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## Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power

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# TREATY-MAKING AND THE NATION: THE HISTORICAL FOUNDATIONS OF THE NATIONALIST CONCEPTION OF THE TREATY POWER

*David M. Golove\**

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Characteristic of the most enduring constitutional controversies is a clash between fundamental but ultimately irreconcilable principles. Unable to synthesize opposing precepts, we visit and revisit certain is-

sues in an endless cycle. Each generation marches forward heedless, and sometimes only dimly aware, of how many times the battle has already been fought. Even the peace of exhaustion achieves only a temporary respite.

The abiding controversy over the relationship between the treaty power of the national government and the legislative powers of the states is paradigmatic in this respect. Beginning as early as in the first debate over ratification of the Articles of Confederation in the Virginia state legislature in 1777 — recurring time and time again throughout the Eighteenth, Nineteenth, and early Twentieth centuries, building to a climax in the Supreme Court's famous 1920 decision *Missouri v. Holland*,<sup>1</sup> continuing in the 1950s with the Bricker Amendment controversy, and reemerging as recently as last year in an article published in this *Review*<sup>2</sup> — the issue has been among the most passionately disputed questions in our constitutional history. Although temporarily in hibernation, it threatens presently to break out again into full-blown conflict.<sup>3</sup>

Can the federal government enter into treaties on subjects that are otherwise beyond Congress's legislative powers? Consider some typical examples from the nation's past: treaty stipulations overriding traditional state laws preventing aliens from owning real property (circa 1795), impinging on the South's "peculiar institution" (circa 1823), overriding a state's *Plessy*-sanctified policy of maintaining separate but equal schools for resident Japanese schoolchildren (circa 1907), and mandating a national anti-segregation policy (circa 1950).<sup>4</sup> In

1. 252 U.S. 416 (1920). The vote was seven to two, with Justices Van Devanter and Pitney dissenting without opinion. For the full text of this opinion, see Appendix *infra* pp. 1316-19.

2. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 391 (1998).

3. Most recent articles have defended *Missouri*. See, e.g., Martin S. Flaherty, *Are We to Be a Nation?: Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1297-316 (1999); Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENTARY 33, 46-49 (1997); Gerald L. Neuman, *The Nationalization of Civil Liberties*, 99 COLUM. L. REV. 1630, 1645-47 (1999); Carlos Manuel Vásquez, Breard, Printz, and the Treaty Power, 70 U. COLO. L. REV. 1317, 1337-43 (1999); Thomas Healy, Note, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726 (1998). Professor G. Edward White, without clearly endorsing a position one way or the other, seems highly critical. See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 62-76 (1999); see also Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 576-78 (1997) (arguing that persistent Senate resistance to human rights treaties affecting the states evidences a limitation on, or even a repudiation of, *Missouri*). Professor Bradley's article is one key part of a wide-gauged states' rights attack on the constitutional law of foreign affairs, which he and his sometimes co-author Jack Goldsmith have launched in recent years. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997).

4. Each of these controversies provoked widespread and impassioned national debate and a virtual flood of commentary. For the Jay Treaty debate, see *infra* Sections II.B.1.a, b,

each of these cases, it was widely agreed contemporaneously that Congress's legislative powers were incapable of reaching so far into the internal affairs of the states. Were treaties? Translated into the present: Can the national government enter into a treaty outlawing the death penalty as a violation of universal human rights, even if Congress's legislative powers would otherwise not extend that far?

Pitted against each other in the debate are two fundamental postulates: on the one hand, the overriding imperative to present a unified national front in negotiations with foreign countries in order to maximize our influence and protect and advance our national interests in the perilous realm of foreign affairs; on the other hand, the principle of local decisionmaking embodied in the Tenth Amendment.<sup>5</sup> The potential for collision is obvious and, at least in theory, of the most portentous character. This prospect has been exacerbated, moreover, by the highly intermittent character of treaty-making. The sudden appearance of a treaty intruding on a field in which Congress had never before regulated understandably tended to upset long-settled expectations of exclusive state authority. When the subject matter of a treaty was tied up with the question of race, as has repeatedly been the case, the combination of circumstances was apt to, and often did, prove explosive.

The cyclical nature of the debate, however, should not obscure the essentially straightforward character of the constitutional question. Nothing said thus far has been intended to intimate that the Constitution is subject to two equally compelling constructions. Notwithstanding two hundred years of impassioned efforts by states' rights advocates to deny the obvious, the text and structure of the Constitution, as well as original intent, leave little room for serious debate. Faced with overwhelming arguments against their view, states' rights proponents have understandably chosen to retreat to arguments from first principles rather than attend to careful analysis of text and structure. Nor does history offer them any greater comfort. Although the issue has never been free from substantial controversy, the dominant view throughout most of our history has affirmed the so-called "nationalist view." The "states' rights view" predominated, if ever, only during the antebellum struggle, when the issue became entangled with the slavery question and the accompanying states' rights dogmas of the day.

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c; for the controversy over the so-called Negro Seamen Act, see *infra* Section II.B.2; for the Japanese schoolchildren controversy, see *infra* Section II.B.3.d; and for the Bricker Amendment controversy and its roots in segregationist policies, see *infra* Section IV.C. The Japanese schoolchildren debate provoked the writing of at least four books and countless articles on the subject. See *infra* notes 590-597 and accompanying text.

5. See U. S. CONST. amend. X.

There is, of course, another overriding consideration in favor of the nationalist view: the Supreme Court authoritatively resolved the question eighty years ago in *Missouri v. Holland* and has never shown any inclination, even in recent decisions, to reconsider that landmark decision. Indeed, it forcefully reaffirmed the essential holding of *Missouri* in the midst of an extended campaign, led by Senator Bricker during the 1950s, to overrule the decision through constitutional amendment.<sup>6</sup> Given a seven-to-two decision rendered by a Court well known for its sensitivity to federalism concerns — a decision that has been on the books for eighty years, repeatedly reaffirmed and never questioned by the Court, and the object of a highly publicized but failed effort to amend the Constitution — it is difficult to see what justification there could be now for overruling such a venerable decision. Yet, that is precisely what Professor Curtis Bradley forcefully advocated in *Treaty Power and American Federalism*, recently published in this *Review*.<sup>7</sup> It is to defending the correctness of *Missouri* that I devote the following pages.

To be sure, Justice Holmes's brilliantly compressed opinion — it spans only five pages in the *United States Reports* — has been and continues even today to be widely misunderstood. This is due in part to the opinion's deceptive blandness. It seems almost a parody that a century and a half of intense constitutional controversy should come down to Justice Holmes's question: If an act regulating migratory birds is unconstitutional as beyond Congress's constitutional powers, can a migratory bird treaty followed by the same act be valid? Even more puzzling is Holmes's impassioned rhetoric: what provoked him, in the opinion's most celebrated passage, to invoke the bloodshed of the Civil War in justification of a migratory bird treaty? As we shall see, notwithstanding the abiding mysteries, all of the essential reasoning in support of the nationalist view can be unearthed from the cryptic passages of Holmes's brief text.

More importantly, the most recent attacks on *Missouri* contend that its holding finds no support in history. This is not a new claim. Indeed, many have viewed the decision as descending like a bolt of lightning out of a clear blue sky.<sup>8</sup> But this is simply false. Historical

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6. See *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion of Black, J.). For discussion of the case, see *infra* notes 692-694 and accompanying text.

7. Bradley, *supra* note 2.

8. This is by no means limited to proponents of the states' rights view. See, e.g., CLINTON ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 217 (1964) (viewing *Missouri* as "the breath-taking case in which Justice Holmes, in effect, converted the treaty-making power into a constitutional basis for laws that Congress was not otherwise authorized to enact"); Bradley, *supra* note 2, at 421 n.178 (characterizing Charles Butler, in 1902, as "the first scholar to directly challenge the view that the treaty power was limited by the reserved powers of the states"); Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 351 n.464 (1990) ("The eternal puzzle of *Missouri v. Holland* is, of course, why Holmes went out of his way to intimate that treaty power is not limited by the

support for the nationalist view goes back as far as the Republic itself, and *Missouri* was the climactic finale to an intense national controversy over the extent to which the treaty power could override state laws discriminating against aliens, particularly Chinese and Japanese residents of the western states.<sup>9</sup> Equally important, the Court decided it under the long shadow of the Treaty of Versailles, which was before the Senate at the same moment *Missouri* was being argued. It was well known that Versailles would soon give birth to the first human rights conventions on the problem of child labor. The Court thus self-consciously opened up the possibility that its own controversial decision in *Hammer v. Dagenhart*,<sup>10</sup> rendered only two years before *Missouri*, might be avoided through the ratification of an international human rights treaty.

In Part I, I set out the basic textual and structural arguments that support the nationalist view. In Part II, I turn to the history of the *Missouri* issue. I first consider how the problem arose and was dealt with under the Articles of Confederation. This practice provides an essential backdrop for understanding how the Framers dealt with the problem in drafting the Constitution and underscores why they believed that the federal treaty power would necessarily have to be plenary in scope. I then examine the discussions in Philadelphia, in the state ratifying conventions, and in the *Federalist Papers* for the evidence they provide of the Founders' purposes and understandings. Next, I turn to the post-ratification history, beginning with the great national debate provoked by the Jay Treaty in 1795-96, running through the antebellum period, and continuing through the post-Civil War period and the early twentieth century up to the Court's decision in *Missouri*. This survey requires extensive consideration of the practices of the political branches (especially the President and the Senate), the decisions of the Court, the recurring national debates over the question, and the views of leading commentators. In this Section, I bring out a good deal of previously unknown, or in some cases little known, historical material in an effort to shed new light on the subject.

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Constitution's ordinary rules of federalism. Holmes could have demurely placed controls on migratory birds within regulation of interstate and foreign commerce, and then decided only that treaty power extends at least as far as Congress' enumerated legislative powers." As will become evident, these views are radically inconsistent with the facts.

9. It was not, unfortunately, the end of the long struggle over whether state laws discriminating against aliens, particularly Chinese and Japanese, were unconstitutional violations of equal protection. Even in *Oyama v. California*, the Court held only that states cannot discriminate against U.S. citizens of foreign descent, but did not answer the question regarding aliens. 332 U.S. 633 (1948).

10. 247 U.S. 251 (1918) (striking down a congressional effort to regulate child labor as beyond Congress's enumerated powers). Of course, it was known that there would be a whole series of labor conventions on subjects that were, under *Hammer*, beyond Congress's regulatory authority.

In Part III, I consider the *Missouri* opinion itself. Once situated in its historical context, Holmes's heretofore opaque language is transformed into a straightforward, and profound, rehearsing of the basic arguments in favor of the nationalist view. Contrary to the speculations of even some of Holmes's most sensitive interpreters, the opinion ultimately rests on standard constitutional premises (text, structure, precedent, and history) — indeed, originalist premises — not on an extraordinary theory of inherent foreign affairs powers or even on a view of the Constitution as an evolving or living text. In Part IV, I turn to the post-*Missouri* history, including a brief look at the Bricker Amendment controversy. Finally, in Part V, I consider the most recent arguments in favor of the states' rights view, principally as articulated by Professor Curtis Bradley last year in this *Review*.

## I. TEXT, STRUCTURE, AND THE TREATY POWER

*Missouri* famously presented the question of whether the treaty power is limited to those subjects over which Congress has regulatory authority, or, more pointedly, whether treaties can deal with matters which would otherwise be within the “reserved” powers of the states. I begin by situating this question within the constitutional text and clarifying the precise issue at stake. Much of the sting in the states' rights position derives from misunderstandings, bred by the exaggerated claims about the scope of *Missouri*'s holding. I then set out the main textual and structural arguments for the nationalist view. Although I believe that these arguments are sufficient in themselves to justify the nationalist position, I leave whatever ambiguities that remain to be answered by history.

### A. *The Constitutional Setting*

A number of provisions are directly pertinent to the inquiry. Most important is the Treaty Clause itself, which resides not in Article I, but in Article II. It grants the President the “Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>11</sup> The Supremacy Clause, in turn, declares that the Constitution, the laws of the United States made pursuant thereto, and “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>12</sup>

Although these provisions might seem sufficient without more, the Constitution does not rest with an unqualified delegation of authority

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11. U.S. CONST. art. II, § 2, cl. 2.

12. U.S. CONST. art. VI, § 2.



and express declaration of federal supremacy. Article I, Section 10 explicitly makes the grant exclusive: "No State shall enter into any Treaty, Alliance, or Confederation."<sup>13</sup> It then adds: No state, without the consent of Congress, shall "enter into any Agreement or Compact with another State, or with a foreign Power."<sup>14</sup>

Nor is the constitutional division of power over the conduct of diplomatic negotiations left implicit. The President is given the power to receive and appoint ambassadors and thus exercise control over all diplomatic discussions.<sup>15</sup> There has never been any serious question that all formal diplomatic communications with foreign states are to be under his exclusive control and that not only the states, but Congress itself, is entirely excluded from the field.<sup>16</sup>

It is clear, then, that the whole treaty power is "delegated" to the federal government and specifically "prohibited" to the states. Nevertheless, proponents of the states' rights view rest their textual case on the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>17</sup>

13. U.S. CONST. art. I, § 10, cl. 1.

14. U.S. CONST. art. I, § 10, cl. 3. This provision is widely referred to as the "Compact Clause."

15. In addition to the Treaty Clause, see U.S. CONST. art. 2, § 2, cl. 2 (granting the President the power to appoint ambassadors, other public ministers, and consuls), and *id.* § 3 (granting the President the power to receive ambassadors and other public ministers).

16. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 41-42 (2d ed. 1996); David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1890-91 (1998). The Articles of Confederation were explicit in this respect. "No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from . . . any king, prince, or state . . ." ARTICLES OF CONFEDERATION AND PERPETUAL UNION, art. VI [hereinafter ARTICLES OF CONFEDERATION]. Nevertheless, even to the strictest of strict constructionists, it was always clear that the same principle applied under the Constitution:

Now, how is a state to hold communications with [foreign] nations? The states neither send nor receive ambassadors to or from foreign nations. That power has been expressly confided to the federal government . . . Every part of [the Constitution] shows that our whole foreign intercourse was intended to be committed to the hands of the general government; and nothing shows it more strongly than the treaty-making power, and the power of appointing and receiving ambassadors; both of which . . . undoubtedly belong exclusively to the federal government. It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities.

Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575-76 (1840) (Taney, C.J.). This does not mean that state officials cannot communicate with representatives of foreign nations; what they cannot do is conduct formal diplomatic relations. Where the line should be drawn may sometimes be difficult to determine. For recent developments challenging traditional understandings, see EARL H. FRY, *THE EXPANDING ROLE OF STATES AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS* (1998).

17. U.S. CONST. amend. X.

### B. Clarifying the Issue

At the outset, it is crucial to specify precisely what is, and what is not, at issue. States' rights proponents have often made wild claims about *Missouri* — most dramatically, that it holds that treaties are not subject to the Constitution, or at least not to federalism limitations of any kind. For the most part, these claims have been tactical.<sup>18</sup> Because they have nonetheless been misleading, it is necessary to begin by clearing out some confusing underbrush.

It has been understood from the beginning — and has been repeatedly affirmed by the Supreme Court before, after, and even in *Missouri* — that treaties, like all other governmental acts, are subject to the Constitution. This means that a provision in a treaty that contravenes any of the specific prohibitions on governmental conduct contained in the Bill of Rights, the Fourteenth Amendment, or elsewhere is unconstitutional and void as a matter of domestic law.<sup>19</sup> This much is common ground.

Likewise, it has always been accepted that treaties are limited by separation of powers principles. Although treaties create law under the express command of the Supremacy Clause and in that sense over-

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18. Proponents of the Bricker Amendment emphasized this point and included language in their proposed amendment to emphasize that treaties were subject to the Constitution. See *infra* notes 676, 688, 693 and accompanying text. It was fairly clear even then that this was a political move designed to garner support for the amendment, which was really focused on other concerns — for example, overruling the actual holding in *Missouri*. See *infra* notes 674-689 and accompanying text. The principal object of the Brickerites was to ensure that the United States would not become a party to any human rights treaties. Although the movement was prompted by a number of different concerns — hostility to the United Nations and to Franklin Roosevelt, virulent anti-communism, and nativism, among others — the principal underlying motivation was the concern that human rights treaties would prohibit segregation on the basis of race. *Missouri* would then give Congress constitutional grounds for adopting national anti-segregation or anti-lynching laws, which, it was then believed, would otherwise be beyond its legislative powers. See *infra* notes 673-675 and accompanying text.

19. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 302(2) (1987) [hereinafter RESTATEMENT (THIRD)]; *id.* § 302 cmt. b & reporter's note 1. For judicial opinions, see, for example, *Reid v. Covert*, 354 U.S. 1, 16-17 (1957), and *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890). For early affirmations by commentators, see, for example, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1502, at 355-56 (1833), and John C. Calhoun, Speech in the Commercial Convention with Great Britain (Jan. 9, 1816), in 2 THE WORKS OF JOHN C. CALHOUN 123, 132-33 (Richard K. Cralle ed., 1864) [hereinafter WORKS OF CALHOUN]. For extended discussion of the issue, see HENKIN, *supra* note 16, at 185-89. Whether an unconstitutional treaty would be void as a matter of international law is another question. That question, however, does not turn on domestic constitutional law, but upon international law, specifically the law of treaties. See Vienna Convention on the Law of Treaties, May 23, 1969, arts. 46, 47, 1155 U.N.T.S. 331, 343-44 (stating the circumstances under which a state can avoid the obligations of a treaty entered into in violation of its constitution, where the violation was manifest and concerned a rule of its internal law of fundamental importance). For discussion, see HENKIN, *supra* note 16, at 188, and Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 814 n.47, 844-45, 902 n.464 (1995).

ride the ordinary processes for the adoption of legislation,<sup>20</sup> they are in principle subject to the separation of powers restrictions that are applicable to ordinary acts of Congress. For example, just as an act of Congress could not transfer the power to execute the law from the President to, say, a committee appointed by Congress, so too a treaty attempting such a transfer would be unconstitutional.<sup>21</sup> More realistically, the Article I, Section 9 injunction that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" applies as much to treaties as to any other act of governmental authority.<sup>22</sup> A treaty cannot appropriate money.<sup>23</sup>

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20. More precisely, under the command of the Supremacy Clause, self-executing treaties create enforceable domestic law without legislative implementation. Non-self-executing treaties do not. See HENKIN, *supra* note 16, at 198-204; Carlos Manuel Vásquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 695 & n.7 (1995). To become enforceable domestic law, non-self-executing treaties require legislative implementation, and it is then the implementing legislation, rather than the treaty itself, which creates domestic law. For current controversy over the self-executing treaty doctrine, compare John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and The Original Understanding*, 99 COLUM. L. REV. 1955 (1999), and John C. Yoo, *Rejoinder, Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999), with Martin S. Flaherty, *Response, History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999), and Carlos Manuel Vásquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999).

