloch v. Maryland*.<sup>251</sup> But the discomfort was confined to a construction of the clause to create powers not already enumerated. The treaty power was explicitly granted, and even for Madison, was not left to implication.<sup>252</sup>

For James Wilson, the issue of implementing legislation seemed fairly straightforward. In enacting domestic legislation, he said, our "consent" alone is required. But for a treaty, the consent of a foreign sovereign is also required.<sup>253</sup> Moreover, even though the Constitution denies the House a role, it was understood that "their legislative authority will be found to have strong restraining influences upon both President and Senate."<sup>254</sup> He explicitly suggested that if implementing legislation would be required, both the Senate and the President would have to rely on the House to secure such implementation.<sup>255</sup>

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249. THE FEDERALIST NO. 33 (Alexander Hamilton), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 239 (Max Farrand ed., 1966).

250. CORWIN, *supra* note 28, at 72.

251. 17 U.S. 316 (1819); *see, e.g.*, Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, Boston University School of Law, (Working Paper Series, Public Law & Legal Theory Working Paper No. 03-11, 2003), at [http://papers.ssrn.com/sol3/delivery.cfm/SSRN\\_ID410542\\_code030527570.pdf?abstractid=410542](http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID410542_code030527570.pdf?abstractid=410542) (last visited Mar. 28, 2004).

252. *Id.*

253. Statements of James Wilson, *supra* note 248, at 506.

254. *Id.*

255. He stated:

In England, if the king and his ministers find themselves, during their negotiation, to be embarrassed because an existing law is not repealed or a new law is not enacted, they give notice to the legislature of their situation, and inform them that it will be necessary, before the treaty can operate, that some law be repealed or some be made. And will not the same thing take place here?

*Id.* at 506–07.

A point that is almost missed is that implementing legislation is *already* a narrowing of the treaty power.<sup>256</sup> This doctrinal creation gives the House of Representatives a role that the Framers denied it,<sup>257</sup> by making the commitments of treaties the law of the land. Consider the following. If Congress had ratified the International Covenant on Civil and Political Rights as self-executing, a citizen aggrieved by one of its guarantees, say sex discrimination, if such grievance amounted to a violation of the Covenant, would have had a direct cause of action either against a state, the United States, or an individual, as the case may be.<sup>258</sup> The federal courts would have jurisdiction over this cause of action pursuant to 28 U.S.C. § 1331 and would be required to adjudicate the merits of the claim based on the treaty provision.

Alternatively, the result ought not to be different if the treaty is non-self-executing and Congress has chosen to pass implementing legislation. If the hypothetical victim now chose to proceed under VAWA's civil remedy provision, it is unclear why what is considered a plenary power in the case above, would be rendered incomplete, narrowed, and balanced against a state prerogative as a result of a political decision to implement an international obligation piece-by-piece, rather than in its entirety. In the absence of a doctrine of non-self-execution, history, practice, and doctrine confirm, Congress ought to be able to meet our international obligations through any proper means, unimpeded by abstract notions of federalism of recent vintage. The result should be no different when the treaty-makers choose to proceed with caution.

So what does it mean for a treaty implementing statute to be consistent with the Constitution? It means that a treaty that contravenes any of the specific injunctions of the Constitution, such as the Bill of Rights, would be invalid as a matter of domestic law.<sup>259</sup> And it means no more than that. The United States should have the legislative capacity to bring its internal affairs into compliance with its international obligations to the same extent that it demands such compliance from other nations. At the very least, the treaty power should permit Congress to adapt our laws to the changing exigencies of our international relations.<sup>260</sup>

Passing a national response to clusters of problematic state laws is an appropriate response to the obligations imposed under the Covenant.

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256. Henkin, *supra* note 10, at 346 (stating that the requirement of non-self-execution the United States attaches to most human rights treaties may be unconstitutional as the Framers envisioned the treaty making power complete in itself).

257. *Id.* at 347.

258. See discussion, *supra* notes 232–42 and accompanying text.

259. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302(2) cmt. b, Reporter's Note 1 (1987); see also *Historical Foundations*, *supra* note 17, at 1083.

260. CORWIN, *supra* note 28, at 19.

There is no requirement that there be a showing of actual discrimination before the United States can take proactive action to “ensure” that effective remedies exist for discriminatory conduct as defined under the Covenant. It makes no sense to require abusive action before a legislative response is deemed constitutionally appropriate under the treaty power. But this is the result that a federalism-encumbered treaty clause would yield.

If first principles federalism encumbers the treaty-makers’ power and discretion to enact legislation pursuant to the treaty power, then the doctrine of non-self-execution must give way. That is, it is inconceivable that the United States would lack the power to enter into treaties because of state prerogatives. Was this not the reason the Articles of Confederation failed? If self-execution is not the default rule, and treaties are supreme pursuant to Article VI,<sup>261</sup> then the doctrine of non-self-execution ought not to incorporate into its doctrinal arsenal federalism limitations conceived to address an entirely different structural concern.

## II. THE TREATY POWER AND AMERICAN FEDERALISM

### *A. The Treaty Power*

Federalism has always been a paradox, and not least in the context of the treaty power. In 1789, Federalists and Anti-Federalists, armed with lessons acquired under the Articles of Confederation, disagreed as to which body should possess this most important power—although they agreed that it should not be located within the states.<sup>262</sup> Even though the treaty clause was a plenary delegation of national power, one thought to inhere in national sovereignty, concerns about the role of and the impact on states permeated the constitutional debates with frequency, and often with insistence.<sup>263</sup> The concerns, however, centered not on how much power the states would have to cede, for it was understood that they retained none in this area, but on what the federal government could attain under such a broad power.

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261. See *Treaties*, *supra* note 31. Professor Vázquez ably explains the reasons treaties should become the law of the land at the moment of ratification. “The Supremacy Clause provides that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” No interpretation is necessary to conclude that this clause purports to give “all” treaties the status of domestic law.” *Id.* at 2169.

262. For Framers’ discussions and understandings, see *infra* notes 265–76, 280–88 and accompanying text.

263. *Id.*

For the Framers, the power of the new government to conduct foreign affairs was fundamentally a problem of federalism.<sup>264</sup> Under the Articles of Confederation the Continental Congress was powerless to force the states to honor the international obligations assumed on behalf of the whole under the Treaty of Paris.<sup>265</sup> Contemptuous of the British and defiant in their refusal to repay revolutionary war debts, the states provoked a crisis of unity and of international credibility, both of which threatened the survival of the emergent United States. This state of affairs, as is well known, was a catalyst for the Philadelphia Convention and the need to revise the Articles of Confederation.

The initial focus of the convention was not to enact a new Constitution. Rather, it was to devise an effective method to bring resistant states into compliance with assumed international obligations.<sup>266</sup> Although Congress had the power to make treaties under the Articles of Confederation,<sup>267</sup> it lacked the coercive power over the states necessary to sustain its credibility with foreign nations<sup>268</sup> and to act with "one voice." This deficiency led James Madison and John Jay to reject all state autonomy over foreign affairs under the new government.<sup>269</sup> James

264. Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause As A Case Study*, in 1 PERSPECTIVES IN AMERICAN HISTORY 233, 236 (1984) [hereinafter *Solving a Constitutional Puzzle*]; see also JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 333-400* (1979) (explaining that the ineffectiveness of the Articles of Confederation in the area of foreign relations was a major motivation for calling the Constitutional Convention).