21. For discussion of the application of the principles of the separation of powers to treaties, see, for example, HENKIN, *supra* note 16, at 194-96; 1 WESTEL WOODBURY WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* §§ 206, 216, 218, at 480-84, 504, 507 (1910); QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* §§ 52-66, at 95-120 (1922). Calhoun said: "No treaty can alter the fabric of our government, nor can it do that which the constitution has expressly forbidden to be done; nor can it do that differently which is directed to be done in a given mode, — all other modes being prohibited." Calhoun, *supra* note 19, at 133. Even earlier, during the Jay Treaty controversy, Hamilton fully endorsed the nationalist view of the treaty power, but explicitly affirmed, at the same time, that treaties are subject to the separation of powers:

A treaty . . . cannot transfer the legislative power to the Executive Department nor the power of this last Department to the Judiciary; in other words it can not stipulate that the President and not Congress shall make laws for the U[nited] States; that the Judges and not the President shall command the national forces &c.

Alexander Hamilton, *The Defence No. XXXVI* (Jan. 2, 1796), reprinted in 20 THE PAPERS OF ALEXANDER HAMILTON 3, 6-7 (Harold C. Syrett ed., 1974) [hereinafter 20 HAMILTON PAPERS].

22. U.S. CONST. art. I, § 9, cl. 7.

23. Although a treaty cannot appropriate money, it can promise to make payments. Carrying out that promise is necessarily left to congressional implementation. See, e.g., HENKIN, *supra* note 16, at 203; 1 WILLOUGHBY, *supra* note 21, § 206, at 480-84. Hamilton agreed:

As to the provision, which restricts the issuing of money from the Treasury to cases of appropriation by law, and which from its intrinsic nature may be considered as applicable to the exercise of every power of the Government, it is in no sort touched by the Treaty. The constant practice of the Government, the cause of an expenditure or the contract which incurs it, is a distinct thing from the appropriation for satisfying it . . . . So, the Treaty only stipulates what may be a cause of Expenditure. An appropriation by law will still be requisite for actual payment.

More important for present purposes, despite the rhetoric of states' rights proponents, treaties are not immune from federalism limitations, and nothing in *Missouri* suggests the contrary.<sup>24</sup> Thus, for example, states are guaranteed "a Republican Form of Government,"<sup>25</sup> and nothing in a treaty can contravene that assurance. Nor, as Justice Field put it, could a treaty require "a change in the character . . . of one of the States."<sup>26</sup> Of course, it is difficult to imagine realistic scenarios in which treaty stipulations would violate these general limitations. Were such a case to arise, however, the treaty would undoubtedly infringe on "an incident of state sovereignty" implicit in the constitutional structure.<sup>27</sup> More pointedly, under the traditional view,

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Hamilton, *supra* note 21, at 20-21. See also Calhoun, *supra* note 19, at 133. For further discussion of the relationship between treaties and the separation of powers, see *infra* notes 53, 292, 711-717 and accompanying text.

24. Professor Bradley seems to suggest the contrary. See Bradley, *supra* note 2, at 391, 400, 409 (referring to "the purported immunity of the treaty power from federalism limitations," and claiming that under *Missouri* "the treaty power is immune from" the limitations of the Supreme Court's recent decisions protecting state sovereign immunity).

25. U.S. CONST. art. IV, § 4.

26. *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); see also John C. Calhoun, A Discourse on the Constitution and Government of the United States, in 1 WORKS OF JOHN C. CALHOUN 111, 203-04 (Richard K. Cralle ed., 1851).

[The treaty power] can enter into no stipulation calculated to change the character of the government; 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.

*Id.* at 204. The question of whether a treaty can cede the territory of a state — and if so, under what circumstances — has been controversial from the first. For discussion, see HENKIN, *supra* note 16, at 465-66; *infra* notes 159-166, 196-207, 210-211, 216, 431, 564 and accompanying text.

27. *New York v. United States*, 505 U.S. 144, 157 (1992); see also HENKIN, *supra* note 16, at 193-94; WRIGHT, *supra* note 21, § 50, at 88-89 (noting that the "national guarantee of territorial integrity and a republican form of government to the states limits the treaty power"). As Professor Henkin explains:

*Missouri v. Holland*, I stress, did not say that there were no limitations on the Treaty Power in favor of the states, only that there were none in any 'invisible radiation' from the Tenth Amendment. The Constitution probably protects some few states' rights, activities, and properties against any federal invasion, even by treaty. Justice Field (and others) said that without a State's consent its territory could not be ceded by treaty to a foreign country. Because 'The United States shall guarantee to every State in the Union a Republican Form of Government', the treaty-makers presumably could not adhere to a treaty that would modify the republican form of government of the states (or of any state). 'A well-regulated militia, being necessary to the security of a free state', and the right to train the militia and appoint its officers being expressly reserved to the states (subject to Congressional regulation), could the United States agree to abolish all state militia, for example in a treaty for general and complete disarmament? There are perhaps remnants of state sovereign immunity that might stir questions about a hypothetical treaty — say, a disarmament agreement with inspection provisions that permits intrusion upon the statehouse, or a treaty that commands state legislatures to adopt laws or that coopts state officials.

the treaty power extends only to subjects proper for negotiation and agreement among nations.<sup>28</sup> A treaty that violates this limitation would be beyond the scope of the treaty power and thus would invade the sphere "reserved" to the states by the Tenth Amendment.

The fact that treaties are not exempt from normal constitutional restraints does not necessarily mean that those restraints apply in precisely the same way to treaties as to statutes. Treaties often deal with subjects that are quite distinct from those typically dealt with in domestic regulations, and they are generated in an altogether different context — they are not edicts issued by a legislative body to the citizens but contracts between sovereign powers. As a consequence, there is a need for greater flexibility in international negotiations, where the benefits of cooperative relations can only be achieved by accommodating the interests and views of different political and legal traditions in mutually agreeable contracts. The prohibitions of the Bill of Rights and the requirements of the separation of powers may, therefore, sometimes require a somewhat more forgiving construction when applied to treaties.<sup>29</sup> This same notion applies equally to federalism limitations. The differential treatment in these cases arises not from any immunity from constitutional restrictions, but from the special considerations that apply in the treaty context. Treaties have no general license to violate the immunities of states any more than they may violate the rights of individuals.

In this regard, consider the longstanding debate over whether the Founders intended the Eleventh Amendment to apply to treaties and, if so, in what kinds of cases.<sup>30</sup> The question is not whether treaties are

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HENKIN, *supra* note 16, at 193-94. By quoting Professor Henkin, I do not mean to endorse each of the particular limitations he sketches. For discussion as to whether recent Supreme Court doctrines expanding the field of state sovereign immunity apply to the treaty power, see *infra* notes 30-35, 704-705, 741 and accompanying text.

28. For discussion of the traditional limits on the scope of the treaty power, see *supra* note 26; *infra* notes 39, 41-42, 61, 131-134, 256-257, 291-292, 424-431, 435, 480-481, 557, 560, 564, 624, 720-721, 724-739, 747-748 and accompanying text.

29. In *Boos v. Berry*, 485 U.S. 312, 324 (1988), the Court left open the possibility that First Amendment analysis might have to be adjusted to account for the special needs of the diplomatic context. Similarly, consider the special difficulties presented by the stipulation in the treaty purchasing Louisiana from France which granted French vessels calling at the port in New Orleans exemptions from the ordinarily applicable duties for twelve years. That provision seemed to violate the prohibition on giving preferences to the ports of one state over those of another. See U.S. CONST. art. I, § 9, cl. 6. Did the treaty context call for a more latitudinarian construction? For discussion of the extended controversy over the question, see EVERETT SOMERVILLE BROWN, *THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE, 1803-1812*, at 74-83 (1920). The issue was later revisited in the *Insular Cases*. See *Downes v. Bidwell*, 182 U.S. 244, 253-56 (1901). For a more in-depth treatment of the application of the separation of powers in the treaty context, see WRIGHT, *supra* note 21, at §§ 52-66, at 95-120.

30. Compare John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1899-920 (1983) (arguing the Eleventh Amendment did not protect states from suits brought under Article III to enforce treaties),

exempt from constitutional or even federalism restrictions generally, but whether the particular immunities protected by the Eleventh Amendment should be carried over into the treaty context and, if so, how. The same applies to state immunities which the Supreme Court recently found implicit in the constitutional structure — the anti-commandeering principle of *New York v. United States*<sup>31</sup> and *Printz v. United States*,<sup>32</sup> and the sovereign immunity principle of *Seminole Tribe v. Florida*<sup>33</sup> and *Alden v. Maine*.<sup>34</sup> Whether these immunities apply in the treaty context and to what extent remain open questions about which there already has been and will continue to be substantial disagreement.<sup>35</sup> It should be clear, however, that nothing in *Missouri* purports to provide a definitive answer. The reason is straightforward: these decisions proclaim affirmative constitutional immunities of states. That is not to say that some of the concerns that animate *Missouri* are not relevant. Plainly, they are. The point is that the textual and structural considerations that underwrite *Missouri*, though overlapping, are also different and that *Missouri* itself does not compel any particular outcome.

If *Missouri* is not about any of these questions, then what exactly is it about? The most perspicacious formulation of the issue is, in my view, as follows: The question is whether the treaty power is properly conceived as an independent grant of power “delegated” to the na-

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and William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1285-87 (1989) (similar), with Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 114-15 (1989) (arguing for the contrary view), and Calvin R. Massey, *Correspondence: Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 118, 119-21 (1990) (responding to Professor Fletcher). The recent Supreme Court decision in *Breard v. Greene*, 523 U.S. 371, 37 (1998), tentatively suggests that treaties may be subject to the Eleventh Amendment. See Carlos Manuel Vásquez, *Breard and the Federal Power to Require Compliance with ICI Orders of Provisional Measures*, 92 AM. J. INT'L L. 683, 688 (1998); see also RESTATEMENT (THIRD), *supra* note 19, § 302 reporter's note 3 (noting that “[c]onstitutional limitations protecting States' rights against invasion by the federal government presumably would apply as well to any such invasion by treaty . . . for example, the limitations in the Eleventh Amendment, or those implied in the guarantee of a republican form of government”).

31. 505 U.S. 144 (1992) (finding an implicit prohibition against Congress “commandeering” state legislatures into adopting federal regulatory programs).

32. 521 U.S. 898 (1997) (extending the anti-commandeering principle to state executive officials).

33. 517 U.S. 44 (1996) (finding that the sovereign immunity of states from suit in federal court cannot be abrogated by Congress when acting under the commerce power).

34. 119 S. Ct. 2240 (1999) (extending *Seminole* to state courts). I do not consider *Seminole Tribe* and *Alden* to be, strictly speaking, Eleventh Amendment cases, notwithstanding the tortured history of the Court's “Eleventh Amendment” jurisprudence.

35. Compare, e.g., Neuman, *The Nationalization of Civil Liberties*, *supra* note 3, at 1650-55 (arguing that the anti-commandeering principle is inapplicable), and Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1260 (1995) (same), with HENKIN, *supra* note 16, at 467 n.75 (suggesting that the principle may apply to treaties).

tional government or as only an alternative mode of exercising the legislative powers granted to Congress in Article I of the Constitution. If it is a separate “delegated” power, then no question of “reserved” powers under the Tenth Amendment can arise. The power is to be exercised in accordance with the object of the grant and without regard to whether Congress, under some other head of power, could otherwise regulate the subject matter. Under this view — the nationalist view — the treaty power is the same as any of the other enumerated powers, except that it is granted to the President and Senate in Article II, rather than to Congress in Article I. In contrast, the states’ rights view, at least in its most plausible formulation, denies that the treaty power is, in the relevant sense, “delegated.” Rather, it is just another method for exercising the powers given to the national government in Article I. For example, since Congress can regulate foreign commerce by passing tariff laws, so too the President and Senate can regulate foreign commerce by making tariff treaties. Just like statutes, however, treaties cannot touch on subjects that are beyond the enumerated powers granted to Congress and thus “reserved” to the states.<sup>36</sup>

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36. I do not mean to suggest that this is the way the states’ rights position has always been formulated. Historically, some states’ rights proponents have conceptualized the problem in this way, *see infra* notes 273-277, 358, 470-471, 530 and accompanying text (discussing examples), but others, including Professor Bradley, *see infra* notes 698-708 and accompanying text, have opted for different approaches. Consider three alternatives: First, there is the view stated in the text. Second, there is a slightly modified, though textually problematic, version under which the treaty power does extend to subjects beyond Congress’s legislative authority but only to those subjects prohibited to the states and hence “reserved” not to the states but to the people. This version of the states’ rights view thus recognizes that the treaty power may itself be the repository of additional powers not delegated to Congress — that is, that it is an independent delegation of authority under the Tenth Amendment — but it limits the scope of the treaty power in dealing with subjects falling outside of Congress’s legislative authority to those which the states are also prohibited from regulating. Third, there is the view that implicit in the Tenth Amendment is an affirmative grant of exclusive state legislative authority over a fixed set of subjects, which are protected against any exercise of federal power. *See infra* notes 470-475, 506, 511-512, 514-519 and accompanying text (discussing examples). Something like this view was most prominent during the antebellum period when states’ rights dogmas were at their peak. Since then, this approach to federal power, which finds no support in the text of the Tenth Amendment and is clearly antithetical to the main line of the Supreme Court’s constitutional jurisprudence beginning with *McCulloch v. Maryland*, has been thoroughly discredited. 17 U.S. (4 Wheat.) 316, 426-27 (1819) (“This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them . . . . It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.”); *see also* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1824). It is surprising, therefore, that Professor Bradley seems to argue for its revival. *See* discussion *infra* at notes 698-708 and accompanying text.

I also note that there are two other lines of argument for justifying *Missouri* which I will not pursue here, but which should at least be acknowledged. The first rests on Justice Sutherland’s famous theory of the foreign affairs powers in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Writing for a seven-to-one majority, Justice Sutherland claimed that the foreign affairs powers are not enumerated but inherent and that, beginning

### C. *The Textual and Structural Argument for the Nationalist View*

The starting point is, of course, the text. From all appearances, the grant of the treaty power is a “delegation” of power like that of all the other delegations of power to the federal government included in the Constitution. Just as Article I, Section 8 provides that “Congress shall have Power To” regulate commerce, declare war, and so on,<sup>37</sup> so the Treaty Clause provides that the President “shall have Power” to make treaties with the advice and consent of the Senate.<sup>38</sup> This unqualified grant of power thus incorporates into the text a familiar term borrowed from the law of nations. Treaties were (and are) binding agreements between states entered into for their mutual benefit.<sup>39</sup> Certainly, had the Framers wished to limit the subject matter of treaties, they could have identified a list of treaties to which the powers of the President and Senate would extend — for example, treaties of peace, alliance, commerce, and so on. Alternatively, the Framers could easily have specified that treaties could be made only on those

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with the Declaration of Independence, they belonged to the national government and not to the states. *See id.* at 316-18. Therefore, they were not granted in the Constitution and do not depend upon the powers enumerated in the text. It goes without saying that this view strongly implies that the treaty power is plenary and is not subject to “reserved” powers limitations of any kind. It probably implies a great deal more. Like many other scholars, however, I do not accept Justice Sutherland’s notion of unenumerated foreign affairs powers and am skeptical about whether the Court today would still endorse his views. For criticisms of *Curtiss-Wright*, see, for example, Charles Lofgren, *The Foreign Relations Power: United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, in GOVERNMENT FROM REFLECTION AND CHOICE 167 (1986). Thus, I will not rest upon his approach in justifying the nationalist view.

The second line of argument is more compelling. Professor Henkin has argued that Congress’s foreign affairs powers, express and implied (not inherent), are plenary and extend to regulating any matter that affects our foreign relations. *See* Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 922-30 (1959). If this is correct, then *Missouri* is of no moment: a treaty on any subject of concern to our foreign affairs would ipso facto fall within Congress’s legislative authority, and no question of “reserved” powers could arise. Even were I to accept this view, however, it would not be appropriate to rely upon it here. *Missouri* is itself an important strut supporting the claim, and it would be circular to cite this doctrine in justifying the ruling in that case. *See id.* at 908-10, 922-30.

37. U.S. CONST. art. I, § 8, cl. 1.

38. U.S. CONST. art. II, § 2, cl. 2. Nor is the treaty power the only other federal power found outside of Article I, Section 8. *See, e.g.*, U.S. CONST. art. III, § 1 (granting power to ordain and establish lower federal courts); *id.* art. III, § 3, cl. 2 (granting power to punish treason); *id.* art. IV, § 1 (granting power to supervise state compliance with the Full Faith and Credit Clause); *id.* art. IV, § 3, cls. 1-2 (granting powers to admit new states and to dispose of and make rules respecting the territory and other property of the United States).

39. Indeed, the accepted international law definition of a treaty is even broader: a treaty is “an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law.” RESTATEMENT (THIRD), *supra* note 19, § 301(1). For discussion of the international law definition, with references to earlier formulations, see HENKIN, *supra* note 16, at 184-85, 455. My qualifying language is added to suggest implicit (constitutional) limits on the scope of the treaty power. *See infra* note 41.



subjects over which Congress had legislative authority.<sup>40</sup> Instead, they chose to make the grant general. The implication is clear: the President and Senate can make treaties on any subject appropriate for negotiation and agreement among states.<sup>41</sup>

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40. Technically, the states' rights view limits not the "subject matter" of treaties but the subject matter of *concessions* that the United States can make in treaties. Even under the states' rights view, there is nothing objectionable about the President seeking to impose obligations on foreign nations that would, if imposed on the United States, fall within the legislative competence of the states. The difficulty arises only when those obligations are made reciprocal. As a practical matter, of course, reciprocal obligations are the norm in international practice. Thus, for example, even under the states' rights view, the President could make a treaty that obligated a foreign state to refrain from imposing the death penalty in return for money or trade or military concessions. For obvious reasons, however, it is extremely unlikely that other nations would be inclined to accept such asymmetrical arrangements. In practice, imposing limits on the subject matter of treaty concessions would ordinarily amount to the same thing as imposing subject matter limits on treaties.

41. The text gives the traditional formulation of the scope of the treaty power. For authorities and discussion, see *infra* notes 61, 131-134, 256-257, 291-292, 424-431, 435, 480-481, 557, 560, 564, 624, 720-721, 724-739, 747-748 and accompanying text. I interpret this requirement to mean that the President and Senate can make any treaty which advances the national interests of the United States in its relations with other nations. Although international law may allow a state to enter into a treaty for any purpose it may have (subject to the principle of *jus cogens*), in my view, the President and Senate may not constitutionally enter into a treaty for the sole purpose of making domestic legislation. See *infra* notes 720-722, 728, 747-748 and accompanying text. With nuances, Henkin appears to agree:

[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 . . . . In this hypothetical case, Canada might be estopped from questioning its character as a treaty; one could nonetheless argue that it is beyond the power of the treaty-makers.

HENKIN, *supra* note 16, at 185, 455. I would only add that even if Canada agreed reciprocally to impose the same uniform divorce law on itself, the treaty would still be unconstitutional if the President and Senate's motivation for making the treaty was unrelated to our relationship with Canada or our foreign affairs more generally but was solely to override Congress and the states and impose what they believed was a particularly worthy divorce code on the United States. If they believed that the United States had no interest in the character of the divorce laws in Canada, and if Canada had no interest in the divorce laws of the United States such that concessions by the United States could advance our interest in good relations with Canada, then the treaty would be a "mock-marriage" and would be unconstitutional whatever its status under international law. Whether a constitutional limitation of the kind I have suggested would be judicially enforceable, and, if so, to what extent and under what circumstances, are wholly separate questions. Nor do I mean to suggest that the United States ever has, or is likely ever to, enter into a treaty in bad faith, as suggested by the hypothetical.

Finally, my approach does not imply that the treaty power is limited to the promotion of the "national interest" in a narrow sense. The national interest certainly includes moral, as well as economic or military, interests. Thus, for example, the President and Senate may promote the nation's moral interests by seeking to ensure respect for the fundamental rights of persons living anywhere in the world and even by deferring on occasion to the views and interests of other nations and peoples. See *infra* notes 756, 771 and accompanying text. The treaty power is thus as compatible with a broadly cosmopolitan, as a narrowly nationalistic, conception of our international relationships. It might be most accurate to say that the treaty power delegates to the President and Senate the power to structure the nature of our relations with other nations through consensual agreement.

This point is underscored, moreover, by a marked contrast between the treaty power and the powers granted to Congress in Article I. In the legislative sphere, Congress's powers are carefully enumerated by subject matter. Congress has the power to tax and spend for the general welfare, to regulate commerce, to coin money, and so on. By direct implication — made express in the Tenth Amendment — those subjects which are not included in the enumerated authorities are left to the states. The very purpose of the enumeration is to divide the whole of the legislative powers of government between Congress and the states. The contrast with the treaty power is striking. The whole treaty power is granted to the President and Senate and specifically denied to the states. There is no enumeration of subject matter because the whole power, like the power over foreign affairs generally, is lodged in the national government. As Calhoun put it:

The limits of the [legislative power] are exactly marked; it was necessary, to prevent collision with similar co-existing States' powers . . . . Exact enumeration on this head is necessary, to prevent the most dangerous consequences. The enumeration of legislative powers in the constitution has relation, then, not to the treaty-making power, but to the powers of the States. In our relation to the rest of the world the case is reversed. Here the States disappear. Divided within, we present the exterior of undivided sovereignty. The wisdom of the constitution, in this, appears conspicuous. Where enumeration was needed, there we find the powers enumerated and exactly defined; where not, we do not find what would be only vain and pernicious. Whatever, then, concerns our foreign relations; whatever requires the consent of another nation, belongs to the treaty-making power . . . .<sup>42</sup>

Nor is it difficult to understand why the Framers made this choice. In 1787, they were acutely aware of the need to present a united front to foreign states. The nation faced menacing perils from abroad, making a common stand against foreign powers a matter of the most urgent necessity. As bitter experience had taught, to limit the flexibility of the federal government in conducting foreign negotiations meant risking war, perhaps even national survival.<sup>43</sup> While much has changed since that time, the international realm is still fraught with dangers and uncertainties. When it comes to advancing our national interests in foreign negotiations, the nation can achieve the most favorable results only by presenting itself as a single nation and thereby maximizing its bargaining position.<sup>44</sup> At times, moreover, safeguard-

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42. Calhoun, *supra* note 19, at 132. For a similar analysis, see Calhoun, *supra* note 26, at 202-03.

43. See *infra* notes 99-102, 137, 144-157, 172-174 and accompanying text.

44. Centralization is beneficial not only from the perspective of the nation as a whole, but also from the perspective of the individual states, since better terms can be won by the national government than could be achieved by the states acting separately. In this respect, it makes no difference whether the subject matter is one that would otherwise fall within the

ing the nation's most vital interests may depend on the ability of the federal government to make treaty concessions on subjects falling within the exclusive legislative competence of the states.<sup>45</sup> Were negotiations on those subjects left to the states, the refusal of a single state to reach satisfactory terms with a foreign nation could embroil the whole country in difficulties and conflict.<sup>46</sup>

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exclusive legislative authority of the states. Thus, for example, consider negotiations over the mutual rights of citizens of the United States and a foreign state to own real property in the territory of the other, and assume, as was the case circa 1795, that the right of aliens to own real property is a matter within the exclusive legislative competence of the states. In comparison with the states acting separately, the federal government may be in a better position to achieve results that are more favorable to the rights of U.S. citizens abroad and less demanding on the states at home. This advantage results from a combination of enhanced bargaining strength which accompanies greater size and power and greater expertise in conducting negotiations in the delicate and complex realm of foreign affairs. For these reasons, centralizing the treaty power is beneficial not only from the perspective of the nation as a whole, but from the perspective of each state separately. Of course, this does not make it an unmixed blessing. For example, some states might simply prefer to refuse to make concessions that would allow aliens to own real property in their territory, notwithstanding the consequences for the rights of their own citizens abroad. Others may feel that the federal government has sold their interests too short. See Spiro, *supra* note 3, at 593-95 (expressing doubts about whether national governments can be expected to represent the interests of subnational units adequately). Nevertheless, even though at times individual states may disagree with federal policy decisions, in the long run all states will be better off, all things considered, having the federal government in control rather than leaving negotiations to the states acting separately.

45. There may be matters of vital national concern in the conduct of foreign states, which, when made the subject of reciprocal concessions, would trench on matters within the exclusive legislative authority of the states. For example, the United States quite arguably has a compelling national interest in ensuring respect for human rights by other nations. Among other things, as has been demonstrated repeatedly across the globe, violations of human rights can lead to instability and can undermine international peace and security. Human rights treaties are one instrument for preventing such occurrences. The national government's ability to uphold international stability, then, may depend upon whether we can enter into human rights treaties that contain mutual concessions on subjects potentially within the exclusive legislative power of the states. For further discussion, see *infra* notes 767-772 and accompanying text.

Flexibility, moreover, is a crucial ingredient in conducting successful negotiations. The United States simply cannot control the matters in which other states take an interest. It is quite possible that a foreign nation will insist on obtaining concessions on a matter within state legislative competence as the price of making other concessions of a political, economic, or even military character. Maintaining good relations or even a military alliance may be on the line. If the national government cannot make the necessary promises, our interests could be severely threatened. To be sure, there must be limits; for example, the constitutional rights of individuals place limits on what can be done by treaty. Every exclusion, however, raises the possibility of undermining our most important national interests. For further discussion of limits on the treaty power, see *infra* note 53 and accompanying text.

46. Even if separate treaties by the fifty states were the equivalent of a single treaty binding the whole country, leaving negotiations to the states would still enable individual states to impose externalities on the rest of the union. What would prevent a single state (or several states) from refusing to grant concessions that were essential to safeguarding the interests of the rest? If the refusal of a single state to deal seriously offended a foreign power, it would direct its ire — whether in the form of diplomatic, political, or economic retaliation, or even the application of military force — on the country as a whole, not on, say, South Carolina alone. See *infra* Section II.B.2. Hence comes the necessity of conceding to the federal government the power to negotiate treaties even on matters within the

It is crucial to understand clearly the nature and object of treaty-making. States' rights proponents tend to confuse the *purpose* of a treaty with the *price* paid for realizing that purpose. The purpose of a treaty is not to adopt domestic regulations at all; that is the *price* of a treaty. The national government enters into treaties in order to protect the rights of United States citizens abroad and to further our foreign policy interests more generally. Those are quintessentially matters within the province of the federal government, over which the states have never claimed nor exercised responsibility. To limit the federal government in the means of advancing these national interests would be to alter the basic theory of the Constitution: federal power extends to achieving national objects irrespective of the powers of the states.<sup>47</sup>

This point bears emphasis. Treaties and legislation are of essentially different characters, and to equate them is to make a category mistake of the first magnitude. It is to misapprehend the difference between a law and a contract. Legislation is the means by which a government regulates the behavior of those subject to its jurisdiction. Treaties, in contrast, are agreements or contracts between sovereign states to do or to forbear from doing certain acts. As with all contracts, they involve mutual concessions by which each party achieves certain of its aims but only at the cost of promising to forgo others.<sup>48</sup> Although the subject matters of treaties and legislation overlap, treaties accomplish what legislation never can: an obligation in the nature of a binding promise on a sovereign, not subject to the legislative ju-

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legislative competence of the states. For a classic nineteenth-century statement of the externalities problem, see *Chy Lung v. Freeman*, 92 U.S. 275, 278-80 (1876) (noting that if California "should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the Federal government?"). Although Professor Spiro has argued that in recent years, the ability of nations to target their sanctions against subunits has increased, see Peter J. Spiro, *Foreign Relations Federalism*, 70 COLO. L. REV. 1223, 1259-70 (1999); Spiro, *supra* note 3, at 585-87, the potentially emerging practices he identifies are still incipient at best, and it is doubtful whether they will ever result in radically changing the prevailing international norms about the responsibility of national governments for the conduct of their subunits. In light of the economic and political interdependence of the states, it is also doubtful whether sanctions targeted at, say, New York could affect only the interests of New York and its citizens.

47. That is one of the key points, I take it, of *McCulloch and Gibbons*. See *supra* note 36; *infra* notes 706-755. For discussion of the breadth of the "national interests," see *supra* note 41.

48. To be sure, contemporary multilateral treaty negotiations look a great deal more like legislating than the more traditional bilateral negotiations of the past. In the crucial respect identified in the text, however, nothing has changed: Legislation is still the act of a recognized sovereign with jurisdiction over those to whom the legislation applies, and the validity of legislative acts is still independent of the latter's consent. In contrast, treaties remain contracts between and among those who recognize no common sovereign with jurisdiction to legislate for them, and therefore treaties still depend for their force upon the consent of each.

isdiction of another, to act, or forbear from acting, in ways that are beneficial to the national interests of that other sovereign.<sup>49</sup>

Treaties, then, are not legislative acts, even though by the Constitution they are declared to be the supreme law of the land and thus operate as laws. They are, rather, contracts through which states promote their national interests in a world made up of other sovereigns over whom they have only limited control. A nation having only legislative authority — a nation without the power to make treaties — would be as hobbled in pursuing its interests as an individual would be in pursuing his own were he denied the power to make contracts. The only difference is that an individual's power to make contracts is less essential because his rights and property are protected by a background set of institutions and guarantees; in contrast, in the more per-

49. Both Hamilton and Calhoun made this point early on. See Hamilton, *supra* note 21, at 8-10; Calhoun, *supra* note 19, at 127-31. For further discussion of Hamilton's view, see *infra* notes 293-294 and accompanying text. For further discussion of Calhoun's views, see *infra* note 531 and accompanying text. To illustrate, pursuant to its power to regulate foreign commerce, Congress may legislatively impose tariffs on imports. But through legislation alone, Congress can never achieve what is the essential characteristic of a tariff treaty: a binding obligation under international law on another state to lower its tariff rates on U.S. products in return for the lowering of tariffs on products of that country imported into the United States. That is the purpose — and the exclusive realm — of the power to make international agreements. As Calhoun explained:

It is proposed to establish some regulation of commerce; — we immediately inquire, does it depend on our will? can we make the desired regulation without the concurrence of any foreign power? If so, it belongs to Congress, and any one would feel it to be absurd to attempt to effect it by treaty. On the contrary, does it require the consent of a foreign power? is it proposed to grant a favor — to repeal discriminating duties on both sides? It is equally felt to belong to the treaty-making power; and he would be thought insane who should propose to abolish the discriminating duties in any case, by an act of the American Congress.

Calhoun, *supra* note 19, at 129.

In this respect, moreover, the legislative powers of the states are limited in precisely the same way as the legislative powers of Congress. In principle, whether exercised by Congress or the states, legislative power can never accomplish what only a binding agreement can. I leave aside the so-called congressional-executive agreement. As I have sought to demonstrate elsewhere, see *supra*, the congressional-executive agreement is an innovation of the World War II-period that established for the first time a power in Congress, in lieu of two-thirds of the Senate, to approve binding international agreements. See Ackerman & Golove, *supra* note 19, at 861-96. When Congress acts in this mode, it is not engaged in legislating in the sense I discuss in the text; it is engaged in international agreement-making, just as the Senate is when it consents to a treaty. For further discussion of congressional-executive agreements and their bearing on the *Missouri* issue, see *infra* notes 784-791 and accompanying text.

Finally, I note that in some cases the President and Senate may agree to a treaty imposing binding obligations on the United States without obtaining reciprocally binding promises in return. Such unilateral treaty obligations would be appropriate in cases where to obtain concessions of a less formal character, the President and Senate nevertheless need to make binding promises on our part. Thus, for example, in order to obtain military cooperation from another nation, the President and Senate may find it necessary to make certain unilateral promises in a treaty. Although there is no reciprocal concession of a binding character, the treaty may still be important in advancing the national interests in our relations with foreign nations.

ilous, anarchical society in which nations interact, the power to contract is a crucial instrument for the securing of their most basic interests. To put it in somewhat archaic nineteenth-century terms, a state without the power to make treaties across the full range of matters appropriate for negotiation and agreement would not be “completely sovereign.”<sup>50</sup>

Recognition of this simple fact lends powerful support to the nationalist view. The real question is not whether there are limits on the scope of the national interests that the President and Senate can seek to safeguard and advance through foreign negotiations — that is, on the *purpose* of a treaty. In this respect, the President and Senate have a virtual *carte blanche*. Rather, the question is whether there are (implied) subject matter limits on the concessions which the President and Senate can make in their efforts to safeguard and advance those interests — that is, on the *price* that the President and Senate may agree to pay. Under the states’ rights view, irrespective of the importance of the national interest that the President and Senate seek to achieve — even, say, if a military alliance were at stake — and irrespective of the consequences, they would be precluded from making concessions on a whole class of subjects simply because legislative power over those subjects is assigned to the states. The President would have to inform his foreign counterparts that those subjects are simply and categorically off the table.

Hobbling the President and Senate in this way would be all the more problematic when combined with the Constitution’s explicit exclusion of the states from the making of treaties.<sup>51</sup> Thus, in seeking to mitigate the damage, the President could not even refer frustrated nations to the states to obtain concessions on those matters which are beyond federal authority. As a practical matter, moreover, if the President and Senate are precluded from making concessions on subjects over which Congress has no legislative authority, then the United States as a whole — both the nation and its constituent parts — would be precluded from making treaties on a range of potentially important subjects otherwise appropriate for treatment by negotiation and agreement. Insofar as other nations insist (as they usually do) upon reciprocal obligations, the federal government would be unable to negotiate, and, by express constitutional prohibition, the states would be unable to pick up the slack.<sup>52</sup>

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50. For a classic statement of the complete “sovereignty” of the United States over all matters pertaining to its foreign affairs, with citations to many other cases to the same effect, see *Fong Yue Ting v. United States*, 149 U.S. 698, 705-06, 711-15 (1892). See also *infra* notes 532, 763 (discussing examples) and accompanying text.

51. See U.S. CONST. art. I, § 10, cl. 1 (prohibiting states from making any “Treaty, Alliance, or Confederation”).

52. In theory, this potential gap might be partly filled in by the Compact Clause, which permits states, with Congress’s consent, to make “agreements and compacts” not only with

sister states but with foreign nations as well. See U.S. CONST. art. I, § 10, cl. 3. The origins and meaning of this clause are famously mysterious. See Abraham C. Weinfeld, *What did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?*, 3 U. CHI. L. REV. 453, 459-64 (1935). Before the twentieth century, however, no one suggested — and it has only rarely been suggested since — that this provision was intended to permit states to conclude all of those international agreements which are beyond the federal treaty power because they touch on subjects over which Congress has no legislative authority. Indeed, to my knowledge, in none of the treaty power controversies during the eighteenth and nineteenth centuries did any states' rights advocate ever suggest that, while the President and Senate could not make a treaty stipulation on a subject "reserved" to the states, the states could. The few early discussions of the Compact Clause instead sought to explain the difference between a prohibited state "treaty" and a permissible "agreement or compact" along entirely different lines. See 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA, app., at 310 (Philadelphia, William Young Birch & Abraham Small 1803) [hereinafter 1 TUCKER] (invoking Vattel's distinction between agreements that are executed once for all and those which last for a longer period or in perpetuity); 3 STORY, *supra* note 19, §§ 1396-97, at 270-72 (criticizing St. George Tucker's view and suggesting that compacts may deal with "questions of boundary; interests in land, situate in the territory of each other; and other internal regulations for the mutual comfort, and convenience of states, bordering on each other"); Weinfeld, *supra*, at 464 (suggesting that the Founders intended to permit agreements concerning boundaries and other related matters). For discussion, see Golove, *supra* note 16, at 1910-11, 1914-15 & n.375. It has been widely assumed that the Founders intended to open only a narrowly limited range of subjects to state negotiations with foreign states. See WRIGHT, *supra* note 21, § 156, at 230 (observing that states can make only "trifling and temporary arrangements" which are "without substantial political and economic effect"); John M. Mathews, *The States and Foreign Relations*, 19 MICH. L. REV. 690, 693 (1920) (observing that "the direct contact of the state governments with foreign governments is, under the Constitution, reduced to a negligible quantity"). Most likely, they had in mind agreements between border states, principally by the northern states and Canada, over highly localized matters. See *Holmes v. Jennison*, 39 U.S. 540, 578-79 (1840) (Taney, C.J.) (seeming to suggest that compacts might properly be made by the northern states with Canada because of the special needs of border states); 3 STORY, *supra* note 19, § 1397. Their expectations in this regard have been fully realized. As late as 1922, Quincy Wright could report that no state had ever attempted to make an agreement with a foreign state under the Compact Clause. See WRIGHT, *supra* note 21, § 156, at 230. Discussions of the treaty power in the eighteenth and nineteenth centuries routinely proceeded as if the states were entirely excluded from the realm of international agreement-making. See, e.g., Mathews, *supra*, at 693-94 (quoting cases). See also *United States v. Rauscher*, 119 U.S. 407, 414 (1886), in which the Court observed in relation to extradition agreements that:

[a]t this time of day, and after the repeated examinations which have been made by this court into the powers of the Federal government to deal with all such international questions exclusively, it can hardly be admitted that, even in the absence of treaties or acts of Congress on the subject, the extradition of a fugitive from justice can become the subject of negotiation between a state of this Union and a foreign government.