265. Treaty of Paris, Sept. 3, 1783, U.S.-Gr. Brit., art. 4, 8 Stat. 80, 82. State refusal to abide by the Treaty of Paris was a serious matter. Several states had enacted legislation confiscating or discharging debts owed to British Creditors. Britain wanted these repealed as a condition to continued adherence to the Treaty. Britain had also requested that Loyalists be permitted to return after the war, a request with which numerous states, including New York and Virginia, refused to comply. As a result of state noncompliance, Britain ultimately refused to surrender military posts in the territories, an action it promised it would carry through. See Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 422-23 (2000).

266. See, e.g., *Solving a Constitutional Puzzle*, supra note 264, at 236; see also Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT'L L. 832, 832 (1989) (stating that one of the main reasons for calling a constitutional convention was to address the problems arising from state autonomy); *Historical Foundations*, supra note 17, at 1102.

267. ARTICLES OF CONFEDERATION, arts. VI, IX (1778).

268. See Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1643-44 (1997).

269. See, e.g., 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 316 (Max Farrand ed., 1966) [hereinafter RECORDS OF THE FEDERAL CONVENTION]. The Journal of June 19, 1787, sets forth James Madison's preoccupation regarding state non-compliance with international obligations:

The tendency of the States to these violations has been manifested in sundry instances. The files of Congs. contain complaints already, from almost every nation with which treaties have been formed. Hitherto indulgence has been shewn us. This

Madison thought that the foreign affairs power “forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”<sup>270</sup> The “one-voice” political imperative justified, in Madison’s view, a “general government” monopoly over foreign affairs.<sup>271</sup> Whatever may be said about dual-federalism in other areas of congressional power, the “one nation” objective implies a rejection of a dual-federalism structure in this realm.

To be sure, state noninterference in foreign policy<sup>272</sup> was of urgent significance to the drafters. This concern led the treaty power to be lodged exclusively in the federal government, just as it was explicitly denied to the states.<sup>273</sup> states were forbidden from entering “into any treaty, alliance, or confederation,”<sup>274</sup> or “any agreement or compact with another state, or with a foreign power,”<sup>275</sup> without congressional consent. The House was excluded from the treaty process because it was viewed as an unsuitable body for negotiation, given its sheer size, and because of concerns over secrecy and expediency.<sup>276</sup>

As an initial matter, then, it is but a truism that the treaty power was, since its inception, expansive and textually complete in its allocation. But it is as descriptively unhelpful to say that the Framers perceived the treaty power as broad, as it is to say that federalism refers to a political structure in which the states and the federal government share power. This recognition only begs the question, for it is its very breadth that is at the root of disagreements.

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cannot be the permanent disposition of foreign nations. A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring [calamities] on the whole.

*Id.* John Jay stated that “as either designed or accidental violations of treaties and of the laws of nations afford *just* causes of war, they are less to be apprehended under one general government than under several lesser ones, and in that respect the former most favors the *safety* of the people.” THE FEDERALIST NO. 3, at 44 (John Jay) (Clinton Rossiter ed., 1961).

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

271. *Id.*

272. *See, e.g.,* RECORDS OF THE FEDERAL CONVENTION, *supra* note 269.

273. U.S. CONST. art. I, § 10, cl. 1.

274. *Id.*

275. *Id.* cl. 3.

276. *See* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION OF PHILADELPHIA IN 1787 280–82 (Jonathan Elliot ed., 2d ed. 1937) (1836) [hereinafter THE DEBATES] (comments of Pinckney in the South Carolina ratifying convention).



B. *The Textual Basis: Its Meaning Along Historical,  
Doctrinal, and Theoretical Dimensions*

The treaty power is set forth in three provisions of the Constitution: Article II, Section 2 gives the President “power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur.”<sup>277</sup> Article VI states that “all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land.”<sup>278</sup> In turn, Article I, Section 8 gives Congress the power to make all laws “necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States.”<sup>279</sup> These three clauses form the constitutional foundation for the principle that Congress may legislate to implement provisions of a treaty.<sup>280</sup> What this text meant to accomplish, as well as what it has evolved to signify, can be captured along three dimensions: history, doctrine, and theory.

1. Historical Deliberations

Discussions in many of the state ratifying conventions indicate that the Framers had no problem in agreeing that the proposed text was plenary and potentially far-reaching. The Framers’ disagreements concerned what the federal government could accomplish under such expansive power. In the North Carolina convention, which rejected the Constitution, deliberations centered on the objection that the proposed treaty power was so broad as to permit the new government to cede the territories and rivers of the states.<sup>281</sup> To this concern, one early commentator responded: “This question of the right of the treaty-making power to cede territory is wholly a political question, and when, if ever, it arises for determination, it will necessarily be determined upon wholly political considerations.”<sup>282</sup> Burr acknowledged that ceding of territory was a political question and accordingly a matter that would be decided “upon

277. U.S. CONST. art. II, § 2, cl. 2.

278. *Id.* art. VI, cl. 2.

279. *Id.* art. I, § 8, cl. 18.

280. Certainly, none of these provisions address implementing legislation. They are focused solely on the power to enact treaties, whom this power is deposited in, how a treaty is ratified, and the declaration that once it is, it becomes the law of the land. The bi-cameral power for treaty-implementing legislation is derivative of the treaty power itself, is necessitated by the doctrine of non-self-execution, and is grounded on the Necessary and Proper Clause.

281. CORWIN, *supra* note 28, at 66 (citing statement of Mr. Porter in the North Carolina Ratifying Convention).

282. Burr, *supra* note 28, at 301.

wholly political considerations.”<sup>283</sup> But this, according to Justice White, was not justified if the argument meant that the federal government could simply sell a state:

True, from the exigency of a calamitous war or the necessity of a settlement of boundaries, it may be that citizens of the United States may be expatriated by the action of the treaty-making power, impliedly or expressly ratified by Congress. But the arising of these particular conditions cannot justify the general proposition that territory which is an integral part of the United States may, as a mere act of sale, be disposed of.<sup>284</sup>

Similar concerns were expressed in the Virginia ratifying convention, where there was much opposition to the breadth of the treaty power because of fears that it could be used to dismember the union. Madison and Randolph’s response to these objections was that the new government would not exercise its power in a manner to destroy the union it was charged with protecting.<sup>285</sup> Madison, pointing out that the treaty power under the Constitution was to be the same as that under the Articles of Confederation, inquired:

Does it follow, because this power is given to Congress, that it is absolute and unlimited? I do not conceive that power is given to the President and Senate to dismember the Empire or to alienate any great essential right. I do not think the whole legislative authority have this power. *The exercise of the power must be consistent with the object of the delegation . . .* The object of treaties is the regulation of intercourse with foreign nations, and is external. *I do not think it possible to enumerate all the cases in which such external regulations would be necessary.* Would it be right to define all the cases in which Congress could exercise this authority? *The definition might and probably would prove defective.* They might be restrained by such a definition, from exercising the authority where it would be essential to the interest and safety of the community. *It is most safe, therefore, to leave it to be exercised as contingencies arise.*<sup>286</sup>

The explanation Madison offered was thus not one of limiting the scope of the power itself, but a defense of its very expansiveness as

283. *Id.*

284. *Downes v. Bidwell*, 182 U.S. 244, 317 (1901) (White, J. concurring).

285. *See* CORWIN, *supra* note 28, at 70.

286. *Id.* at 70–71; *see also* 3 THE DEBATES, *supra* note 276, at 512–16 (setting forth exchanges between Patrick Henry and James Madison on the potential unlimited scope of the treaty power.)

necessary to accomplish the objectives for which it was enacted. Short of destruction of the union, Madison believed the treaty power did not, and in fact should not, have any pre-established or enumerated limits.