*Id.* Also, in *Holmes v. Jennison*, 39 U.S. at 573-74, 578-79, the Court recognized a limited power of states to make compacts under congressional supervision but observed that:

The framers of the Constitution manifestly believed that any intercourse between a state and a foreign nation was dangerous to the Union; that it would open a door of which foreign powers would avail themselves to obtain influence in separate states. Provisions were therefore introduced to cut off all negotiations and intercourse between the state authorities and foreign nations.

*Id.* at 573-74. Leaving the theoretical difficulties aside, if modern practice is a guide, the few actual agreements approved by Congress have involved establishing a port authority for a bridge over the Niagara River, a highway agreement between Minnesota and Manitoba, and a cooperative arrangement in the Northwest for dealing with forest fires. See HENKIN, *supra* note 16, at 153. In any case, moreover, the state power is so hedged by practical obstacles

This is not to suggest that it is essential that a nation be able to make every kind of treaty without limitation. Here, it is crucial to distinguish among various reasons for imposing limits on the treaty power. Some treaties are objectionable because they contravene fundamental substantive principles that apply to all governmental acts, including both legislation and treaties. A treaty that contravenes the First Amendment, for example, would be beyond the treaty-making power, just as a law violating the First Amendment would be beyond the legislative power. The *content* of such a treaty would be objectionable. In contrast, there is nothing objectionable in the *content* of a treaty that deals with a subject for which legislative power happens to be assigned to the state legislatures. Notwithstanding the assignment of legislative authority to one or another legislative body, a treaty of this nature may be of great value to the states individually and to the country as a whole, and be perfectly consistent with the substantive values embodied in the Constitution. If the treaty power does not extend to making such an agreement (or if the treaty power is limited in ways that make concluding such agreements impossible as a practical matter), then there would be a whole class of potentially beneficial, even essential, international agreements that would simply be beyond the power of the United States to conclude. Short of clear constitutional language, there is no basis for attributing such an intent to the Founders. It certainly ought not to be presumed in the face of clear provisions to the contrary.<sup>53</sup>

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that without substantial changes in practice, it could not substitute for a comparable power in the United States. Besides the difficulties of obtaining congressional consent, states have no regular means of engaging in diplomatic discussions, and it remains unlikely that the federal government would permit them to establish independent diplomatic ties. The states are thus seriously handicapped in negotiating international agreements. This helps explain why they failed to make any such agreements during the first one hundred and fifty years after adoption of the Constitution. In recent years, some have argued for a change in this respect, see Spiro, *supra* note 3, at 590-95, and there is some evidence that states have become more assertive on the international front. See *id.*; FRY, *supra* note 16. Whether any substantial change is likely to emerge — and whether it would be constitutionally permissible — remains uncertain. What is clear, however, is that any such change would require a radical revision of traditional constitutional practices and understandings.

53. Similar considerations also distinguish between treaties that violate the separation of powers and treaties that incidentally regulate a matter within the exclusive legislative competence of the states. It is true that governmental action, whether by legislation or by treaty, that violates the separation of powers is not objectionable in the same sense as a treaty that violates the First Amendment. In this respect, the separation of powers and the federal division of legislative power are similar. They are, however, different in another crucial respect. Separation of powers restrictions do not limit the subject matter or content of treaties. They only require that certain subject matters not be regulated in certain ways — that money not be appropriated except as specified in the Constitution, that wars not be initiated without congressional declaration, and so on. Treaties can still deal with these subjects — by forming defensive alliances or by promising to pay money — limited only by the requirement that whatever acts are promised must be carried out in the required manner. In contrast, if treaties that touch on subjects within the exclusive legislative competence of the states are beyond the treaty power, then those subject matters are entirely off limits to international negotiation and agreement. If the federal government cannot make such treaties, no one can.



This problem, of course, is not unique to the United States. The treaty power poses a dilemma for any constitution creating a federal structure. Although there are many possible solutions, the most appealing is surely not to preclude both the national and the constituent governments from making beneficial treaties on certain subjects simply because of the peculiar division of powers devised for domestic legislation. Nor is it practical, in a nation with a large number of sub-units, to subject treaties to the latter's unanimous consent.

Be that as it may, in the case of the United States Constitution, the Founders' choice is clear: they assigned plenary authority over treaties to the national government and excluded the states from any participation. Their reasons for doing so, moreover, were compelling. Even leaving aside the collective bargaining advantages that accrue from a unified negotiating posture, permitting states to carry on formal diplomatic contacts and enter into separate relationships with foreign powers raises the prospect of foreign intrigue, of divided loyalties, and of conflict and competition among the states.<sup>54</sup> The Founders acted decisively to prevent the realization of this potentiality, and the unity of the nation in this respect has never been seriously breached.<sup>55</sup> The consequence, however, is that the federal government must have the power to conclude treaties even when they include concessions on subjects that are within the exclusive *legislative* authority of the states.

Nor were the Founders insensitive to concerns about how the interests of the states would be affected by treaty-making. Out of just these concerns, they created a procedure uniquely sensitive to, and capable of safeguarding, state interests. Treaties are not made through the ordinary majoritarian legislative process. Instead, they have to be approved by a two-thirds vote in the Senate, the organ in which the states are equally represented (and whose members, under the initial design, were appointed by the state legislatures). The point is not that the Senate was assigned the task of policing constitutional limits on the treaty-power. Like all governmental actors, the Senate of course has the duty to ensure respect for the fundamental law. The point, rather, is that the Senate, fortified by a minority veto, was

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In any case, however, there is another difference between treaties which violate the separation of powers and treaties which touch on matters within exclusive state legislative competence. Nothing in the constitutional text suggests that treaties are free of the requirements of the separation of powers. In contrast, the text does strongly suggest that treaties may cover any subject proper for international negotiation. For further consideration of the relationship between the treaty power and the principles of federalism and the separation of powers, see *supra* notes 20-34 and accompanying text; *infra* notes 292, 698-717 and accompanying text.

54. See Chief Justice Taney's discussion of this point in *Holmes*, 39 U.S. at 573-74, quoted *supra* note 52. For further discussion, see *infra* notes 173-174, 179 and accompanying text.

55. *But see infra* notes 174, 534-537 and accompanying text (discussing examples where national unity was potentially threatened by separate state negotiations).

charged with the special *political* task of refusing its consent to any treaty that trenched too far on the interests of the states without serving a sufficiently powerful countervailing national interest. In carrying out these duties, the Senate was to be guided by *political*, not *constitutional*, standards because the need for flexibility made it imprudent, if not impossible, to draw legally defined lines. Although the Founders may not have fully anticipated developments which would change the political dynamics in the Senate, they were certainly correct in the bottom line: the Senate, under the shadow of the minority veto, has actively protected state interests in treaty-making throughout U.S. history.<sup>56</sup> This political safeguard goes a long way in explaining why the Founders felt content with a system that delegated the whole treaty power to the national government.

The textual and structural case for the nationalist view is thus compelling, even overwhelming. Of course, proponents of the states' rights view have pressed a number of counterarguments that will need to be considered. I leave those arguments until the end, however — until after exploring the rich history that gives these textual and structural considerations their flesh and blood, the real substance of a living Constitution.

One final point before turning to the historical materials. Under the Supremacy Clause, some treaties — self-executing treaties — become binding domestic law even in the absence of any congressional implementing legislation. Sometimes, however, treaty stipulations are not self-executing and consequently only become binding rules of decision when executed by Congress.<sup>57</sup> Under the Necessary and Proper Clause, it is quite clear that Congress has the power to adopt legislation executing the provisions of any valid treaty.<sup>58</sup> That Clause provides explicitly that Congress has the power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>59</sup> If the President and Senate have the power to conclude treaties on subjects that are beyond the scope of Congress's legislative powers, then the Necessary and Proper Clause makes clear that Congress has the power to adopt legislation implementing the provisions of such treaties as domestic law. Otherwise, the federal government could undertake, on behalf of the nation, binding obligations which it would find itself powerless to enforce. The treaty power is a

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56. For further discussion and authorities, see *infra* notes 167-170, 178, 425, 695, 748-756, 772 and accompanying text.

57. For discussion of self-executing and non-self-executing treaties, see *supra* note 20 and accompanying text; *infra* notes 708, 799 and accompanying text.

58. See U.S. CONST. art. I, § 8, cl. 18.

59. *Id.* (emphasis added).

power vested in the government of the United States or in a department thereof. Hence, the least controversial portion of Justice Holmes's opinion in *Missouri*: if the President and Senate had the power to conclude a migratory bird treaty with Canada, then Congress had the power to pass legislation implementing the treaty, notwithstanding its lack of authority to pass the same legislation in the absence of the treaty.<sup>60</sup>

## II. THE HISTORICAL ROOTS OF THE NATIONALIST VIEW

A striking feature of the history of *Missouri v. Holland* is the way in which controversy over a relatively narrow constitutional question has recurrently engulfed the nation in controversy, while somehow successfully resisting final resolution. Equally striking is the way in which *Missouri's* doctrine has repeatedly provoked debate over the fundamental nature of the federal system. The history is therefore interesting in its own right as a case study elucidating both the complex processes through which constitutional conflicts journey in the course of time and theories of federalism. There are, however, several more immediate reasons for my extended treatment of *Missouri's* historical underpinnings.

First, because the question of *Missouri's* vitality has been raised once again, the history necessarily becomes relevant. Constitutional interpretation does not occur in a historical vacuum, particularly in regard to fundamental structural questions. Insofar as Professor Bradley relies upon the trend in recent Supreme Court decisions, it is evident as well that history will play a predominant role should the issue ever come before the Court. Second, like many states' rights advocates before him, Professor Bradley claims that *Missouri* is without historical foundation.<sup>61</sup> As will soon be evident, this claim is simply

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60. For further discussion and authorities, see *infra* notes 800-802 and accompanying text.

61. See Bradley, *supra* note 2, at 450 (asserting that "the nationalist view of the treaty power is unsupported by history"); *id.* at 416 & n.148 (asserting that the states' rights view "appear[s] to have been consistent with the prevailing views" at the time of the Founding); *id.* at 421 n.178 (claiming that "the first scholar to directly challenge the view that the treaty power was limited by the reserved powers of the states" wrote in 1902). At one point, Professor Bradley is slightly more equivocal. See *id.* at 410 (noting that the "historical record may not by itself require contemporary rejection of the nationalist view, but it does undermine any strong historical claims for that view"). Given his emphasis on history, the absence of any discussion of evidence supporting the nationalist view also strongly suggests that he believes that such evidence does not in fact exist. See *id.* at 409-29.

Professor Bradley complicates the matter by conflating two entirely different questions — whether the treaty power is limited to those subjects falling within Congress's legislative powers (the "states' rights" view), and whether there are any limitations whatsoever on the subject matter of treaties. To be sure, there is widespread historical support for limits of the latter kind; indeed, they have been so widely recognized from the beginning that it would be difficult to find any historical support for the contrary view. However, Professor Bradley does not argue for general subject matter limitations of the kind that have been recognized

false. Moreover, although defenders of the nationalist view long ago mustered enough history to validate *Missouri's* pedigree, to a surprising extent they too have been ignorant of a great deal of the relevant historical materials.<sup>62</sup> Finally, at the core of Professor Bradley's critique of *Missouri* is the claim that contemporary treaties somehow trench more deeply into areas of state sovereignty than their more traditional forebears. This claim too is false. As we shall see, from the beginning, treaties have invaded the most sensitive spheres of state autonomy and consequently have periodically provoked intense resentment and controversy. Indeed, the most serious conflicts have arisen from treaties affording rights to aliens and hence interfering with state and local policies concerning race — a subject which, to put it mildly, was at the core of traditional notions of state autonomy. Contemporary human rights treaties, which bear a close family resemblance to the most controversial treaties of the past, offer nothing new in this critical respect.

History provides strong support for the nationalist view. It is true that there have always been proponents of the states' rights view, occasionally even leading figures. As we shall see, however, much of the support for that view has been strongly politically motivated; some reflected a conception of the limited nature of the Union that did not survive the Civil War; some arose out of confusion, occasioned by judicial dicta that also stemmed from the controversy over slavery; some was simply disingenuous, remarks made to foreign nations in justification of politically motivated refusals to deal. To be sure, comparable claims might be made about the authorities supporting the nationalist view, but not as pervasively or persuasively. My claim is that from the beginning the nationalist view has been dominant; that this dominance was seriously threatened only during the antebellum struggle over slavery; and that there is a strong line beginning with the Articles of Confederation, running through the Philadelphia and state ratifying conventions, through the great debates of the first generation, continuing on (though more threatened) during the antebellum struggle, revived in the aftermath of the Civil War, and culminating ultimately in *Missouri*. *Missouri* is an originalist decision.

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traditionally. His argument is that *Missouri* was incorrectly decided and that the treaty power is limited in a very particular way — viz, that it cannot, without the consent of the states, touch upon matters that are beyond the legislative powers of Congress. For further discussion, see *infra* notes 696-742, 794-806 and accompanying text.

62. For leading historical accounts arguing in favor of the nationalist view, see CHARLES HENRY BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* (2 vols. 1902); EDWARD S. CORWIN, *NATIONAL SUPREMACY* (1913); and ROBERT T. DEVLIN, *THE TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES* (1908). For the most elaborate effort at a historical rebuttal, see HENRY ST. GEORGE TUCKER, *LIMITATIONS ON THE TREATY-MAKING POWER* (1915).

### A. *Original Intent and the Treaty Power*

I begin with the materials bearing on original intent. In order to appreciate fully the discussions in Philadelphia and the state conventions, it is essential to begin with the practice under the Articles of Confederation. First, the Framers were acting against the backdrop of the previous decade, and they drew heavily upon the extensive store of practical experience that they had gained in the realm of foreign negotiations. It was famously the difficulty of obtaining state compliance with treaties that was among the foremost reasons impelling the movement toward Philadelphia, and that experience left an unmistakable imprint on the text adopted.<sup>63</sup> More than that, however, the Framers self-consciously sought to correct the loopholes and ambiguities in the Articles of Confederation that had repeatedly given rise to states' rights controversies which sometimes threatened seriously to embarrass the conduct of foreign affairs. Second, notwithstanding these controversies, there was, by 1787, a fairly widespread consensus on the broad scope of the treaty power, especially among the most influential figures, and this consensus carried over into the construction of the new system. Finally, the disputes that did arise continued to fester even after the old Confederation died, and, as we will see, they ultimately played a central role in prompting resolution of the *Missouri* issue during the years after the adoption of the Constitution. After examining the experience under the Confederation, I turn to the Philadelphia Convention, the *Federalist Papers*, and the Virginia Ratifying Convention, where the discussions of the treaty power was by far the most extensive.

#### 1. *The Experience Under the Articles of Confederation*

It has often been observed that the pattern for the conduct of American foreign relations for a century or more was established during the Articles of Confederation. In no field is this observation more warranted than in relation to the treaty power. No doubt the explanation lies at least in part in the remarkable assemblage of talents among those who shaped and supervised our foreign affairs during those early years, particularly our principal negotiators — among them, Benjamin Franklin, John Jay, John Adams, and Thomas Jefferson. Be that as it may, the lessons learned during the crisis-ridden decade following the Declaration of Independence inevitably

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63. On this point, see the useful discussion in FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL, FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* (1973).

played a decisive role in shaping the Constitution drafted in Philadelphia in 1787.<sup>64</sup>

It should be no surprise that events quickly provoked conflict over the relationship between the power of the national government to make treaties and the powers of the state governments. Although the treaty power was lodged in the Continental Congress, Congress's legislative powers were highly restricted. Most saliently, it had no power over foreign commerce. Thus, the states retained virtually the entire power of legislation. This division of authority was a recipe for conflict. Charged with the conduct of American foreign affairs, Congress would inevitably seek to make treaties on subjects falling outside the scope of its limited legislative authority. The inevitable quickly became the real, as our negotiators aggressively pursued a commercial treaty with our patron and ally, France, immediately following the issuance of the Declaration.

However, it was not only the inevitable clash between the powers of the states and the subject matter of the various treaties that were proposed, negotiated, and concluded that provoked dispute over the scope of the treaty power. Ambiguities in the provisions of the Articles dealing with treaties seriously exacerbated the problem, giving rise to plausible claims in favor of the states. Moreover, in the agitated politics of the times, it was inevitable that some would be tempted to raise states' rights objections to treaties they opposed principally on other grounds. Even our negotiators would find it hard to resist the expedient of seeking to avert undesirable treaty stipulations, pressed upon them by powerful foreign interlocutors, by claiming constitutional incapacities.

Thus, conflicts over the treaty power and states' rights were recurrent under the Confederation, and while the national government uniformly reaffirmed the broad scope of its authority in each confrontation, states' rights proponents did succeed in creating controversy and uncertainty and sometimes even in seriously subverting Congress's foreign policy initiatives — indeed, so severely as to place the peace of the nation in jeopardy. By 1787, the leading figures responsible for conducting our foreign affairs had learned three crucial lessons: first, that any rigid limitations on the treaty power in favor of the states created a serious potential to embarrass the conduct of our foreign affairs with the most grave possible consequences; second, that the federal government had to have sufficient power to ensure that any obligations it undertook to foreign countries would be observed by the

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64. For accounts of the foreign affairs experience under the Confederation, see, for example, SAMUEL FLAGG BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* 15-84 (4th ed. 1955); SAMUEL B. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 19-43 (1904); 1 GEORGE TICKNOR CURTIS, *HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES* 276-90 (New York, Harper & Bros. 1854); MARKS, *supra* note 63.

states; and third, that to ensure state compliance with the stipulations of treaties, it was essential that treaties supersede any conflicting provisions of state law. All three of these lessons were incorporated into the Constitution they drafted in Philadelphia.

a. *The First Confrontations and the Recurrent Problem of Alien Land Ownership.* The first confrontation over the treaty power arose even before the ink was dry on the Articles of Confederation. The Continental Congress finally agreed upon a text in mid-November 1777 and sent it to the states with a request that the legislatures grant their delegations a power of ratification.<sup>65</sup> Much like the Constitution, the Articles lodged the foreign affairs powers in Congress. Included in Article IX were, most importantly, the “sole and exclusive right and power of determining on peace and war,” “of sending and receiving ambassadors,” and of “entering into treaties and alliances.”<sup>66</sup> Beyond foreign affairs, however, Congress’s legislative powers were strictly limited, and it was denied authority even to implement its foreign affairs powers, consigning it to reliance on the states to carry out the measures decided upon and the obligations incurred.<sup>67</sup>

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65. See 9 JOURNALS OF THE CONTINENTAL CONG., 1774-89, at 907-25, 932-35 (Nov. 15-17, 1777) (1907). For an account of the prolonged negotiations, see MERRILL JENSEN, THE ARTICLES OF CONFEDERATION, 1774-81, at 126-84 (1940). Because of disputes over the extensive western land claims of some of the states, the Articles were not finally ratified until March 1, 1781. See *id.* at 198-238.

66. ARTICLES OF CONFEDERATION, *supra* note 16, art. IX. Among the other foreign affairs powers which the Articles conferred on Congress were the powers to establish rules for captures, to grant letters of marque and reprisal, to establish courts for the trial of pirates and for deciding on appeals in cases of captures, to build a navy, to agree on the number of land forces and make requisitions from the states for their quotas, to appoint officers for the land and naval forces, to make rules for their government and regulation, and to direct their operations. See *id.* In Article VI, the states were precluded from doing the following without Congress’s consent: engaging in war or sending any embassy to, or receiving any embassy from, or entering into “any conference, agreement, alliance, or treaty with any King, Prince, or State.” *Id.*, art. VI. At the same time, however, Congress’s treaty power was limited by a proviso which provided “that no treaty of commerce shall be made, whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever.” *Id.*, art. IX. Correspondingly, the states were prohibited from laying “any imposts or duties which may interfere with any stipulations in treaties entered into by the United States, in Congress assembled, with any King, Prince, or State, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.” *Id.*, art. VI. For further discussion of these last two provisions, see *infra* notes 84-89 and accompanying text. Congress could conclude treaties only with the votes of nine states. See *id.*, art. IX.

67. See ARTICLES OF CONFEDERATION, *supra* note 16, art. IX. Most important, Congress had no power to regulate foreign commerce, which was thus left to the states. Article II provided that “[e]ach State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.” *Id.*, art. II. Of course, the Articles left Congress dependent on the states in a number of other crucial respects — for example, for raising money to fund the war.

Under the leadership of then Governor Thomas Jefferson, Virginia was the first state to act. The Virginia Assembly promptly took up the Articles and, on December 16, overwhelmingly adopted a resolution lending them its approbation.<sup>68</sup> During the discussions, there was only one point which provoked substantial dissension. As Jefferson reported to Adams in a letter, “[o]ne objection only, stuck with them.” According to Jefferson, some members of the legislature were concerned that under the treaty power “the congress would have the whole regulation of our trade.”<sup>69</sup> Advocates for the Articles, in turn,

insisted that Congress would have no such power by the confederation: that a power to treat, did not include *ex vi termini* a power to pass away every thing by treaty which might be the subject of a treaty; and consequently no more gave such power over our commerce than over everything else.<sup>70</sup>

Jefferson reported that the majority was satisfied with this explanation, a view in which he concurred. Out of evident uncertainty about the matter, however, he requested that Congress pass an explanatory resolution “declaring that the Confederation will give them no such powers.”<sup>71</sup>

It is striking that the Virginia legislators immediately perceived the apparent implications of the treaty power, and it remains unclear just how Jefferson and the majority believed the treaty power would be limited. Nothing came of their request for clarification, and their concerns were quickly lost in the mists of time.<sup>72</sup> Indeed, Jefferson himself shortly became one of the foremost advocates of aggressive efforts to regulate commerce through comprehensive commercial treaties.<sup>73</sup>

68. See Letter from Thomas Jefferson to John Adams (Dec. 17, 1777), in 2 THE PAPERS OF THOMAS JEFFERSON 120, 120-21 (Julian P. Boyd ed., 1950).

69. *Id.* at 120.

70. *Id.* The opponents were worried that the commercial states would use treaties to bargain away the interests of the agricultural states in return for commercial privileges. See *id.* In response, proponents pointed to Article II, which limited Congress to those powers which were expressly granted. They argued that such a move could not be justified by a mere “*implication*” from the proviso to the treaty power. See *id.* The proviso, however, only made even more explicit what was already evident in the general grant of the treaty power — that Congress could make commercial treaties, subject to the limitations specified in the proviso.

71. *Id.* at 121. “There remains,” Jefferson wrote Adams, “great anxiety that an article so important should not be laid down in more express terms, and so as to exclude all possible doubt.” *Id.* at 120. He then appealed to Congress for its cooperation in easing Virginia’s agitation: “If the confirming in their affections an assembly which have ever witnessed the highest respect for congress, would be an object with them, I know nothing which would produce that effect more powerfully than such vote passed before the final ratification of the instrument.” *Id.* at 121.

72. Adams never received Jefferson’s letter. Before it arrived, Adams had proceeded to the north to embark on a diplomatic mission to France. See *id.* at 121.

73. See *infra* notes 148-155 and accompanying text.



For its part, Congress answered Virginia's concerns with the negotiation and ratification of an extensive commercial treaty with the French, signed in February 1778.<sup>74</sup> Even before the Articles were formally ratified, then, Congress openly declared its authority to make treaties on subjects that were within the sole legislative powers of the states.

Notwithstanding the potential for controversy, however, the commercial stipulations in the 1778 Treaty of Amity and Commerce with France ("French Treaty") failed to raise any serious objections. It had been contemplated that Congress would make commercial treaties, at least with France and Spain, and both Articles VI and IX of the Confederation had indirectly affirmed this expectation.<sup>75</sup> Following the conclusion of the French Treaty, Congress appointed a large number of commissioners to negotiate commercial treaties with most of the leading powers in Europe, modeling their commissions on the terms of the French Treaty.<sup>76</sup>

One article in the French Treaty, however, did prove to pose more delicate concerns. Article XI provided that subjects of the two countries could own real and personal property in the territory of the other and dispose of it by testament, donation, or otherwise to whomsoever they chose.<sup>77</sup> This stipulation altered the traditional common law rule

74. See Treaty of Amity and Commerce, Feb. 6, 1778, U.S.-Fr., in 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 3 (Hunter Miller ed., 1931) [hereinafter TREATIES]. In fact, Congress began plans for a commercial treaty with France at the same time as it began work on the Declaration of Independence. See CRANDALL, *supra* note 64, at 19-25.

75. See 1 CURTIS, *supra* note 64, at 279. The reference to commercial treaties in the proviso to Article IX's grant of the treaty power clearly signaled Congress's plans, and the point was made even more explicitly in Article VI's reference to "treaties already proposed by Congress to the courts of France and Spain." ARTICLES OF CONFEDERATION, *supra* note 16, art. VI.

76. See CRANDALL, *supra* note 64, at 25-26. Few of these negotiations bore fruit. See *id.* For further discussion, see *infra* notes 93-95, 150-158 and accompanying text.

77. See 2 TREATIES, *supra* note 74, art. XI, at 11-12. The article numbers here refer to the renumbered version of the treaty, denoted by the bracketed numbers in this printing. See *id.* at 32 (note regarding Articles IX and XI). Article XI provided:

The Subjects and Inhabitants of the said United States, or any one of them, shall not be reputed Aubains in France, & consequently shall be exempted from the *Droit d'Aubaine* or other similar Duty under what name soever. They may by Testament, Donation, or otherwise dispose of their Goods moveable and immoveable in favour of such Persons as to them shall seem good; and their Heirs, Subjects of the Said United States, residing whether in France or elsewhere, may succeed them *ab intestat*, without being obliged to obtain Letters of Naturalization, and without having the Effect of this Concession contested or impeded under Pretext of any Rights or Prerogatives of Provinces, Cities, or Private Persons. And the said Heirs, whether such by particular Title, or *ab intestat*, shall be exempt from all Duty called *Droit de Detraction*, or other Duty of the same kind . . . . The Subjects of the most Christian King shall enjoy on their Part, in all the Dominions of the sd States, an entire and perfect Reciprocity relative to the Stipulations contained in the present Article.

*Id.*, art. XI, at 11-12. The *Droit d'Aubaine* and the *Droit de Detraction* were special rules under French law that imposed taxes on alien owned property and in some cases required its

of the states, which denied aliens the right to own real property.<sup>78</sup> Given the close relationship between real property and state sovereignty, the provision was bound to raise questions about the scope of the treaty power. Indeed, as we shall see, this provision, found in the very first treaty of the new nation and repeated in countless treaties thereafter, raised the single issue over which the states' rights and nationalist views of the treaty power would most recurrently contend for the next century and a half. It is somewhat surprising, then, that it passed through Congress without immediate comment.

This silent acquiescence, however, did not last long.<sup>79</sup> When Congress modeled the commissions given to its negotiators on the 1778 French Treaty, it had included provisions similar to Article XI. Thus, for example, on December 29, 1780, it charged John Adams with negotiating a treaty of amity with the Netherlands and specifically directed him in Congress's plan for the treaty to seek reciprocal rights for the subjects of each nation to dispose by will or otherwise of their real and personal property in the territory of the other.<sup>80</sup> A year and a half later, a few members of Congress, among them most notably James Madison, developed doubts about the advisability of this instruction. On behalf of a committee of three, on July 5, 1782, Madison prepared a report recommending that Adams's instructions be modified to direct him to decline to include any provision which would

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forfeiture altogether. For later discussions of this provision, see *infra* notes 78, 80, 82-89, 96-98, 257, 280, 283, 287-288, 301-302, 411-413, 483, 532 and accompanying text.

78. For extended discussion of the common law rules concerning alien ownership of real property, see 1 TUCKER, *supra* note 52, at 53-65. For an excellent exploration of the persistence of this traditional common law rule throughout the antebellum period, see Polly J. Price, *Alien Law Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 44 AM. J. LEGAL HIST. (forthcoming 2000) (on file with author).

79. The first sign of doubt appeared the following year. Apparently, some of the state legislatures were slow to implement Article XI, causing friction with the French. On January 14, 1780, Congress brought the matter directly to the attention of the state legislatures, adopting a resolution reiterating the terms of the provision and recommending that they "make provision, where not already made, for conferring like privileges and immunities on the subjects of his most Christian Majesty, agreeable to the form and spirit of the above recited article." 16 JOURNALS OF THE CONTINENTAL CONG. 1774-1789, at 54, 57 (Jan. 14, 1780) (1910).

80. See 18 JOURNALS OF THE CONTINENTAL CONG. 1774-1789, at 1204-10 (Dec. 29, 1780) (1910). Adams's commission was apparently similar to an earlier commission given to Henry Laurens for the same purpose. See *id.* at 1204. Congress adapted the language for this provision from Article XI of the French Treaty. Article VI of the proposed "project," as draft treaties were then called, provided that the subjects of each nation could "devise or give away to such person or persons as to them shall seem good, their effects, merchandise, money, debts or goods, moveable or immoveable, which they have or ought to have at the time of their death, or at any time before." *Id.* at 1209. In accordance with the practice of the time, Congress often developed elaborate plans for the treaties which it charged its commissioners with negotiating. They were essentially full draft treaties, from which the commissioners were given more or less discretion to diverge in reaching final agreement.

grant subjects of the Netherlands the right to own real property in the United States.<sup>81</sup>

In the committee's report, Madison objected to this provision on a number of grounds.<sup>82</sup> Most important for present purposes, he observed:

That in the opinion of the Committee it is not altogether clear that the stipulation of the right above stated to the subjects of his M.C.M. [France] does not encroach on the rights reserved by the federal articles to the individual States; And very clear, that on extension of it to subjects of other powers than of Spain, will be chargeable with such encroachment.<sup>83</sup>

One should not be misled by this language. Contrary to first impressions, Madison's constitutional objection did not arise from implicit limits on the treaty power, in favor of the power of the states, of the kind contended for in the states' rights view. Although Madison was less than explicit in explaining his view, he was in fact alluding to a basic ambiguity in the Articles — an ambiguity that would provide the textual foundation for future states' rights objections to Congress's treaties. The problem arose out of an apparent conflict between the two Articles dealing with treaties. In Article IX, Congress had been granted the sole and exclusive power to make treaties and alliances subject to the proviso "that no treaty of commerce shall be made, whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or

81. See James Madison, Report Revising John Adams' Instructions (July 5, 1782) [hereinafter Madison, Report of July 5], reprinted in 4 THE PAPERS OF JAMES MADISON 391-94 (William T. Hutchinson & William M.E. Rachal eds., 1965) [hereinafter 4 MADISON PAPERS]; James Madison, Report on Treaty with the Netherlands (July 12, 1782) [hereinafter Madison, Report of July 12], reprinted in 4 MADISON PAPERS, *supra*, at 410-12. The committee proposed that Adams be directed to avoid any such stipulation provided that he had not already taken steps toward conclusion of the treaty in accordance with the original instructions. See *id.* at 411. Madison actually prepared two reports. The first, dated July 5, was recommitted by Congress on July 8. See 22 JOURNALS OF THE CONTINENTAL CONG. 1774-1789, at 376 n.1 (July 8, 1782) (1914). The revised report, dated July 12, was then presented on July 17. See 22 JOURNALS OF THE CONTINENTAL CONG. 1774-1789, at 393-96 (July 17, 1782) (1914).

82. First, he doubted whether it would be equally beneficial to both sides and questioned the advisability of granting aliens an "indefinite licence" to hold real property in the country. See Madison, Report of July 12, *supra* note 81, at 411. Even more important, recalling the difficulties in obtaining state compliance with Article XI of the French Treaty, he thought it extremely doubtful that the states would comply with a similar stipulation in a treaty with the Netherlands, to whom their loyalty was not engaged as it was toward France. See *id.*

83. *Id.* The first draft of the report had been more tentative, asserting instead that "it is at least questionable whether the extension of this privilege to the subjects of other powers than of France, and Spain will not encroach on the rights reserved by the federal articles to the individual states." Madison, Report of July 5, *supra* note 81, at 392. When Congress decided to recommit this version, Madison amended it to go a step further, as indicated in the text.

importation of any species of goods or commodities whatsoever.”<sup>84</sup> The inclusion of the proviso obviously created an explicit, but limited, states’ rights restriction on the treaty power. At the same time, however, it strongly implied the nationalist view. On those few subject matters where Congress was to be restrained from invading the legislative powers of the states, Article IX was explicit. Congress could thus make treaties on other subjects without regard to the legislative authority of the states.

But if Article IX suggested an expansive power, Article VI suggested just the reverse. In exceedingly confusing language, it prohibited the states from laying “any imposts or duties which may interfere with any stipulations in treaties entered into by the United States, in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the court of France and Spain.”<sup>85</sup> Thus, Article VI explicitly asserted the supremacy of federal treaties over state law, but it did so only as to the imposition of imposts and duties in violation of treaties entered into “in pursuance” of the treaties proposed with France and Spain. Here, the possible negative implication was clear: the states were restrained only as to the treaties with France and Spain (and those “in pursuance” thereof) and only as to stipulations concerning imposts and duties. They were not otherwise restrained from violating Congress’s treaties.

Given the horns of this interpretive dilemma, Madison opted for the reading favorable to state power. Article VI, he seemed to think, precluded Congress from making treaties which limited the power of the states to impose imposts and duties, excepting only the treaties proposed to France and Spain at the time the Articles were drafted and treaties with other powers incorporating the commercial terms of the proposed French and Spanish treaties.<sup>86</sup> More important, even as to the treaties with France and Spain, the legislative power of the states could be constrained only as to imposts and duties, not as to other matters such as real property; a fortiori if this was the case as to France and Spain, it was certainly the case as to other powers. Hence, insofar as the instructions to Adams directed him to include stipula-

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84. ARTICLES OF CONFEDERATION, *supra* note 16, art. IX.

85. ARTICLES OF CONFEDERATION, *supra* note 16, art. VI. See JENSEN, *supra* note 65, at 177 n.3 (noting that the inclusion of this language “left the restriction rather ambiguous”).

86. Although Madison gave broad scope to the possible negative implications of Article VI, he did not similarly narrowly construe the Article’s “in pursuance” language. Read narrowly, that language could have been taken to mean that commercial treaties could be made only with France and Spain and perhaps with those other nations that the French and Spanish treaties somehow made necessary. If Madison had so interpreted Article VI, then the whole project of making a commercial treaty with the Netherlands would presumably have been beyond Congress’s powers. George Ticknor Curtis took this view. For discussion, see *infra* note 87. Madison’s broader reading seemed to allow Congress to make any commercial treaty which included the same provisions that had been proposed for the French and Spanish treaties.

tions regarding real property, the proposed treaty was beyond Congress's powers. As Madison recognized in his report, even Article XI in the French Treaty ran afoul of this understanding of Article VI.