John Calhoun, no ardent supporter of a strong federal government, agreed with Madison's understanding. Although he believed that the legislative power ought to have expressly delineated limits, which he thought essential to preserving co-existing state powers, the treaty power, in his opinion, should have none. Calhoun believed that when the country's relation with the world was implicated, "the states disappear. Divided within, we present the exterior of undivided sovereignty. The wisdom of the constitution, in this, appears conspicuous."<sup>287</sup> He believed that imposing an enumerated list for the exercise of this power was "vain and pernicious. . . Whatever, then, concerns our foreign relations; whatever requires the consent of another nation, belongs to the treaty-making power"<sup>288</sup> and it with the federal government.

Others emphasized that while enumeration was appropriate for Article I, because states retained some quantum of undelegated authority, the treaty power was not, and should not, be subject to the intervention, "consent or fiat of state legislatures. It derives its obligation from its being a compact between the sovereign of this, and the sovereign of another nation."<sup>289</sup> George Mason, an opponent of the Constitution, stated:

By declaring all treaties supreme laws of the land, the Executive and the Senate have, in many cases, an exclusive power of legislation; which might have been avoided by proper distinctions with respect to treaties, and requiring the assent of the House of Representatives, where it could be done with safety.<sup>290</sup>

Nowhere in the records of the Convention or anywhere else is there evidence that anyone disagreed with Mason, who spoke often and vigorously, on the meaning of the Treaty Clause.<sup>291</sup> In the federal convention, for example, it was acknowledged that because the Senate represented the sovereignty of the states, whatever decisions this body made in pursuance of the treaty power must safely be left to it.<sup>292</sup> It was understood

287. 2 THE WORKS OF JOHN C. CALHOUN 132 (Richard K. Cralle ed., 1854).

288. *Id.*

289. Letter from British Minister Carmathen to John Adams (Feb. 28, 1786), in 4 SECRET JOURNALS OF THE CONGRESS OF THE CONFEDERATION 187, 203-204 (1820), quoted in *Historical Foundations*, *supra* note 17, at 1126.

290. Burr, *supra* note 28, at 308 (citing 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 260, at 639).

291. *Id.*

292. CORWIN, *supra* note 28, at 67 (citing statement by Davie, a North Carolina delegate to the Federal Convention).

and accepted that states' interests would be adequately represented by requiring a two-thirds supermajority for the conclusion of treaties. This, the Framers believed, was the extent of the concern for state prerogatives.

A singular, emphatic voice disagreed. Jefferson commented that the treaty power was:

confined to two branches only of the ordinary legislature, the President originating and the Senate having a negative. To what subjects this power extends has not been defined in detail by the Constitution nor are we entirely agreed among ourselves. (1) It is admitted that it must concern the foreign nation, party to the contract . . . (2) By the general power to make treaties, the constitution must have intended to comprehend only those objects which are usually regulated by treaty, and cannot be otherwise regulated. (3) It must have meant to except out of these the rights reserved to the states: for surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way. (4) And also to except those subjects of legislation in which it gave a participation to the House of Representatives. This last is denied by some, on the ground that it would leave very little matter for the treaty-power to work on. The less the better, say others.<sup>293</sup>

Commentators rely on Jefferson's statements in his *Manual of Parliamentary Practice* to support the proposition that federalism limits were not only considered, but also widely shared. The problem with relying on Jefferson's argument alone, while ignoring other commentaries is obvious. Aside from that, some commentators have unequivocally stated that Jefferson's arguments run counter to history and doctrine and "have been consistently rejected."<sup>294</sup> For purposes of this discussion, it is unimportant who is correct in the interpretation of what history has to offer on this issue. What the disagreement does reflect, however, is that a conclusion supporting a normative view of pro-federalism limits is not self-evident.

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293. *Id.* at 122; see also Thomas Jefferson, *A Manual of Parliamentary Practice: For the Use of the Senate of the United States*, in JEFFERSON'S PARLIAMENTARY WRITINGS 353, 420 (Wilbur Samuel Howell ed., 1988); HENKIN, *supra* note 230, at 189. *But see* William E. Mikell, *The Extent of the Treaty-Making Power of the President and Senate of the United States*, 57 U. PA. L. REV. 435, 528, 535 (1909) (serving as an example of earlier commentators who explained Jefferson's concerns as being consistent with the structural limitations of the Constitution).

294. Brucke Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801, 813 (1995).

Unlike Jefferson, John Calhoun—also a strong state rights’ advocate—believed federalism had no function in constraining the treaty power. The rationale for this belief, “‘is to be found in the fact that the treaty-making power is vested exclusively in the Government of the United States; and therefore nothing more was necessary in delegating it than to specify as is done, the portion or department of the Government in which it is vested . . . .’”<sup>295</sup> He did recognize that the treaty power was limited, in the manner in which power is generally limited. But this limitation, he believed, was not one focused on state prerogatives.<sup>296</sup> Thus, Calhoun believed the power was: (1) limited to questions proper for negotiation between the United States and foreign powers, (2) limited by the express prohibitions of the Constitution, and (3) limited in a way that would prevent the federal government from changing the character of the union,

or to do that which can only be done by the constitution-making power; or which is inconsistent with the nature and structure of the government, or the objects for which it was formed. Among which it seems to be settled that it cannot change or alter the boundary of a state or cede any portion of its territory without its consent. Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, fall within the limits of the treaty-making power and may be adjusted by it.<sup>297</sup>

The Framers thus considered the role of the states in the treaty-making process (perhaps we can label this the “federalism concern,”) and reached a compromise resulting in Article II. There is no historical justification further to qualify the treaty power with the radiations emanating from the Tenth Amendment.

Unlike federalism limitations, the issue of subject-matter limitation was addressed in constitutional debates,<sup>298</sup> as well as by early observers.<sup>299</sup> But these discussions centered on what was of national concern

295. CORWIN, *supra* note 28, at 158 (quoting JOHN C. CALHOUN, DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 202–04 (1855)).

296. 2 THE WORKS OF JOHN C. CALHOUN, *supra* note 287, at 132.

297. CORWIN, *supra* note 28, at 159.

298. See 3 THE DEBATES, *supra* note 276, at 512–16 (setting forth exchanges between Patrick Henry and James Madison on the potential unlimited scope of the treaty power). Madison stated: “I do not think it possible to enumerate all the cases in which such external regulations would be necessary. Would it be right to define all the cases in which Congress could exercise this authority? The definition might, and probably would, be defective.” *Id.* at 514–15.

299. See, e.g., John C. Calhoun, *Speech on the Bill to regulate the commerce between the United States and Great Britain, according to the Convention of the 3d of July, 1815* (Jan. 9, 1816), John C. Calhoun, *Speech in the Commercial Convention with Great Britain* (Jan. 9,

versus what was international and thus the proper subject of negotiation with other nations. The original understanding of this subject-matter limitation is no longer illustratively useful,<sup>300</sup> nor can it help advance the discourse on limits that ought to exist to constrain the treaty power.