To be sure, Madison's construction of the Articles of Confederation was not wholly implausible.<sup>87</sup> Nor does the negotiating history fully clear up the matter.<sup>88</sup> It does, however, suggest that Madison was

87. The language of Article VI lent itself to at least three alternative constructions. First, Article VI might have been simply an inelegant restatement of the limitation found in the proviso to Article IX and not have been intended to impose any further limitation. In the proviso, the limitation was directly stated; in Article VI, it was made clear that the states were not obliged to follow a treaty that violated Article IX. Crandall took this view of the two provisions. See CRANDALL, *supra* note 64, at 27-28; see also JENSEN, *supra* note 65, at 177-78 (adopting a similar view). Second, Article VI might have been read instead as an additional restriction on the treaty power beyond the limitations of the proviso to Article IX. Congress could not make treaties that limited the states as specified in the proviso, and it was also prohibited from agreeing to any stipulations regarding imposts and duties that went beyond those included in the French and Spanish treaties. Finally, Article VI might be read the way Madison seemed to suggest: as limiting Congress from going beyond the stipulations on imposts and duties contained in the proposed French and Spanish treaties and as prohibiting it from making stipulations on any other subject, including alien ownership of real property, that restrained the legislative powers of the states in any area outside of Congress's very limited legislative authority. George Ticknor Curtis adopted an even more extreme version of Madison's view. He claimed that the power to make treaties dealing with imposts and duties was limited to the French and Spanish treaties "and such as were dependent upon them." 1 CURTIS, *supra* note 64, at 280. Congress was constitutionally incompetent to conclude "others which should have the effect of restraining the legislatures of the states from prohibiting the exportation or importation of any species of goods or merchandise, or laying whatever duties or imposts they thought proper." *Id.* As a result, the other commercial treaties entered into by Congress, with the Netherlands in 1782 and Sweden in 1783, were unconstitutional, even though they contained the same stipulations regarding imposts and duties as the 1778 French Treaty. See *id.* at 279-82. Moreover, Curtis agreed that Article VI did not permit Congress, even in the French and Spanish treaties, to include provisions dealing with real property. See *id.* at 281. Something like this view seems to have been at the root of much of the subsequent state resistance to Congress's treaties. See *infra* notes 126, 127-142, 149-156 and accompanying text. It also helps explain the close relationship in the Founders' minds between the Supremacy Clause, which replaced Article VI with a blanket declaration of the supremacy of national treaties, and the nationalist view of the treaty power. See *infra* Section II.A.2 and *infra* notes 234, 294, 403-405, 412, 437, 464 and accompanying text.

88. The negotiating history is most supportive of the view that Article VI was merely meant to reinforce the limitations of Article IX. In the initial draft, Congress was given the sole and exclusive power of "Entering into Treaties and Alliances" without limitation, see 5 JOURNALS OF THE CONTINENTAL CONG., 1774-1789, at 545, 550 (July 12, 1776) (1906), while the states were explicitly given the power to regulate foreign commerce. It was the latter grant which the drafters may have thought necessitated clarification. Each state was permitted to

assess or lay such Imposts or Duties as it thinks proper, on Importations or Exportations, provided such Imposts or Duties do not interfere with any Stipulations in Treaties hereafter entered into by the United States assembled, with the King or Kingdom of Great Britain, or any foreign Prince or State.

*Id.* at 547-48. By August, the latter provision had been redrafted to remove the direct grant to the states of regulatory authority over foreign commerce (presumably on the assumption that it was already implicit), leaving only the prohibition on the states from laying "any imposts or duties which may interfere with any stipulations in treaties" with foreign powers. *Id.* at 676 (Aug. 20, 1776). This change, however, inadvertently seems to have created the possible negative implication that Madison later drew: by removing the grant of power over

wrong in thinking that Article VI was a general limitation on Congress's power to make treaties restraining the state legislatures. Most likely, it was meant only as a cognate to the proviso to Article IX. If a treaty violated the limitations of the proviso, then Article VI freed the states of any obligation to restrain the exercise of their legislative discretion. In any case, even if, *arguendo*, Article VI was intended to prohibit Congress from agreeing to stipulations limiting the rights of the states to impose imposts and duties beyond those limitations contained in the French and Spanish treaties, it is doubtful that it was meant as a general prohibition on all other treaty stipulations that in any way constrained the state legislatures. Such a construction was directly at odds with the language of Article IX, which was far clearer in its apparent intent. Moreover, Madison's construction would have seriously undermined Congress's ability to conduct foreign policy. That it necessarily called into question the validity of Article XI of the French Treaty was no doubt alone sufficient to condemn it in the eyes of his colleagues. Not surprisingly, then, Congress was singularly un-

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foreign commerce, which had necessitated the exception for treaty stipulations, the new language might be construed, via the canon *expressio unius*, to express the only restrictions that treaties could impose on the legislative power of the states. There is no reason to think that Congress had any such intention in mind.

In any case, when discussion resumed a year later, advocates of restrictions on Congress's power to make commercial treaties made their move. On October 21, 1777, echoing the limitation that would ultimately be included in Article IX, they proposed an amendment to Article VI which would have only prohibited the states from imposing imposts or duties

upon goods, wares or merchandise, imported or exported by any foreign nation with whom the United States assembled shall enter into any commercial treaty, other than what shall be laid upon the inhabitants of such state; provided that any state may totally prohibit the exportation or importation of any particular species of goods, wares or merchandise; and provided also, that if any foreign nation shall not allow the same privileges, exemptions or advantages, to the people and vessels of any state trading in their ports, as to their own people and vessels, the said state may disallow the like privileges, exemptions and advantages to those foreigners.

9 JOURNALS OF THE CONTINENTAL CONG., *supra* note 65, at 824, 826-27 (Oct. 21, 1777). This amendment failed. *See id.* at 828. At the legislative session two days later, however, its proponents tried again. This time, however, they proposed two amendments. The first included the language ultimately included in Article VI; the second included most of the language from the defeated amendment from the previous session, only this time attached as a proviso to Article IX. *See id.* at 833-34 (Oct. 23, 1777). Congress adopted both, thus providing the final language that became Articles VI and IX. *See id.*

In light of this history, it seems reasonably clear that Article VI was not meant as a comprehensive limitation on the power of Congress to bind the state legislatures by treaty, but rather as a specific limitation on commercial stipulations. Likewise, in context, the amendments to both Articles appear to have been parallel in intention. Article IX limited the commercial stipulations that could be included in treaties. Article VI, in turn, achieved the same result by limiting the obligation of the states to comply with treaties that violated the restrictions in Article IX. The peculiar language of Article VI probably reflected the understanding of the delegates concerning the nature of the treaties proposed by Congress to France and Spain. Those proposed treaties, they must have believed, were consistent with the restrictions in the proviso to Article IX. By referring to the proposed treaties, therefore, they were incorporating the restrictions that they had made express in Article IX.

impressed with Madison's report. It resoundingly defeated his proposed modification of Adams's instructions, with Madison able to muster the votes of only six out of the twenty-nine delegates present.<sup>89</sup>

In a twist, when Adams completed the negotiations only a few months later, he sent back a treaty which, though perhaps ambiguous, seemed to grant subjects of the two nations only the right to own and dispose of personal, not real, property in the territory of the other.<sup>90</sup> Adams, in fact, had resisted a Dutch proposal to extend that right to the ownership of real property. In doing so, moreover, he established a somewhat dubious precedent that would be followed repeatedly in the future by our negotiators when pressed to accept undesirable treaty stipulations: although he objected to such a provision on policy grounds, he laid the heaviest emphasis on an asserted lack of constitutional power. "What rendered all other considerations unnecessary," he informed the Dutch ministers, "was that Congress had not authority to do this, it being a matter of the interior policy of the separate States."<sup>91</sup> Although Congress approved the treaty, it disagreed with

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89. See Madison, Report of July 12, *supra* note 81, at 412 n.9 (noting that "every state delegation except New Jersey's rejected the resolution. . . . Of the twenty-nine delegates in Congress, only six favored the proposal"); see also 22 JOURNALS OF THE CONTINENTAL CONG., *supra* note 81, at 396 (July 18, 1782). Even Virginia's delegation overrode Madison and voted to uphold the existing instructions.

90. See 24 JOURNALS OF THE CONTINENTAL CONG. 1774-1789, at 64, 70 (Jan. 23, 1783) (1922). The treaty as signed by Adams had removed the language in Congress's draft referring to "goods, moveable or immoveable," 18 JOURNALS OF THE CONTINENTAL CONG., *supra* note 80, at 1209 (Dec. 29, 1780), and replaced it with the words "effects" and "successions," 24 JOURNALS OF THE CONTINENTAL CONG., *supra*, at 70-71. At a minimum, however, these words were equivocal. See CURTIS, *supra* note 64, at 281 (noting that these expressions "would probably exclude real property, but . . . might possibly be construed to include it"). Moreover, Adams retained in full Article II of the Congress's draft treaty, which had provided that the subjects of each nation shall "enjoy all the rights, liberties, privileges, immunities and exemptions in trade, navigation and commerce . . . which the [most favored] nations do or shall enjoy." 18 JOURNALS OF THE CONTINENTAL CONG., *supra* note 80, at 1207-08 (Dec. 29, 1780). Compare this with the entry on 24 JOURNALS OF THE CONTINENTAL CONG., *supra*, at 69 (Jan. 23, 1783). Madison had warned that this most favored nation provision might give rise to the claim that subjects of the Netherlands were entitled to the same rights to own real property that had been granted to French subjects in the Treaty of 1778, and he had recommended that it be clarified to avoid that result. See Madison, Report of July 12, *supra* note 81, at 410.

91. Letter from John Adams to Robert Livingston (Oct. 8, 1782), in 5 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 803, 804 (Francis Wharton ed., Washington, Government Printing Office 1889). Oddly, Adams reported that it was the Dutch who had proposed "that a right should be stipulated for the subjects of this republic to purchase lands in any of our States," and Adams claimed that such a right "was not even stipulated for France." *Id.* Perhaps he understood the Dutch proposal to be different in some important respect from what Congress had included in the draft treaty and what was already promised in Article XI of the French Treaty for French subjects. Be that as it may, his position was not a little ironic in light of the recent discussions on the subject in Congress. For further discussion of the tendency of U.S. commissioners to invoke constitutional constraints, see *infra* notes 104-116, 550-552, 667-672 and accompanying text.

Adams's constitutional claim.<sup>92</sup> Leaving no doubt about its view, a short time later it approved a similar treaty with Sweden. The principal difference between the two was that the Swedish treaty did grant the subjects of each nation the right to hold not only personal but also real property in the territory of the other.<sup>93</sup>

Nevertheless, the conflict over these provisions had its effect. Although Congress stuck to its constitutional position, its political enthusiasm was chastened somewhat. Shortly after ratifying the Swedish treaty, it adopted an elaborate set of instructions for its commissioners to use in negotiating commercial treaties with most of the powers of Europe. Once again, it directed the commissioners to seek provisions granting reciprocal rights in real property. This time, however, it was more sensitive to the concerns of the states, taking note of their uniform policy to prohibit aliens from owning real estate. Rather than directing the commissioners to pursue the unqualified right included in the French and Swedish treaties, it instead instructed them to seek a more limited right, though one still in conflict with the laws of the states:

where on the death of any person holding real estate within the territories of one of the contracting parties, such real estate would by their laws descend on a Subject or Citizen of the other, were he not disqualified by alienage, there he shall be allowed a reasonable time to dispose of the same, and withdraw the proceeds without molestation.<sup>94</sup>

The commissioners immediately undertook negotiations under the new set of instructions. Despite vigorous efforts, in only one case, with Prussia, was a treaty finally concluded. It faithfully included the provision envisioned by Congress.<sup>95</sup>

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92. When Congress thereafter took up the treaty, its committee, which included James Madison, Alexander Hamilton, and Oliver Ellsworth, took note of the discrepancy between the treaty and Congress's instructions to Adams. See 24 JOURNALS OF THE CONTINENTAL CONG., *supra* note 90, at 65 (Jan. 23, 1783). Rather than embracing Adams's constitutional views, however, the committee merely noted that the treaty "seems more cautiously" to exclude the privilege of holding real estate. *Id.* Upon the committee's recommendation, Congress, in turn, approved the treaty. See *id.* at 66.

93. See Treaty of Amity and Commerce, Apr. 3, 1783, U.S.-Swed., in 2 TREATIES, *supra* note 74, at 123, 127-28 (retaining in the official French version the use of the term "biens," translated as "goods," but which includes both real and personal property). For later conflicts over how this language should be interpreted, culminating in a Supreme Court decision upholding the view that it applies to both real and personal property, see *infra* notes 421, 664 and accompanying text.

94. 26 JOURNALS OF THE CONTINENTAL CONG., 1774-1789, at 352, 360-61 (May 7, 1784) (1928); see also *id.* at 357-63 (approving instructions to commissioners to negotiate commercial treaties with Russia, the Court of Vienna, Prussia, Denmark, Saxony, Hamburg, Great Britain, Spain, Portugal, Genoa, Tuscany, Rome, Naples, Venice, Sardinia, and the Ottoman Porte).

95. See Treaty of Amity and Commerce, Sept. 10, 1785, U.S.-Prussia, in 2 TREATIES, *supra* note 74, at 162, 168-69. It should be noted that the various commercial treaties concluded during the Confederation invaded the sphere of the states in a number of respects beyond those dealing with alien property rights. The Prussian treaty, for example,



In late 1785, the French Minister Count de Vergennes complained to Jefferson, then American ambassador to France, about a lack of compliance with Article XI of the 1778 French Treaty. According to Vergennes, Georgia had never passed any law implementing Article XI and had refused to recognize the rights of the Chevalier de Mezieres as heir to the Georgia estate of one General Oglethorpe, a British subject. For technical reasons, Jefferson denied that Mezieres had any rights under the treaty but, in the course of his extended reply, affirmed the full scope of Article XI: "The Treaty has placed the Subjects of France on a footing with Natives as to Conveiances [sic] and Descent of Property."<sup>96</sup> More important, far from questioning the validity of this stipulation, he proclaimed that treaties were the law of the land in the states, would be enforced by their courts, did not need an act of the state legislature to bring them into effect, and would even supersede inconsistent state laws.

The Judges[?] . . . Guide is the Law of the Land, of which Law its Treaties make a Part . . . There was no occasion for the Assemblies to pass Laws on this Subject, the Treaty being a Law, as I conceive, superior to those of particular Assemblies, and repealing them where they stand in the Way of its Operation.<sup>97</sup>

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allowed aliens to hold personal property and to dispose of it by testament, donation, or otherwise, and to succeed to it, and [it] prohibited the exaction in such case by any State of dues, except such as the inhabitants of the country were subject to . . . The right to aliens to frequent the coasts and countries of each and all the several States, and to reside there and to trade in all sorts of produce, manufactures, and merchandise was granted by the national government; and the States were prohibited from imposing upon such aliens any duties or charges to which the citizens of the most favored nation were not made subject. Resident aliens were also assured against State legislation to prevent the exercise of an entire and perfect liberty of conscience, and the performance of religious worship; and, when dying, they were guaranteed the right of decent burial, and undisturbed rest for their bodies.

J.C. Bancroft Davis, *Treaties and Conventions Concluded Between the United States of America and Other Powers*, printed in S. Ex. Doc. No. 47, 48th Cong., 2d Sess., Vol. 1, Part 2 1221-22 (1889). Similar provisions were contained in the Treaty of 1778 with France, the Treaty of 1782 with the Netherlands, and the Treaty of 1783 with Sweden.

96. Thomas Jefferson, *Jefferson's Amplification of Subjects Discussed with Vergennes* (circa Dec. 20, 1785), in 9 THE PAPERS OF THOMAS JEFFERSON 107, 110 (Julian P. Boyd ed., 1954) [hereinafter 9 JEFFERSON PAPERS]. Jefferson explained at great length why, under any construction of the applicable law, Oglethorpe's property would not have gone to Mezieres, even were both Mezieres and Oglethorpe U.S. citizens. The treaty never entered into the question. See *id.* at 107-10.

Later, as Secretary of State, Jefferson would again affirm the importance of the liberal policy embodied in Article XI. When France refused to extend the Article XI privilege to real property owned by Americans in French colonies, he instructed his ambassador to try to reverse this policy. See Letter from Thomas Jefferson to William Short (Aug. 26, 1790), in 17 THE PAPERS OF THOMAS JEFFERSON 431-35 (Julian P. Boyd ed., 1965) [hereinafter 17 JEFFERSON PAPERS] (referring to the *droit d'Aubaine* as "this odious law . . . this fragment of barbarism" and instructing his Minister to seek its abolition so "as to relieve our citizens from this species of risk and ruin hereafter").

97. *Id.* at 107, 110. Jefferson gave a detailed report to John Jay and Congress on his discussions with Vergennes. See Letter from Thomas Jefferson to John Jay, with Report on Conversation with Vergennes (Jan. 2, 1786), in 9 JEFFERSON PAPERS, *supra* note 96, at 136,

By affirming the validity of this treaty stipulation, Jefferson thus squarely placed himself in favor of the nationalist view and prefigured the Supremacy Clause to the Constitution of 1787, anticipating by a year a doctrine that Jay would incorporate into his famous report on state infractions of the Treaty of Peace and that would later be associated with Jay's, rather than Jefferson's, name.<sup>98</sup> Jefferson's affirmation of the nationalist view is particularly striking, moreover, because he would later become the foremost proponent of the states' rights position. It is all the more striking because the question of alien ownership of real property would prove to be the issue over which the scope of the treaty power would later be fought.

*b. The Treaty of Peace.* Far more consequential than treaties about the rights of aliens to hold real property was the Treaty of Peace with Great Britain of 1782.<sup>99</sup> Even today, it remains the most momentous treaty ever concluded by the United States. Among other things, of course, it secured recognition of both the nation's independence and its claim to expansive boundaries.<sup>100</sup> Notwithstanding its importance, however, the treaty was dogged from the outset by questions about whether its principal concessions to the British infringed upon the authority of the states. Resistance by the states to carrying out the

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143-44. He also corresponded with Adams on the subject. See Letter from Thomas Jefferson to John Adams (Dec. 27, 1785), in 9 JEFFERSON PAPERS, *supra* note 96, at 126, 127; Letter from John Adams to Thomas Jefferson (Jan. 19, 1786), in 9 JEFFERSON PAPERS, *supra* note 96, at 181-82; see also Letter from Thomas Jefferson to John Adams (Feb. 23, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON 177 (Julian P. Boyd ed., 1955) (affirming that acts of the Continental Congress are supreme law of the land). In 1792, Jefferson as Secretary of State again reaffirmed this view in his famous diplomatic note to British Minister George Hammond, responding to Hammond's claim that the states were breaching the Treaty of Peace ending the Revolutionary War. For discussion, see *infra* notes 121-122 and accompanying text. For discussion of later controversies over whether treaties under the Confederation were self-executing supreme law of the land binding on state court judges, see *infra* notes 98, 121, 138-140, 152, 230-231, 233-234, 261-264, 272-273, 290, 293, 295, 305, 318-319, 329, 349, 431, 436 and accompanying text.

98. For discussion of Jay's report, see *infra* notes 120, 132, 137-141 and accompanying text. As early as 1784, Hamilton had articulated this position in the course of litigation of a celebrated case in the New York courts, *Rugers v. Waddington*, challenging the so-called Trespass Act as void because it was in conflict with the Treaty of Peace. For Hamilton's discussion of the case, see Alexander Hamilton, *Philo Camillus No. 3* (Aug. 12, 1795), reprinted in 19 THE PAPERS OF ALEXANDER HAMILTON 124, 131-33 (Harold C. Syrett ed., 1973) [hereinafter 19 HAMILTON PAPERS]. For further discussion, see *infra* notes 134, 295.

99. There were actually two treaties. The first, see Preliminary Articles of Peace, Nov. 30, 1782, U.S.-Gr. Brit., in 2 TREATIES, *supra* note 74, at 96, contained all of the terms of the final settlement but was considered preliminary. The terms of the alliance with France required the United States to await the conclusion of a peace treaty between Great Britain and France before concluding a permanent treaty of peace with the British. The final treaty was the Definitive Treaty of Peace, Sept. 3, 1783, U.S.-Gr. Brit., in 2 TREATIES, *supra* note 74, at 151.

100. For Justice Iredell's moving, and remarkably prescient, appraisal of the importance of the treaty in U.S. and even world history, see *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 256, 270 (1796) (Iredell, J., dissenting).

treaty's painful financial and amnesty stipulations — the same obligations which had been challenged on states' rights grounds — led to severe tensions with Great Britain. Claiming that the United States was in violation of the treaty, it refused to carry out its promise to withdraw British troops from military posts in the northwestern territory. Relations soured, and tensions grew severe. At times, war seemed imminent.<sup>101</sup> The difficulties with the British were not finally resolved until the Jay Treaty of 1796. In the meantime, the whole issue had sharply divided Americans and had significantly contributed to the split between Federalists and Republicans.<sup>102</sup>

Crucial for present purposes, the problems that arose in connection with the Treaty of Peace had an immediate and dramatic impact upon the framing of the Constitution. They concretely demonstrated the need to avoid states' rights subject matter limitations on the treaty power and the imperative for a mechanism that could ensure state compliance with treaty stipulations. The controversy over the treaty, moreover, persisted even after adoption of the Constitution. States still resisted, and the treaty continued to be a subject of debate and controversy, including over constitutional issues pertaining to the treaty power. The whole subject repeatedly came before the Supreme Court, first in *Ware v. Hylton*, and then again on a number of subsequent occasions.<sup>103</sup> In each instance, the Court rejected arguments in favor of the states and upheld the treaty. As we shall see, the Treaty of Peace disputes ultimately led the Court to affirm the nationalist conception of the scope of the treaty power.

During the early round of the peace negotiations in the fall of 1782, the American Commissioners, Franklin and Jay, faced a number of thorny issues.<sup>104</sup> None were more delicate than the British demands that American debtors pay their pre-War debts to British creditors despite war-time confiscation decrees issued by the states, and that the

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101. For one of the most famous of the British diplomatic protests against state violations of Article IV of the treaty, see Letter from British Minister Carmarthen to John Adams (Feb. 28, 1786), in 4 SECRET JOURNALS OF THE CONGRESS OF THE CONFEDERATION 187-203 (Boston, Thomas B. Wait 1820) [hereinafter SECRET JOURNALS OF CONGRESS]. For discussion of the growing possibility of war, see *infra* notes 137-142, 235-240, 242 and accompanying text.

102. For discussion of increased tensions with the British and its relation to the Jay Treaty, see *infra* notes 235-242 and accompanying text.

103. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). For discussion of *Ware* and subsequent decisions, see *infra* notes 120, 123-125, 226-234, 311, 367-369, 401-421 and accompanying text.

104. The leading account of the negotiations of the Treaty of Peace is RICHARD B. MORRIS, *THE PEACEMAKERS, THE GREAT POWERS AND AMERICAN INDEPENDENCE* (1965) [hereinafter MORRIS, *THE PEACEMAKERS*]; see also BEMIS, *supra* note 64, at 46-64; Richard B. Morris, *The Durable Significance of the Treaty of 1783*, in PEACE AND THE PEACEMAKERS, THE TREATY OF 1783, at 230 (Ronald Hoffman & Peter J. Albert eds., 1986).

confiscated estates of British Loyalists be restored or their prior owners compensated. These demands raised highly emotional issues for the Americans, particularly in light of the depredations which the British army and their Loyalist allies had committed during the War. Franklin and Jay felt constrained to resist British demands on this front.<sup>105</sup> Following Adams's precedent, they chose to stand on, among other grounds, constitutional incapacity. Congress, they claimed, lacked the power to deal with these subjects.<sup>106</sup>

When Adams arrived at the end of October to join the negotiations, however, he inadvertently tipped their hand. In his initial session with the British commissioners, and before he had time to consult with Franklin and Jay, he declared that the debts should be treated differently from the Loyalists. "I have no notion of cheating any Body," he asserted.<sup>107</sup> With that, the American commissioners were forced to abandon their constitutional objections and agree to what became Article IV of the Treaty of Peace, which provided that "Creditors on either side, shall meet with no lawful Impediment to the Recovery of the full value in Sterling Money of all bonâ fide Debts heretofore contracted."<sup>108</sup> As events would later unfold, this provision would prove to have the most far-reaching consequences not only for the future course of Anglo-American relations, but also for the shape the Constitution ultimately would take and even for the later development of the party system in the United States.<sup>109</sup>

105. See MORRIS, *THE PEACEMAKERS*, *supra* note 104, at 361-80. The main points at issue were the recognition of American independence, the settling of the boundaries, questions pertaining to the rights of American fishermen in the Newfoundland fisheries, navigation on the Mississippi River, the pre-War debts owed British creditors which had been confiscated by the states, and the problem of the Loyalists. As to the last, several questions emerged. The British bottom-line demand was amnesty for all Loyalists. Under strict instructions from London, the British commissioners also pressed for compensation for the confiscation of Loyalist estates. They tried a number of expedients, including distinguishing between those who had taken up arms and those who had not, and also between those who had committed particularly notorious outrages on the civilian population. They also pressed for the reservation of some territory for British Loyalists. See *id.* at 364-72, 375-82.

106. See 3 *DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 43 (L.H. Butterfield ed., 1961) [hereinafter *ADAMS'S DIARY*] (reporting Franklin's comment to Adams that Franklin and Jay had been resisting British demands for payment of the debts and the compensation to the Loyalists by claiming "We had not Power, nor had Congress"); MORRIS, *THE PEACEMAKERS*, *supra* note 104, at 361 (noting that Franklin and Jay "for months had been insisting that both the commissioners and Congress lacked the power to deal with the subject" of the debts).

107. 3 *ADAMS'S DIARY*, *supra* note 106, at 43. Adams acknowledged that when he made this statement to the British commissioners, "I saw it struck Mr. Stretchy with peculiar Pleasure, I saw it instantly smiling in every Line of his Face. Mr. O. was apparently pleased with it too." *Id.* at 44.

108. Preliminary Articles of Peace, *supra* note 99, art. IV, at 98. Adams later defended his concession by arguing that it would drive a wedge between the British creditors and the Loyalists and thus ease the opposition to the treaty in Britain. See MORRIS, *THE PEACEMAKERS*, *supra* note 104, at 361.

109. See *infra* notes 236-243, 259-267 and accompanying text.

Notwithstanding the concession forced upon them by Adams's misstep, the American commissioners nevertheless persisted in their claim that Congress at least had no power over confiscated estates. As they explained to the British commissioners, "as this is a matter evidently appertaining to the internal polity of the separate States, the Congress, by the nature of our constitution, have no authority to interfere with it."<sup>110</sup> Indeed, Adams advised his British counterparts

that we are instructed against it; that Congress are instructed against it, or rather have not constitutional authority to do it; that we can only write about it to Congress, and they to the States, who may, and probably will, deliberate upon it eighteen months before they all decide, and then every one of them will determine against it.<sup>111</sup>

No doubt this parry must have looked unconvincing to the British, especially after the concession on the debts, and their negotiators, under instructions from London, continued to press the point urgently.<sup>112</sup> In response, the Americans, although unyielding, eventually retreated to new and potentially even more treacherous ground, arguing that if the Loyalists were to be compensated for their losses, the Americans should be compensated for the damages they had suffered at the hands of the British and Loyalist forces.<sup>113</sup> After an intense round of

110. Letter from John Adams, B. Franklin, and John Jay to Richard Oswald, British Commissioner (Nov. 4, 1782), in 1 AMERICAN STATE PAPERS 219, 219 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1833).

111. Extract from Mr. Adams' Journal Respecting Peace (Nov. 11, 1782), in 1 AMERICAN STATE PAPERS, *supra* note 110, at 219, 219; *see also* Extract from Mr. Adams' Journal Respecting Peace (Nov. 15, 1782), in 1 AMERICAN STATE PAPERS, *supra* note 110, at 219; Extract from Mr. Adams' Journal Respecting Peace (Nov. 17, 1782), in 1 AMERICAN STATE PAPERS, *supra* note 110, at 220; Extract of a Letter from Doctor Franklin to Richard Oswald, Esq. (Nov. 26, 1782), in 1 AMERICAN STATE PAPERS, *supra* note 110, at 221; Extracts from Dr. Franklin's Journal of Negotiations for Peace with Great Britain, in 1 AMERICAN STATE PAPERS, *supra* note 110, at 222. For the demand of the British commissioners for restoration of, or compensation for, the confiscated Loyalist estates and for a general amnesty, *see* Letter from Richard Oswald to J. Adams, B. Franklin, and J. Jay (Nov. 4, 1782), in 1 AMERICAN STATE PAPERS, *supra* note 110, at 219. In response to earlier demands in favor of the Loyalists, Franklin had written Congress, which, in turn, on September 10, 1782, adopted a resolution declaring that

in the opinion of Congress, the great loss of property which the citizens of the United States have sustained, by the enemy, will be considered by the several States as an insuperable bar to their making restitution, or indemnification, to the former owners of property, which has been or may be forfeited to, or confiscated by, any of the States.

Extract of a Letter from Doctor Franklin to Richard Oswald, Esq., *supra*, at 221.

112. *See* MORRIS, THE PEACEMAKERS, *supra* note 104, at 367-68, 372.

113. *See* MORRIS, THE PEACEMAKERS, *supra* note 104, at 375, 378-79; Extract from Mr. Adams' Journal Respecting Peace (Nov. 29, 1782), in 1 AMERICAN STATE PAPERS, *supra* note 110, at 220; Extract of a Letter from Doctor Franklin to Richard Oswald, Esq., *supra* note 111, at 221-22. Although Adams and Jay were more disposed to be flexible, Franklin was uncompromising on the Loyalist issue and read the British commissioners a letter he had drafted vividly recounting the atrocities that had been committed against the Americans during the War. The record would show not only

further negotiations, the British finally relented, opening the door to a final compromise.

If the American commissioners' constitutional objections had already seemed half-baked, the final agreement made a complete hash of their pretensions. In Article IV, they agreed to resuscitate debts that had been discharged under state law, clearly implying that Congress did have power to override state laws even retrospectively. In contrast, in Article V, they agreed only that Congress would recommend to the state legislatures the restitution of confiscated estates, on the plea that the restitution of estates confiscated under state law was beyond Congress's powers.<sup>114</sup> In still another part of Article V, however, they agreed that certain interests in land that the states had confiscated would be revived after all: "all Persons who have any Interest in confiscated Lands, either by Debts, Marriage Settlements or otherwise, shall meet with no lawful Impediment in the prosecution of their just Rights."<sup>115</sup> Finally, in Article VI, the commissioners agreed that there would be no further confiscations, prosecutions, or other actions taken against Loyalists and that those still in prison would be immediately released.<sup>116</sup> But this necessarily implied that Congress did in fact have the power to override state laws concerning confiscations, to say nothing of their criminal laws.

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the enormities committed by [the Loyalists], under the direction of British generals, but of those committed by the British troops themselves, [and] will form a record that must render the British name odious in America to the latest generations. In that authentic record will be found, the burning of the fine towns of Charlestown, near Boston, of Falmouth just before winter, when the sick, the aged, the women, and children, were driven to seek shelter where they could hardly find it; of Norfolk, in the midst of winter; of New London, of Fairfield, of Esopus, &c &c besides near a hundred and fifty miles of well settled country laid waste, every house and barn burnt, and many hundred of farmers, with their wives and children, butchered and scalped.

Extract of a Letter from Doctor Franklin to Richard Oswald, Esq., *supra* note 111, at 221. He then proposed that the claims on both sides be submitted to commissioners for their determination of the total losses and that the side with lesser losses compensate the other. *See id.*; MORRIS, *THE PEACEMAKERS*, *supra* note 104, at 378-79.

114. *See* Preliminary Articles of Peace, *supra* note 99, art. V, at 98-99. Article V provided that Congress would recommend to the state legislatures the restitution of the estates of "real British Subjects" and of those "Persons resident in Districts in the Possession of his Majesty's Arms; and who have not borne Arms against the said United States." *Id.* As to the rest of the Loyalists, there was to be a similar, though more qualified, recommendation and a right on their part to spend twelve months unmolested in the United States seeking full restitution of their estates. *See id.*

115. *Id.* at 99.

116. *See id.* at 99. Article VI provided:

That there shall be no future Confiscations made, nor any prosecutions commenced against any Person or Persons, for or by reason of the Part which he or they may have taken in the present War, and that no person shall on that account suffer any future Loss or Damage either in his Person, Liberty or Property; and that those who may be in confinement on such charges, at the time of the Ratification of the Treaty in America, shall be immediately set at Liberty, and the Prosecutions so commenced be discontinued.

*Id.*

It was clear, then, that no coherent construction of the Articles of Confederation could explain how Congress could have authority to make the definite commitments agreed upon but not the more extensive commitments the British sought. The strategic character of their arguments was obvious, as the commissioners' subsequent conduct strikingly revealed. Immediately communicating the Treaty of Peace to Secretary for Foreign Affairs Robert Livingston, the commissioners reversed course. As to Article IV, they now claimed that the right to confiscate debts "appertains solely to Congress, in whom exclusively are vested the rights of making war and peace."<sup>117</sup> As to Article VI, they took a different tack. Acknowledging how deeply it intruded into the "sovereign rights of the States,"<sup>118</sup> they believed that it was sufficient simply to point out that it was "as little unfavorable . . . as any that could in reason be expected."<sup>119</sup> Four years later, Jay, now Secretary for Foreign Affairs, publicly reaffirmed this position in his celebrated 1786 report on state infractions of the Treaty of Peace. Repeating the view asserted by the commissioners, he now claimed that the right to confiscate the debts of wartime enemies belonged exclusively to *Congress* and that state laws confiscating British debts were therefore invalid.<sup>120</sup>

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117. See Letter from John Adams, B. Franklin, John Jay, and Henry Laurens, to Robert Livingston (Dec. 14, 1782), in 6 *THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES* 131, 132 (Francis Wharton ed., 1889).

118. *Id.* It was the "respect which both in London and Versailles is supposed to be due to the honor, dignity and interests of royalty," that had forced the commissioners to agree to the article even though it was "so near to the views of Congress and the sovereign rights of the States as it now stands." *Id.*

119. *Id.*

120. Jay's October 13, 1796, report [hereinafter Jay's Report (Oct. 13, 1796)], reprinted in 4 *SECRET JOURNALS OF CONGRESS*, *supra* note 101, at 185-287. He contended that:

The rights to make war, to make peace, and to make treaties, appertaining *exclusively* to the national sovereign, that is, to Congress, your secretary is of opinion that the thirteen state legislatures have no more authority to exercise the powers, or pass acts of sovereignty on those points, than any thirteen individual citizens.

*Id.* at 209. Thus, he concluded, "your secretary is exceedingly mistaken if there ever was a period since the year 1775, to this day, when either of the then colonies, now states, were in capacity to pass state laws for sequestering or confiscating the debts or property of a national enemy." *Id.* To be sure, this claim was extraordinary, since the right of the states to pass confiscatory decrees against British property had been widely exercised by the states and never previously been challenged by Congress. Jay's conclusions in this respect were explicitly rejected by Justices Chase and Iredell, and upheld only by Justice Wilson, in *Ware v. Hylton*. Compare *Ware v. Hylton*, 3 U.S. (3 Dall.), 199, 220, 222, 229 (1796) (Chase, J., concurring) (rejecting Jay's view), and *id.* at 256, 266 (Iredell, J., dissenting) (same), with *id.* at 281, 281 (Wilson, J., concurring) (agreeing with Jay). For further discussion, see *infra* notes 226-234 and accompanying text.

Notwithstanding Jay's claim of exclusive congressional authority, his discussion reveals just how deeply the Treaty of Peace penetrated into the sphere of state authority. Thus, for example, he branded an act passed by the New York legislature on May 12, 1784, a violation of Article VI of the Treaty of Peace. See Jay's Report (Oct. 13, 1796), *supra*, at 269-74. The act recited that "it is of great importance to the safety of a free government, that persons

Nor were the commissioners the only ones forced to renounce their claims. When the issue of state violations of the Treaty of Peace arose again in 1792, Jefferson, now Secretary of State, felt compelled to find a way to reformulate more plausibly the constitutional objections the American commissioners had pressed in the negotiations. His note in reply to the British Minister George Hammond's diplomatic protest is an impressive piece of work.<sup>121</sup> On this point, however, Jefferson could manage only a face-saving gesture. According to Jefferson, the problem had not been, as the commissioners had claimed, that the matter rested exclusively with the states. Rather, the problem was that any restitution of confiscated estates would perforce operate retrospectively and therefore be in violation of the substantive constitutional constraint against retroactive legislation. The commissioners had agreed only to recommend restitution of the confiscated estates "[b]ecause the things here proposed to be done were retrospective in their nature — would tear up the laws of the several States, and the contracts and transactions, private and public, which had taken place under them."<sup>122</sup> Why it was permissible to recommend but not pledge to adopt retrospective legislation was left unclear. More important, Jefferson's point about retroactivity obviously applied equally to the restitution of the debts, but that had been promised unequivocally in Article IV.

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holding principles inimical to the constitution should not be admitted into offices or places of trust, whereby they might acquire an immediate influence in the direction of its councils," and further that

some of the citizens of this state, entertaining sentiments hostile to its independence, have taken an active part in the late war, in opposition to the present government, and it would be improper and dangerous that such persons should be suffered to hold or enjoy any such office or place of trust within this state.

*Id.* at 269. The act then prohibited any person who had sided with the British during the war from "holding, exercising or enjoying any legislative, judicial or executive office or place whatsoever within this state" or from voting "at any election to fill any office or place whatsoever, within this state." *Id.* at 272. This act, Jay charged, "clearly violates the sixth article in various respects too obvious and decided to require enumeration or discussion." *Id.* at 274. But if determining who is qualified to hold state office and vote in state elections was not within the exclusive legislative authority of the states, what was? By limiting the way a state could treat its own citizens, Article VI was a true forerunner to the modern human rights treaty. For further discussion, see *infra* notes 127-136.