An essential premise in this understanding is that the original conceptualization of the treaty power has lost its descriptive value. Dichotomized, as it was, between the national and the international, the Framers' sense of the objectives the power was to serve is a precarious basis for defining the ends it ought to serve in today's fluid and richly compromised reality. In other words, the lens of history, as well as of precedent—isolated from other considerations—has shown to be stunningly ill equipped to inform a 21st century problem by extrapolating categorical principles from an 18th century background.<sup>301</sup> Indeed, although the Supreme Court embraced the originalist view in several treaty cases,<sup>302</sup> the American Law Institute, after having adopted it in the Second Restatement of Foreign Relations Law, rejected it in the Third.<sup>303</sup>

1816), CORWIN, *supra* note 28, at 70–71 (quoting James Madison in suggesting that there cannot be useful subject-matter limitations to the treaty power); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 185–189 (2d ed. 1996); JOSEPH STORY, 3 *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1503, at 356 (1833) (“It is difficult to circumscribe the power within any definite limits, applicable to all times and exigencies, without impairing its efficacy, or defeating its purposes. The Constitution has, therefore, made it general and unqualified.”). JOSEPH STORY, 3 *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1503, at 356 (1833) (“It is difficult to circumscribe the power within any definite limits, applicable to all times and exigencies, without impairing its efficacy, or defeating its purposes. The constitution has, therefore, made it general and unqualified”); in 2 *THE WORKS OF JOHN C. CALHOUN* 123, 132–33 (Richard K. Cralle ed., 1864).

300. See, e.g., *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES*, § 302 cmt. c (1987) (“[T]he Constitution does not require that an international agreement deal only with ‘matters of international concern.’”).

301. This is not to say that history is irrelevant, of course, nor that intuitive structural arguments by appealing to Framers' intent are an ineffectual method of clarifying the modern scope of the treaty power. But it is to say that it cannot be the only method.

302. See, e.g., *Asakura v. Seattle*, 265 U.S. 332, 341 (1924) (holding that the power to enter into treaties is limited to “all proper subjects of negotiation between our government and other nations”); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (stating that treaty power extends only to concerns “properly the subject of negotiation with a foreign country”); *Holden v. Joy*, 84 U.S. 211, 243 (1872) (stating that the treaty power extends to “all those object which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty”).

303. Compare *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 117(1) (1965) (“The United States has the power under the Constitution to make international agreement if . . . the matter is of international concern.”), with *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 302 cmt. c (1987) (“Contrary to what was once suggested, the Constitution does not require that an international agreement deal only with ‘matters of international concern.’”).

## 2. Doctrinal Understandings

The most important case to address the power of Congress to domesticate treaties free of federalism limitations is *Missouri v. Holland*.<sup>304</sup> Although it was not the first to consider the scope of the treaty power, it was the vanguard in establishing the proposition that is the subject of current academic attack, the power of Congress to legislate pursuant to a treaty, even in areas falling outside of its Article I powers. Because of its central role in this discussion, it is important to analyze the case at some length.

The Migratory Bird Act<sup>305</sup> at issue in *Holland* had been struck down by two federal district courts as falling outside an explicit congressional power.<sup>306</sup> The *Shauver* court expressed the familiar principle that our government is one of limited and enumerated powers and thus Congress can only legislate in an area for which it has authority.<sup>307</sup> Similarly, the court noted, "as to all internal affairs the states retained their police power, which they, as sovereign nations, possessed prior to the adoption of the national Constitution, and no such powers were granted to the nation."<sup>308</sup> The court added that the Tenth Amendment prohibited Congress from legislating for general welfare.<sup>309</sup> The government had also defended the Migratory Bird Act on the theory that no single state could regulate for all, thus requiring Congress to act.<sup>310</sup> The court rejected this argument and reasoned that birds were not the property of the United States, and thus it could not regulate them.<sup>311</sup>

After these decisions, the United States entered into a treaty with Great Britain signing on behalf of Canada's territory for the protection of migratory birds.<sup>312</sup> Both governments agreed to enact "necessary measures for insuring the execution of" the Treaty.<sup>313</sup> The implementing

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

305. Migratory Bird Treaty Act (July 3, 1918), ch. 128, 40 Stat. 755 (codified as amended at 16 U.S.C. § 703-712 (1994)).

306. *See* *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915). In *McCullagh*, the federal government defended the statute under the Commerce Clause and the General Welfare Clause. *See also* *United States v. Shauver*, 214 F. 154, 156 (E.D. Ark. 1914). In *Shauver*, the government argued that the statute was valid legislation under Article IV, Section 3, Clause 2 of the Constitution: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . ."

307. *Shauver*, 214 F. at 156.

308. *Id.*

309. *Id.* at 157.

310. *Id.*

311. *Id.*

312. Convention with Great Britain for the Protection of Migratory Birds, Aug. 16, 1916, U.S.-Gr. Brit., 39 Stat. 1702.

313. *Id.* art. 8, 39 Stat. at 1704.

legislation resulting from this Treaty, as well as the Treaty itself, were attacked in the United States Supreme Court.<sup>314</sup> Missouri sought an injunction preventing the enforcement of the Migratory Bird Treaty Act of 1918 and its implementing regulations.<sup>315</sup> It claimed that the Act was an unconstitutional interference with its sovereign rights under the Tenth Amendment because it claimed a proprietary right over all birds within its borders.<sup>316</sup>

Justice Holmes rejected Missouri's contention that it exercised authority over birds within its territory, because no one possessed wild birds, possession being an essential element of ownership.<sup>317</sup> Rather, the protection of these birds was "a national interest of very nearly the first magnitude" which "can be protected only by national action in concert with that of another power."<sup>318</sup> He stated that "[b]ut for the treaty and the statute there soon might be no birds for any powers to deal with."<sup>319</sup> The argument followed, that if the treaty was valid, there could be no doubt that Congress could enact implementing legislation pursuant to the Necessary and Proper Clause.<sup>320</sup> Consequently, concluded Justice Holmes, implementing legislation is a valid exercise of congressional power, notwithstanding any claimed sovereign rights that may exist under the Tenth Amendment.<sup>321</sup> The Court explicitly rejected the argument that "what an act of Congress could not do unaided, in derogation of the powers reserved to the states, a treaty cannot do."<sup>322</sup> Rather, "[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."<sup>323</sup> Thus the treaty power is complete in its allocation and Congress need not rely on an explicit Article I power to reach a proper subject within its realm.

No Supreme Court case has ever challenged *Holland's* understanding of the scope of implementing legislation and the irrelevance of the Tenth Amendment in limiting its reach. Rather, this understanding has been reaffirmed, even in a case that struck down an executive agreement as unconstitutional. In *Reid v. Covert*,<sup>324</sup> the Court considered whether Congress had the power to expose civilians to trial

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

315. *Id.* at 430–31.

316. *Id.* at 431.

317. *Id.* at 434.

318. *Id.* at 435.

319. *Id.*

320. *Id.* at 432.

321. *Id.*

322. *Id.*

323. *Id.* at 433.

324. *Reid v. Covert*, 354 U.S. 1 (1957).



before a military tribunal without the protections of the Bill of Rights and concluded that it did not. Mrs. Covert had killed her husband, a sergeant in the Air Force, at an airbase in England. She was court-martialed for murder under the Uniform Code of Military Justice and was convicted of murder.<sup>325</sup> She sought a writ of habeas corpus contending that it was unconstitutional for the Air Force to try her in a military tribunal.<sup>326</sup> The Court accepted her argument and held that the Constitution required that civilians be tried in civil courts.<sup>327</sup>

The government had argued that the trial before the military tribunal was necessary and proper for compliance with obligations assumed under an executive agreement in effect with Great Britain.<sup>328</sup> This agreement permitted the United States to exercise exclusive jurisdiction over all offenses committed by American servicemen and their dependents on British soil.<sup>329</sup> The Court rejected this argument 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.”<sup>330</sup> The Court rejected the argument that the Supremacy Clause implied that treaties did not have to comply with the explicit provisions of the Constitution. It noted that nothing in the history of its adoption suggested the interpretation proposed by the government. Rather,

It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.<sup>331</sup>

The *Reid* Court noted that *Missouri v. Holland* was not inconsistent with its holding. In *Holland* there was no conflict with any provision of the Constitution, as was the case in *Reid*. And the holding in *Holland*,

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325. *Id.* at 3–4.

326. *Id.* at 4.

327. *Id.* at 40–41.

328. *Id.* at 16.

329. *Id.*

330. *Id.* at 17 (citation omitted).

331. *Id.* at 16–17.

finding the Tenth Amendment to be no impediment to the treaty power, stands: "To the extent that the United States can validly make treaties, the people and the states have delegated their power to the National Government and the Tenth Amendment is no barrier."<sup>332</sup> The Court reaffirmed the role of the Necessary and Proper Clause as a permissible vehicle for carrying into execution implied powers.<sup>333</sup>

Other significant cases focused on two issues: (1) the treaty-makers' prerogatives to negotiate with foreign nations on any matter deemed suitable for such negotiation, and (2) the necessity for conflicting state laws or policies to yield to ratified treaties. In the much criticized decision of *United States v. Curtiss-Wright Export Corp.*,<sup>334</sup> for example, Justice Sutherland stated in dictum that states never possessed any sovereignty in the international sense of the word and concluded that all foreign affairs powers were vested exclusively in the federal government "as necessary concomitants of nationality."<sup>335</sup> The Court has also expressed the understanding that states, upon ratifying the Constitution, ceded exclusive authority over foreign affairs to the federal government.<sup>336</sup>

In *United States v. Belmont*,<sup>337</sup> the Court struck down New York's bid to thwart several agreements negotiated by the United States in recognition of the Soviet Union. The Court sweepingly dismissed any potential interest New York may have had in its efforts, "since [the Court was] of the opinion that no state policy can prevail against the international compact here involved."<sup>338</sup> It stated, "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies."<sup>339</sup> To permit states to dictate or interfere in foreign policy would

332. *Id.* at 18 (citing *United States v. Darby*, 312 U.S. 100, 124–25 (1941)).

333. *Id.* at 20–22.

334. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 317–18 (1936). This case addressed the validity of a congressional resolution granting President Roosevelt the power to prohibit the sale of arms to countries involved in a South American conflict. Relying on this resolution, the President declared any sales of arms illegal. The Curtiss-Wright Corporation was indicted for violating the order. The Supreme Court held delegation of power to Roosevelt constitutional. The decision has been severely criticized for its historical inaccuracies and theoretical untenability. See Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 26–33 (1972); *Federalism I*, *supra* note 17, at 437; *Globalism and the Constitution*, *supra* note 17, at 2020 n.310; Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973).

335. 299 U.S. 304 at 318.

336. *Holmes v. Jennison*, 39 U.S. 540, 550 (1840) ("The states, by the adoption of the existing Constitution, have become divested of all their national attributes, except such as relate purely to their internal concerns.").

337. *United States v. Belmont*, 301 U.S. 324 (1937).

338. *Id.* at 327.

339. *Id.* at 331.

result in a "charge of national perfidy, and involve us in war."<sup>340</sup> The foreign affairs power, therefore, cannot be subject to any limitations on account of the states,<sup>341</sup> especially in cases of preemption.

This concern of prohibiting the states from rewriting the United States' foreign policy was echoed in *United States v. Pink*.<sup>342</sup> The Court reiterated that states play no role in the foreign affairs power. Rather, this power is vested in the national government exclusively, and it need not defer or conform to state laws or policies. To be sure, the Court emphasized, whatever state policy may be implicated is wholly irrelevant to the judicial inquiry when the United States acts in its plenary and constitutional capacity to enforce its foreign policy in the courts of the union.<sup>343</sup>

This understanding goes as far back as interpretations of the Treaty of Paris in conflict with state property laws. The Court's first significant decision in this area invalidated a Virginia statute that conflicted with the 1783 Treaty of Paris by canceling debts owed to British citizens.<sup>344</sup> Justice Chase, writing for the majority, reaffirmed that under the Supremacy Clause, treaties are the supreme law of the land and any conflicting state statutes must give way to the superiority of federal law.<sup>345</sup> The Court has repeatedly invalidated state legislation as inconsistent with treaty provisions in subjects such as statutes of limitations,<sup>346</sup> confiscation,<sup>347</sup> and escheat of land.<sup>348</sup>

Modern examples of courts' deference to the treaty power are consistent with 200 years of doctrinal precedent. One such example is

340. *Id.* (quoting James Madison in 3 THE DEBATES, *supra* note 267, at 515).

341. *Id.*

342. 315 U.S. 203, 233–34 (1942) (holding that an executive agreement with Russia preempted contrary state property laws).

343. *Id.*

344. *See* *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1796).

345. *Id.*; *see also* *Neely v. Henkel*, 180 U.S. 109 (1901), where the Supreme Court considered the propriety of Congress's use of the Necessary and Proper Clause in enacting a statute to implement certain provisions of the Treaty of Paris. Congress had enacted an extradition statute authorizing any United States court to hold probable cause hearings for persons charged with crimes committed in another country and to issue, upon request of the offended country, a surrender order. *Id.* at 110–11. The Court held:

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

*Id.* at 121.

346. *See* *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454 (1806).

347. *See* *Ware v. Hylton*, 3 U.S. 199 (1796).

348. *See* *Blythe v. Hinckley*, 180 U.S. 333, 340 (1901).

*United States v. Lue*.<sup>349</sup> President Reagan had proposed legislation designed to implement the International Convention Against the Taking of Hostages.<sup>350</sup> The Convention required signatory parties to take specific steps to adopt “effective measures for the prevention, prosecution and punishment of all acts of taking of hostages as manifestations of international terrorism.”<sup>351</sup> Pursuant to its obligations under the Hostage Taking Convention, Congress passed the Hostage Taking Act.<sup>352</sup>

Lue was convicted under the Hostage Taking Act<sup>353</sup> for attempting to abduct and hold a victim hostage for a ransom. He thus challenged the statute as unconstitutional under *United States v. Lopez*, which had held that Congress lacked the power to regulate purely local activities, particularly in areas such as education and crime.<sup>354</sup> He contended that the Act exceeded Congress’s Article I powers as set forth in *Lopez*, and that it violated principles of federalism secured under the Tenth Amendment and the Equal Protection Clause of the Fifth Amendment.<sup>355</sup> He also argued that the treaty itself exceeded the treaty power as it regulated purely domestic matters not touching on relations with other nations.<sup>356</sup>

The federal appeals court upheld the validity of the Act based on Congress’s treaty power, the Necessary and Proper Clause, and the authority of *Holland*.<sup>357</sup> The court held that the “proper subject of negotiation” between the United States and other nations is not the province of the judiciary to define. Rather, in foreign affairs, the prerogative belongs to the Executive.<sup>358</sup> The court stated:

International law knows no limitations on the purpose or subject matter of international agreements, other than they may not

349. 134 F.3d 79 (2nd Cir. 1998).

350. *Id.* at 81. The signatory parties to the Convention agreed that:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person . . . in order to compel a third party, namely, a state . . . to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages . . . within the meaning of this Convention.

International Convention against the Taking of Hostages, *adopted* Dec. 17, 1979, art. 1, T.I.A.S. 11,081, 11,083, 1316 U.N.T.S. 205, 207 [hereinafter Hostage Taking Convention].

351. Hostage Taking Convention, *supra* note 350, at 206.

352. Act for the Prevention and Punishment of the Crime of Hostage-Taking, Pub. L. No. 98-473, Title II, ch. XX, pt. A, § 2002(a), 98 Stat. 2186 (codified at 18 U.S.C.A. § 1203 (West 2000)).

353. *Id.*

354. *See* *United States v. Lopez*, 514 U.S. 549 (1995).

355. 134 F.3d at 81.

356. *Id.* at 82.

357. *Id.* at 81.

358. *Id.* at 83.

conflict with a peremptory norm of international law. states may enter into an agreement on any matter of concern to them, and international law does not look behind their motives or purposes in doing so. Thus, the United States may make an agreement on any subject suggested by its national interests in relations with other nations.<sup>359</sup>

Thus whatever outer limits there may be to the treaty making power, the Hostage Convention does not transgress that limit.<sup>360</sup> If the Hostage Taking Convention was a valid exercise of the treaty power, then there was little room to argue that implementing legislation was not necessary and proper.<sup>361</sup>

Similarly, In *Palila v. Hawaii Department of Land and Natural Resources*,<sup>362</sup> a federal district court upheld the constitutionality of the Endangered Species Act of 1973<sup>363</sup> as valid implementing legislation<sup>364</sup> for the Convention for the Protection of Migratory and Endangered Birds<sup>365</sup> and the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere.<sup>366</sup> The court relied on *Holland* and the treaty power as well as the Necessary and Proper Clause to uphold the statute.<sup>367</sup>

Most recently, the validity of the NAFTA Implementation Act<sup>368</sup> was challenged.<sup>369</sup> Plaintiff union members challenged the constitutionality of NAFTA and of the Implementation Act as exceeding Congress's treaty powers. The court held that both the treaty and its implementing legislation were constitutional.<sup>370</sup> The Supreme Court denied certiorari.<sup>371</sup>

359. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 302 cmt. a (1986)).

360. *Id.* at 84.

361. *Id.*

362. 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

363. Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1993) (codified as amended at 16 U.S.C. §§ 1531-44 (1994)).

364. 471 F. Supp. at 994.

365. Convention for the Protection of Migratory and Endangered Birds, March 4, 1972, U.S.-Japan, 25 U.S.T. 3329.

366. Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, *opened for signature* Oct. 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193.

367. 471 F. Supp. at 994.

368. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C. §§ 3301-3473).

369. *Made in the USA Found. v. United States*, 56 F. Supp.2d. 1226, 1229 (N.D. Ala. 1999), *vacated by* 242 F.3d 1300 (11th Cir. 2001), *cert. denied*, 534 U.S. 1039 (2001).

370. 56 F. Supp.2d, at 1322-23. For an in-depth discussion of the constitutionality of NAFTA, see David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791 (1998); see also Ackerman & Golove, *supra* note 294 at 805 n.12; but cf. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (criticizing Professors Ackerman and Golove on the constitutionality of Congressional-Executive Agreements); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(2) cmt. e (1987).

371. *Made in the USA Foundation v. U.S.*, 242 F.3d 1300 (11th Cir. 2001), *cert. denied*, 534 U.S. 1039 (2001).

The point of this laundry-listing of doctrinal understandings is to underscore that established doctrine has never seen fit to incorporate federalism limits, as may be abstractly and implicitly derived from the Tenth Amendment, as a formal or proper limitation to the treaty power, including the power of Congress to enact implementing legislation that may fall outside of its Article I powers. The answer to the *Holland* caveat cannot be found in history or doctrine, though either one can support a normative argument for the overruling of its holding. It is important to note, however, that this result is anything but compelled.

### 3. Theoretical Propositions

The normative proposition that there ought to be some form of limitation to the treaty power should rest on a recognizable principle of constitutionalism. History offers very little in this realm, notwithstanding the Herculean efforts of some commentators arguing to the contrary.<sup>372</sup> If we determine that that there exists some form of limitation on the treaty power, then what principled standard are we going to adopt that limits that power in line with the demands of the Constitution?

As a matter of political theory, the prior question is why such a normative limitation should exist at all. That ours is a government of limited and enumerated powers, with reserved powers belonging to the states, is an unsatisfactory basis on which to ground the case against a treaty power “exceptionalism.” To be sure, it cannot, standing alone, serve as a *constitutional* foundation. That powers of the federal government are limited says nothing about the nature of the limitation on a field that as established by text, history, and doctrine, is within the exclusive control of the President and the Senate.

The problem of federalism in the context of domestic legislation emerges when the structural guarantees to the states are interrupted by implementing domestic legislation that reaches areas, in first principles federalism’s lexicon, that were previously reserved to the states.<sup>373</sup> But as an initial matter, if state laws that interfere with foreign policy are invalid,<sup>374</sup> then it is difficult to see why a plenary constitutional power should

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372. See, e.g., Bradley & Goldsmith, *supra* note 17, at 675; James Deeken, *A New Miranda for Foreign Nationals? The Impact of Federalism on International Treaties that Place Affirmative Obligations on state Governments in the Wake of Printz v. United States*, 31 VAND. J. TRANSNAT’L L. 997 (1998); *Federalism I*, *supra* note 17, at 456; *Globalism and the Constitution*, *supra* note 17.

373. As has been widely argued, principled federalism categories of “inherent” state sovereignty are as difficult to define as they are to defend, much less to apply through a coherent theory consistent with rule-of-law values.

374. See, e.g., *United States v. Belmont*, 301 U.S. 324 (1937) (holding that an executive agreement between the United States and the Soviet Union preempted a New York property

be limited by structural federalism limitations. There is nothing in Article II, or within the understood scope of presidential powers, that limits the President's ability to negotiate a treaty on virtually any subject he considers proper to raise with a foreign nation.<sup>375</sup> And there is no structural ban on the Senate giving its advice and consent to the treaty proposed by the President. In my view, it would be structurally incoherent, as well as contrary to history and doctrine, to impose an "enumerated powers limitation" to the negotiations and implementations of treaties.

An enumerated-powers limitation, under which category first principles federalism falls, would have to involve the Court in micromanaging this country's foreign affairs, a task it is spectacularly ill suited to undertake. Moreover, to the extent judicial federalism would justify umpiring the national versus the international, in the same manner it has umpired the local versus the national, it is difficult to conceive of a judicial intervention that is not inappropriately intrusive on the prerogatives of the treaty-makers. Should the Court unfortunately choose to undertake this task, one which it has prudentially so far refused to take on, serious separation of powers problems would ensue and the Court would be positioned selectively to reject or accept the commitments we have made with other nations. The implications stemming from this institutional arrangement are too eccentric to fathom.

Some commentators argue that such limitations are necessary because the lack of federalism limits simply cedes too much power to Congress, while denying a proper role for the states. But this is a disagreement with the Constitution itself: the states have no role in this process, historically, doctrinally, or otherwise. Moreover, that a lack of federalism restrictions on the treaty power would leave the treaty-makers to do what they wish proves too much. It ignores the inherent complexities of the treaty-making process itself, as well as the dynamics of ratification.

First, it assumes that the President and the Senate act as a monolith, that they might conspire or collude not only with one another, but with other nations for the sole purpose of entering into international agreements that would enable domestic legislation otherwise impermissible; that is, they enter into what Professor Henkin has termed a "mock marriage."<sup>376</sup> It also assumes that treaty-makers will disregard our foreign

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law); *Chy Lung v. Freeman*, 92 U.S. 275 (1875) (striking down a California law that restricted Chinese immigration); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 271-72 (1817) (invalidating a Maryland law that conflicted with the provisions of a treaty with France).

375. See *Am. Insurance Assn. v. Garamendi*, 539 U.S. 2374(2003).

376. HENKIN, *supra* note 230, at 185.

policy implications in the process. These assumptions say more about human nature than they do about the treaty power<sup>377</sup> and nothing about constitutional requirements.

To illustrate the point, the type of consensus that would be required for an egregious usurpation of power to take place, of the type neo-federalism proponents worry about, is simply unrealistic. If the goal of an entirely cohesive Congress were to interfere with state prerogatives for the sake of regulating all matters which it lacks the power to regulate under Article I, a series of episodes must take place. First, a cohesive and agreeable Congress would have to convince the President to negotiate a treaty of the type addressing matters that it wants to regulate. Assuming that the President goes along with this proposal, then in deference to the congressional request, he must find a nation or nations willing to enter into this international agreement and to bind themselves by its provisions. Assuming that a recognized state under international law willingly enters into this agreement with the United States, then the President must seek two-thirds consent of the Senate to ratify the treaty. This consent should be readily forthcoming, as we are operating under the assumption that the whole of Congress was able to persuade the President in the first instance.

Assuming the Senate gives its consent, the treaty, if self-executing, becomes the law of the land. If not, then implementing legislation will be required. This second step should also not be a problem for the same reason that consent was not. Now there exists a self-executing treaty, with the status of domestic law, operating to interfere with undefined state prerogatives. Allow me to suggest that if this scenario were ever to take place, perhaps we should think seriously about our capacity as voters, rather than focus on creating a broad constitutional principle for all times.

Moreover, if the treaty power is ever used by Congress to create unprecedented domestic legislation, it will be not as a result of the unbounded scope of the power itself, but would pursue from the Rehnquist Court's own jurisprudence in cabining federal power in areas

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[T]here must be an agreement, a bona fide agreement, between states, not a "mock marriage." So, hypothetically, if in order to circumvent the House of Representatives and the states, the President wrote a uniform divorce law, applicable to the United States alone, into 'a treaty', and the Prime Minister of Canada cooperated in the Scheme . . . it would presumably not be a treaty under international law, and therefore not a treaty under the Constitution.

*Id.*

377. See Statements of James Wilson, *supra* note 248, at 508 (stating that any fears related to the Senate bribing the House are not an objection to the system of government proposed but a commentary on human nature).



where Congress is otherwise competent to legislate. "If there is one lesson most believed that the Court had learned during the New Deal, it is that greater danger may lie in the rejection of democratic ends than in a system of imperfect boundaries between federal and state spheres."<sup>378</sup>

Professor Bradley's initial premise for arguing that there indeed exist federalism limitations to the foreign affairs power is that ours is a government of limited and enumerated powers, and thus "when the federal government makes supreme federal law, it is restrained in what it can do either by inherent limits in the scope of its delegated powers, or by the Tenth Amendment's reservation of powers to the states, or both."<sup>379</sup> The essence of Professor Bradley's argument is "that *if* federalism is to be the subject of judicial protection . . . there is no justification for giving the treaty power special immunity from such protection."<sup>380</sup> But why not? The argument seems to be that if the Court is to remain consistent with its first principle federalism doctrine, then it must extend implied federalism limitations to all areas of congressional and executive power. But this argument for consistency or symmetry is not an argument based on what is constitutionally permissible, only what may be doctrinally desirable or normatively preferred.

It is not unprecedented for Congress to be able to legislate pursuant to one of its powers, but not pursuant to others. As Professor Vázquez explains, "In no other context are the limits of one power applicable to another power."<sup>381</sup> There is no recognizable doctrine that applies the limitations to the Bankruptcy Power, for example, to the power to raise armies, or to the power to coin money.<sup>382</sup> In *United States v. Butler*,<sup>383</sup> for example, the Supreme Court interpreted Congress's power to tax and that to regulate interstate commerce as mutually independent.<sup>384</sup> Similarly, the argument for symmetry does not make the case that federalism limitations ought to apply to the treaty power.

The first historical evidence on which Professor Bradley relies to advance the federalism limitations argument is that at the time of the founding there was a clear understanding about what was truly interna-

378. Nourse, *supra* note 152, at 23.

379. *Federalism I*, *supra* note 17, at 392 (citing for this proposition, *New York v. United States*, 505 U.S. 144, 155–56 (1992); *United States v. Lopez*, 514 U.S. 549, 552 (1995); *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Printz v. United States*, 117 S. Ct. 2365, 2379 (1997); and *South Carolina v. Baker*, 485 U.S. 505, 511 n.5 (1988)).

380. *Federalism I*, *supra* note 17, at 394.

381. Vázquez, *supra* note 26, at 720.

382. *See id.*

383. *United States v. Butler*, 297 U.S. 1 (1936).

384. *Id.* at 65–66.

tional—the proper subject of treaties—and what was domestic.<sup>385</sup> But this statement by itself adds no instructive insights. Rather, it speaks to the “proper” subject of treaties, which is quite different in the year 2004 than it was in 1791. That is to say, it is unhelpful to determine whether there is or ought to be a federalism limitation to the treaty power by stating that the Framers understood it to encompass only international matters. For if a matter is deemed to be international, then on Professor Bradley’s own terms, no federalism limitation should apply.

Professor Bradley also critiques the separation of subject matter from federalism concerns as artificial because, the argument goes, it is precisely by combining them that the problem of preemptive implementing federal law arises.<sup>386</sup> It is unclear, however, *why* the combination of subject matter as understood in 1791 and first principles federalism *should* define the scope of the treaty power. It is no less artificial to cut the Rehnquist Court’s brand of federalism, on which these recent claims are made, and paste them onto the intent of the Framers, and further infer from that combination the proposition that the Constitution demands a state rights’ limitation on the exercise of the treaty power. One could, as a theoretical matter, make a principled objection to an unlimited treaty power. But no one argues that the power is unlimited, only that it is limited by the institutional safeguards of the treaty-making process itself and the explicit prohibitions of the Constitution. That those may be conceived by some to be insufficient limitations does not render the power limitless. Nor does the fact that it is limited in *some* way mean that it is sufficiently limited. But *what* the limit should be cannot be found in the federalism doctrine.

It is unnecessary to foresee a clash of values between federalism and the treaty power. The inherent nature of foreign policy sovereignty can be understood in the same structural terms that the Court has ascribed to state sovereignty in recent years: the power to conduct foreign affairs at the national level and the implementation of a treaty is the conduct of foreign affairs; it is a statement about the United States’ commitment to the instrument it ratified. It is both plenary and exclusive and arises “inherently” from the “conception of nationality.”<sup>387</sup>

Just as the structure of government is preserved by ensuring appropriate limits between that which the government can regulate at the national level and that which it cannot because it falls within the prerogative of a state, the national structure is preserved by understanding that the treaty power does not, and it need not incorporate states’ rights

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385. See *Federalism I*, *supra* note 17, at 410–11.

386. See *Federalism II*, *supra* note 17, at 104–05.

387. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317–18 (1936).

considerations. Due consideration was given to state interests by putting in place the procedural and structural safeguards the Framers agreed upon. To “split” the “atom of sovereignty” in the area of foreign affairs is to deny the very essence of what it means to be a nation as envisioned by Madison.

Accommodation of competing values is preferable to confrontation. Accommodation incorporates interpretive integrity and expands the possibilities of republican government. This statement of course, assumes that the role of the Court is to expand the possibilities of government. By this I mean that it is the duty of the Court to remain faithful to the Constitution, but at the same time to interpret the document in a way that does not create irreconcilable or irretrievable fissures in our constitutional understandings. A declaration that the Constitution forbids the democratically elected branches from carrying out the nation’s international obligations in a manner, which in their judgment, fully accomplishes those objectives, is problematic when such a declaration is premised on an ambiguous account of historical originalism. Rather, the procedural safeguards understanding of the treaty power is historically supported, and is nowhere contradicted by text, history, or settled doctrinal understandings. To preserve the country’s original design by fragmenting the treaty power, as is the purported goal of the current conservative majority of the Court, is to neglect this country’s current design.

Founding era conceptions of our structure bear on contemporary issues and permissible interpretations only as a starting point, but they cannot be the definitive and ending point. The rich doctrinal constitutional history and evolved understanding of the role of international commitments ought to bear on our current understanding of the treaty power, for they themselves incorporate evolving conceptions of what is permissible and acceptable in constitutional practice and political compromise. Evolving doctrinal understandings reflect our commitments to constitutional stability.

Tolerance for implementing legislation that may contradict this Court’s federalism aspirations or structural visions simply follows from the Supremacy Clause and from a vision of a strong executive in the foreign policy realm. The thought of federalism limitations in domestic legislation may be said to follow from an anti-tyranny principle coupled with a structural appreciation for how command and control vitiates checks and balances. It may be necessary for Article I powers, although not necessarily in the categorical manner in which the Court has deployed it. But with respect to the treaty power, the structural safeguards were explicitly factored in, not just because each state is equally repre-

sented in the Senate, but also because steps necessary to trigger the treaty power involve a complex series of negotiations, agreements, counter proposals, political compromises, and the agreement of other nations as well as two-thirds of the Senate.<sup>388</sup> These international and national structural safeguards were deemed adequate enough even for the most ardent opponents of the Constitution.

Doctrinally, at least, an acceptance of a federalism limitation to the Treaty Power would require explicitly overruling *McCulloch vs. Maryland*, *McCulloch v. Maryland*, 17 U.S. 316 (1819) and its interpretation of what is “necessary and proper,” as well as *Missouri v. Holland*, *Missouri v. Holland*, 252 U.S. 416 (1920), (which some advocate as a necessary result). Proponents of this new framework should advance more than categorical arguments, permitted only by recent doctrinal developments, themselves of questionable constitutional validity, that what they have offered.

Categorical statements about federalism limitations seem oblivious to difficulties of applying such limitations in practice. For example, even if one were to accept that the Rehnquist Court’s brand of federalism requires a re-examination of previously settled understandings, it is unclear what kind of limits treaty-makers ought to be concerned about when negotiating with foreign nations if the agreement is to be self-executing, or what state sovereign prerogatives ought to trump implementing legislation. The more important implication, however, is what effect this analytical approach would have on the foreign affairs power and the Court’s involvement in parsing through the legitimacy or illegitimacy of these agreements on federalism grounds.

## CONCLUSION

This Article has explored the idea that treaty-implementing legislation, unencumbered by federalism limitations, is consistent with the Constitution. The Civil Remedy Provision of the VAWA could have been a legitimate domestication of a human rights norm to which this country has acceded. It seems improbable that the elected branches would collude with the objective of subverting state prerogatives. Indeed, the Senate’s adoption of federalism understandings, for example, reflects the due consideration and responsible decision-making in which the Senate engages in matters of foreign policy. Structural safeguards have worked for 200 years, and there is no reason to think that they have become an insufficient limitation.

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388. See *supra* Part II, pp. 309–25.

I believe that the *Holland* caveat cannot be answered authoritatively or conclusively. The nature of federalism discourse, with its normatively loaded terms of “natures,” “essences,” “traditional state prerogatives,” and constitutional silences, are notoriously difficult tools in a doctrinal toolbox.<sup>389</sup> It is not constitutionally inevitable that federalism limitations ought to hinder the treaty power generally or implementing legislation specifically, any more than the first principle federalism decisions were themselves constitutionally inevitable.

The complexity of these issues arises at a time when the internationalization of norms is pervasive at all levels of regulation, while the trend domestically is to contract the legislative power and to shield state interests from federal encroachment. But a limitation to the treaty power is not a unitary or isolated consideration. It is informed by allocations of power and structural concerns that are distinct from those related to Article I powers. Any consideration of the treaty power scope ought to take into account the nature of the international obligations assumed pursuant to it. The discussion ultimately addresses the treaty-makers’ constitutional prerogative to exercise the treaty power in a manner that is consistent both with federalism concerns and with international norms. Their ability to do so is tempered by the structural assurances and doctrinal understandings that have preserved this power since the creation of the Republic.

A serious consideration of this Country’s assumed obligations under the Covenant should help advance a broader understanding of the implications of a treaty power restrained by neo-federalism limits. Should Congress choose to implement discreet provisions of human rights treaties, it should be able to do so unimpeded by structural concerns that have no bearing on the nature of the matters embraced by the treaty power. The structural concerns relating to state interests that arise today, were authoritatively resolved at the creation of the republic.

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389. See Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 *TULSA L.J.* 11, 35–37 (2000).

APPENDIX  
UNITED STATES RESERVATIONS, UNDERSTANDINGS, AND  
DECLARATIONS, INTERNATIONAL COVENANT ON CIVIL AND  
POLITICAL RIGHTS

- I. The Senate's advice and consent is subject to the following reservations:
- (1) That Article 20 [free speech] does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.
  - (2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant women) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.
  - (3) That the United States considers itself bound by Article 7 [torture/punishment] to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.
  - (4) That because U.S. law generally applies to an offender the penalty in force at the time the offense was committed, the United States does not adhere to the third clause of paragraph 1 of Article 15 [post-offense reductions in penalty].
  - (5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of Article 10 [treatment of juveniles in the criminal justice system] and paragraph 4 of Article 14 [trial procedure in the criminal justice system]. The United States further reserves to these provisions with respect to individuals who volunteer for military service prior to age 18.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Covenant:

- (1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status—as those terms are used in Article 2, paragraph 1 [nondiscrimination] and Article 26 [nondiscrimination]—to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of Article 4 [nondiscrimination] upon discrimination, in time of public emergency, based “solely” on the status of race, color, sex, language, religion or social origin not to bar distinctions that may have a disproportionate effect upon persons of a particular status.
- (2) That the United States understands the right to compensation referred to in Articles 9(5) and 14(6) [compensation for unlawful arrest and miscarriage of justice] to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law.
- (3) That the United States understands the reference to “exceptional circumstances” in paragraph 2(a) of Article 10 [separate treatment of the accused] to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons. The United States further understands that paragraph 3 of Article 10 [separate treatment of the accused] does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system.
- (4) That the United States understands that subparagraphs 3(b) and (d) of Article 14 [right to counsel] do not require the

provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed. The United States further understands that paragraph 3(e) [compelled witness] does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defense. The United States understands the prohibition upon double jeopardy in paragraph 7 [double jeopardy] to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause.

- (5) That the United States understands [in regard to Article 50 (federalism)] that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal System to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.

III. The Senate's advice and consent is subject to the following declarations:

- (1) That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.
- (2) That it is the view of the United States [in regard to restrictions on rights] that states Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, Article 5, paragraph 2, which provides that fundamental human rights existing in any state Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to Article 19, paragraph 3, which would permit certain restrictions on the freedom of expression. The United States declares that it will



continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations.

- (3) That the United States declares that it accepts the competence of the Human Rights Committee to receive and consider communications under Article 41 [state-to-state complaints] in which a state Party claims that another state party is not fulfilling its obligations under the Covenant.
- (4) That the United States declares that the right referred to in Article 47 [savings clause on natural wealth and resources] may be exercised only in accordance with international law.

IV. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:

Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.<sup>390</sup>

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390. 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992).