121. See Letter from Thomas Jefferson to George Hammond, British Minister (Apr. 6, 1792), in 1 AMERICAN STATE PAPERS, *supra* note 110, at 200, 200. Hammond, the British Minister, once again raised the lack of state compliance with the Treaty of Peace. In contrast to Jay, Jefferson sought to show that there were no violations. In order to justify this claim, Jefferson relied in large part on the contention that state laws in conflict with the treaty were ipso facto void and would not be enforced by state court judges. See Letter from Thomas Jefferson to George Hammond, British Minister (May 29, 1792), in 1 AMERICAN STATE PAPERS, *supra* note 110, at 201, 209-11.

122. Letter from Thomas Jefferson to George Hammond (May 29, 1792), *supra* note 121, at 202.



Perhaps most revealing, however, was the later 1796 decision in the great case of *Ware v. Hylton*,<sup>123</sup> which involved a direct challenge to the validity of Article IV of the Treaty of Peace. The Court had no difficulty in finding that a provision for the restitution of confiscated debts fell within the scope of the treaty power. Noting that the treaty power granted in Article IX of the Articles of Confederation “has no restriction, nor is there any limitation on the power in any part of the confederation,” Justice Chase could imagine no basis upon which to find Article IV of the Treaty of Peace invalid: “Surely, the sacrificing *public*, or *private*, property, to obtain *peace* cannot be the cases in which a treaty would be *void* . . . . I am fully satisfied that Congress were invested with the authority to make the stipulation in the 4th article.”<sup>124</sup> In a separate opinion, moreover, Justice Cushing specifically rejected the argument that the unwillingness of the American commissioners to agree in Article V to anything more than a recommendation for the restoration of the confiscated estates demonstrated that they did not believe that they had power to repeal state laws confiscating property. According to Justice Cushing, who sat with Chief Justice Jay on the Supreme Court from 1789 to Jay’s retirement in 1795, “[i]t would be hard upon [the American commissioners], to suppose they gave up all, that they might think they strictly had a right to give up. We may allow somewhat to skill, policy and fidelity.”<sup>125</sup>

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123. 3 U.S. (3 Dall.) 199 (1796). The Justices in *Ware* issued seriatim opinions in accordance with the then practice. The plaintiffs were British creditors suing Virginia debtors on the basis of Article IV. The debtors defended on the ground that, pursuant to a Virginia state law, they had paid the debt into the Virginia loan office, thereby discharging their obligation under state law. For further discussion of *Ware*, see *infra* notes 226-234 and accompanying text.

124. *Ware*, 3 U.S. (3 Dall.) at 220, 236-37 (Chase, J., concurring).

125. *Ware*, 3 U.S. (3 Dall.) at 281, 283 (Cushing, J., concurring). Cushing was responding in part to an argument of John Marshall’s, who, in his only appearance before the Supreme Court, was representing the Virginia debtors. Marshall argued that Article IV ought to be interpreted as not applying to debts that had been discharged by Virginia upon the debtor’s payment, prior to the treaty, of the amount owing into the state loan office. Resting on the same concern for vested rights that Jefferson had invoked in regard to Article V, he argued that the opposing construction of Article IV would invade such rights:

It is evident, that the power of the government, to take away a vested right, was questionable in the minds of the *American* commissioners, since they would not exercise that power in restoring confiscated real estate; and confiscated debts, or other personal estate must come within the same rule.

*Ware v. Hylton*, Argument in the Supreme Court of the United States (Feb. 9, 1796) [hereinafter Marshall’s Oral Argument in *Ware* (Feb. 9, 1796)], in 3 THE PAPERS OF JOHN MARSHALL 7, 13 (William C. Stinchcombe et al. eds., 1979) [hereinafter 3 MARSHALL PAPERS]. For obvious reasons, the Justices, with the exception of Justice Iredell, were entirely unconvinced by Marshall’s construction of Article IV. Compare *Ware*, 3 U.S. (3 Dall.) at 220, 238-45 (Chase, J., concurring), and *id.* at 245, 249-55 (Patterson, J., concurring), and *id.* at 281, 281 (Wilson, J., concurring), and *id.* at 281, 282-83 (Cushing, J., concurring), with *id.* at 256, 278-80 (Iredell, J., dissenting).

It is noteworthy that Marshall, even in his argument on behalf of the debtors, could not resist expounding on the necessity for a broad construction of the treaty power because of

In light of this history, it is ironic, though perhaps not surprising, that the self-denying protestations of the admittedly nationalist commissioners — strategically asserted to resist unacceptable British demands — would later be relied upon by states' rights proponents as authority for their view.<sup>126</sup> Immediately following the peace, state legislatures were under intense pressure to favor local interests over those of British creditors and hated Loyalists, and the sentiments expressed in the Commissioner's remarks reappeared in the arguments of those who wished to justify state resistance to the obligations imposed by the Treaty of Peace. In New York, for example, Article VI's promise that Loyalists would suffer no further losses as a result of their part in the war could not control the passions inflamed by the long years of revolutionary battle.<sup>127</sup> Just as the American commissioners had foreseen, in late 1783, as Patriot forces assumed control over New York City from departing British troops, the legislature began to pass a series of harsh measures designed to punish those who had remained behind British lines.<sup>128</sup> A number of these laws were in

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the need for flexibility in international negotiations. The treaty might properly have vested a vested right, he noted, but that power would "have arisen from the necessity of the case." Marshall's Oral Argument in *Ware* (Feb. 9, 1796), *supra*, at 13. Had such a necessity existed, however, "the American commissioners, explicitly avowing it, would have justified their acquiescence to the nation." *Id.* Justice Iredell agreed: "Though Congress possibly might, as the price of peace, have been authorized to give up, even rights fully acquired by private persons during the war . . . yet, nothing but the most rigorous necessity could justify such a sacrifice . . ." *Ware*, 3 U.S. (Dall.) at 256, 279 (Justice Iredell, dissenting). Both also seemed to think that such an invasion of vested rights ought to be mitigated by paying compensation to the private debtor. See Marshall's Oral Argument in *Ware* (Feb. 9, 1796), *supra*, at 13-14; *Ware*, 3 U.S. (Dall.) at 256, 279 (Justice Iredell, dissenting). For further discussion of Marshall's views, see *infra* notes 261, 331, 367-387, 402, 484 and accompanying text.

126. See *infra* notes 148-152, 393 and accompanying text.

127. Following the evacuation of New York City, the revolutionary Council for the Southern District called elections, and the treatment of Loyalists became an incendiary issue. The Patriot press called for the voluntary departure or exile of all Loyalists, and denunciations of the Loyalists were virulent. See ALEXANDER HAMILTON, A LETTER FROM PHOCION TO THE CONSIDERATE CITIZENS OF NEW YORK (Jan. 1-27, 1784), *reprinted in* 3 THE PAPERS OF ALEXANDER HAMILTON 483, 483 n.1 (Harold C. Syrett & Jacob E. Cooke eds., 1962) (editorial comment by editors) [hereinafter 3 HAMILTON PAPERS]. For discussion of the treatment of the Loyalists in New York, see PHILIP RANLET, THE NEW YORK LOYALISTS 153-74 (1986).

128. The legislature began passing anti-Loyalist measures during the war. See Francis K. Decker et al., *Aftermath of Revolution: Patriots v. Loyalists*, in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 197, 197-202 (Julius Goebel, Jr. et al. eds., 1964) [hereinafter Decker et al., *Aftermath of Revolution*]. The Trespass Act, which gave rise to considerable litigation, was passed just as Congress was approving the Preliminary Treaty of Peace. See *id.* at 200; Francis K. Decker et al., *The Trespass Act*, in THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra*, at 282, 287-88 [hereinafter Decker et al., *The Trespass Act*]; *supra* note 120. A number of others were passed in late 1783 and early 1784, including one disenfranchising Loyalists and another declaring them to be aliens. See Decker et al., *The Trespass Act*, *supra*, at 288. After a veto by the Council of Revision, the legislature dropped the latter. See HAMILTON, *supra* note 127, at 484 n.1. For further discussion of these measures, see Jay's remarks in his report on state infractions of the

patent violation of Article VI and prompted vigorous, but only partially effectual, objections by the Council of Revision.<sup>129</sup> The legislative sponsors of the measures purported to find no inconsistency with the treaty. More importantly, echoing the American commissioners, some asserted that, in any case, the treaty was irrelevant: Article VI was beyond Congress's authority and thus null because it interfered with the internal police powers of the state.<sup>130</sup>

Outraged, a young Alexander Hamilton, writing as Phocion, leapt into the fray.<sup>131</sup> In characteristic fashion, he offered a wide-ranging and comprehensive response to the anti-Loyalist agitators. The arguments asserting that the anti-Loyalist laws were consistent with the treaty, he claimed, were nothing more than "fraudulent subterfuges."<sup>132</sup> At least equally indefensible, however, was the challenge to the scope of congressional authority:

Does not the act of confederation place the exclusive right of war and peace in the United States in Congress? Have they not the sole power of making treaties with foreign nations? Are not these among the first rights of sovereignty, and does not the delegation of them to the general confederacy, so far abridge the sovereignty of each particular state? . . . What reasonable limits can be assigned to these prerogatives of the union, other than the general safety and the *fundamentals* of the constitution?<sup>133</sup>

Thus, Congress's treaty power extended to all subjects which implicated the "national safety" and was limited only by the fundamental liberties of the people. Nor was the treaty's interference with the internal police powers of the states a legitimate objection:

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Treaty of Peace. See Jay's Report (Oct. 13, 1796), *supra* note 120, at 266-74. For description of the act disenfranchising Loyalists, see *supra* note 120.

129. For discussion of the Council's vetoes of anti-Loyalist legislation, see Decker et al., *The Trespass Act*, *supra* note 128, at 288 (noting that the Council objected to these measures, *inter alia*, on the ground that they were in violation of the Treaty of Peace). In some cases, the legislature nevertheless overrode the Council's veto. See *id.*

130. See HAMILTON, *supra* note 127, at 486-91 (describing the arguments of the anti-Loyalists); Decker et al., *Aftermath of Revolution*, *supra* note 128, at 211-14 (same); Decker et al., *The Trespass Act*, *supra* note 128, at 303-04 (same).

131. Hamilton wrote two lengthy essays. See HAMILTON, *supra* note 127; ALEXANDER HAMILTON, SECOND LETTER FROM PHOCION (Apr. 1784), *reprinted in* 3 HAMILTON PAPERS, *supra* note 127, at 530-58.

132. HAMILTON, *supra* note 127, at 489. Hamilton devoted the greater part of his argument to the interpretive dispute over Article VI. See *id.* at 486-89; HAMILTON, *supra* note 131, at 535-39, 541-47, 555-56. In his later report on state infractions of the Treaty of Peace, Jay concurred in Hamilton's view. The Trespass Act was "so destitute of even resemblance to reason, that a particular exposition of its demerits would be an unnecessary, and therefore an improper application of time and attention. In a word, this act is . . . a direct violation of the treaty of peace." Jay's Report (Oct. 13, 1796), *supra* note 120, at 268. Likewise, the law disenfranchising Loyalists was an "intemperate act" that "clearly violates the sixth article in various respects too obvious and decided to require enumeration or discussion." *Id.* at 274.

133. HAMILTON, *supra* note 127, at 489.

When in order to procure privileges of commerce to the citizens of these states in foreign countries, they stipulate a reciprocity of privileges here, does not such an admission of the subjects of foreign countries to certain rights within these states operate, immediately upon their internal police? And were this not done, would not the power of making commercial treaties vested in Congress, become a mere nullity? In short if nothing was to be done by Congress that would affect our internal police, in the large sense in which it has been taken, would not all the powers of the confederation be annihilated and the union dissolved?<sup>134</sup>

Given the agitated state of affairs, Hamilton may not have convinced everyone, but he did at least quiet some of the attacks on the constitutionality of Article VI. Thus, for example, while his chief antagonist in the newspaper debate, Mentor, continued to argue for a narrow reading of the treaty, Mentor seemed to forgo any further insistence on the claim that Article VI was beyond Congress's authority.<sup>135</sup> Still, that claim never died entirely, and ironically, as we shall

134. *Id.* at 490-91. Hamilton returned to this argument in his second letter. The need for flexibility in negotiating treaties was particularly evident, he noted, in peace treaties:

The exigencies of a community, in time of war, are so various and often so critical, that it would be extremely dangerous to prescribe narrow bounds to that power, by which it is to be restored. The consequence might frequently be a diffidence of our engagements, and a prolongation of the calamities of war.

HAMILTON, *supra* note 131, at 540. Hamilton also developed the argument as an attorney in the celebrated *Rutgers v. Waddington* case, in which he sought to avoid application of the Trespass Act to his Loyalist client. See Decker et al., *The Trespass Act*, *supra* note 128, at 296, 299-300, 305; *supra* note 98; *infra* note 295. For Hamilton's brief on the issue, see *id.* at 362, 373-80. The Mayor's Court agreed. In an opinion by Chief Judge James Duane, the court explicitly rejected the plaintiff's argument that "Congress could form no treaty of peace to reach our *internal* police." OPINION OF THE MAYOR'S COURT (Aug. 27, 1784), reprinted in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 128, at 393, 412. The treaty

we hold to be sacred and shall never, as far as we have power, suffer it to be violated or questioned.

It is the great charter of America — it has formally and forever released us from foreign domination — It has confirmed our sovereignty and independence; and ascertained our extensive limits.

... The foederal compact hath vested Congress with full and exclusive powers to make peace and war. This treaty they have made and ratified, and rendered its obligation perpetual.

And we are clearly of opinion, that no state in this union can alter or abridge, in a single point, the foederal articles or the treaty . . . .

*Id.* at 413.

135. See *Mentor's Reply to Phocion's Letter; with Some Observations on Trade, Addressed to the Citizens of New York* (printed by Shepard Kollock, No. 22, Hannover Square 1784). Mentor persisted in claiming that the act declaring Loyalists to be aliens was consistent with the treaty. See *id.* at 7-11. Although alluding to the issue, however, he seemed to abandon the claim that Article VI was beyond Congress's powers. See *id.* at 10-11 (noting, somewhat ambiguously, that "for my own part, I cannot see the inconsistency" between the treaty and Congress's powers and further noting, in reference to a related question, that "[i]f the treaty have not this power, then have we played the cheat, not only with England, but with every power that was represented in that Congress, which settled the terms of peace"). Hamilton interpreted Mentor as having "conceded this point." HAMILTON, *supra* note 131, at 539.

see, states' rights proponents would later rely directly on the strategic remarks of the American commissioners.<sup>136</sup>

New York's violations of the Treaty of Peace, however, were only the beginning of the troubles. After completing the negotiations in Paris, Jay became Secretary of Foreign affairs and, under intense pressure from the British, now found himself in the embarrassing position of trying to persuade the states to cease violating Articles IV and VI.<sup>137</sup> Continuing state resistance led directly to Jay's famous report of 1786. Undertaking a general review of the relationship between the federal treaty power and the powers of the state governments, he now asserted the broad principle of national supremacy with which he has ever after been associated:

Your secretary considers the thirteen independent sovereign states as having, by express delegation of power, formed and vested in Congress a perfect though limited sovereignty for the general and national purposes specified in the confederation. In this sovereignty they cannot severally participate . . . for the ninth article of the confederation most expressly conveys to Congress the sole and *exclusive* right and power of determining on war and *peace*, and of entering into treaties and alliances . . . . When therefore a treaty is constitutionally made, ratified and published by Congress, it immediately becomes binding on the whole nation, and superadded to the laws of the land, without 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; but laws or statutes derive their force from being acts of a legislature competent to the passing of them.<sup>138</sup>

Congress agreed and, on March 21, 1787, unanimously adopted a resolution incorporating Jay's recommendations.<sup>139</sup> Among these was the suggestion that the states pass general acts declaring any laws inconsistent with the Treaty of Peace repealed, and authorizing state courts to determine in individual cases whether any particular law was

136. See *infra* notes 148-152, 393 and accompanying text.

137. In a diplomatic note to Adams, the British made clear that they would not consider withdrawing from the western posts, as stipulated in Article VII of the Treaty of Peace, until state violations of Article IV were corrected. "I can assure you," the British Minister said, "that whenever America shall manifest a real determination to fulfil her part of the treaty, Great Britain will not hesitate to prove her sincerity." Letter from British Minister Carmathen to John Adams, *supra* note 101, at 189. For discussion of this episode, see CRANDALL, *supra* note 64, at 40-42. See also MARKS, *supra* note 63, at 5-15.

138. Letter from British Minister Carmathen to John Adams, *supra* note 101, at 203-04.

139. For Congress's resolution, see 4 SECRET JOURNALS OF CONGRESS, *supra* note 101, at 294-96 (Mar. 21, 1787). For Jay's recommendations, see Jay's Report (Oct. 13, 1796), *supra* note 120, at 282-83. Jay had recommended that Congress make three resolves: first, affirming that treaties are law of the land binding on the states and not subject to their legislative authority; second, that all acts of the states inconsistent with the Treaty of Peace should be forthwith repealed; and third, that each state should pass a general law repealing any laws inconsistent with the treaty and leaving to the courts the determination of which particular laws ran afoul of the obligations of the treaty. See *id.*

in conflict with the treaty.<sup>140</sup> Congress then sent an elaborate circular letter to the states, communicating its resolution and justifying the understanding of the constitutional division of powers on which the resolution was based.<sup>141</sup> A number of states quickly responded by passing legislation. Virginia, however, whose citizens owed the largest portion of the debts, continued to resist.<sup>142</sup> In Virginia's view, it was ultimately the state, not Congress, that had the power to decide when national treaties should be complied with and when they should be violated. That is where the matter lay when the delegates began their discussions in Philadelphia just a little over a month after Congress sent its circular letter.

*c. The Effort to Regulate Foreign Commerce Through the Systematic Conclusion of Commercial Treaties.* To the American commissioners, the embarrassments which their inconsistencies might cause must have seemed insignificant compared to the potential benefits, given the overriding importance Americans placed on the debt and Loyalist issues. In retrospect, however, it appears that they were not fully aware of the depth of the waters in which they were swimming, failing to anticipate how Great Britain might make use of their putative concessions to its own advantage.<sup>143</sup> After recognition of independence, the most pressing American concern was to establish commercial relations between the United States and Britain on favorable terms.<sup>144</sup> Initially, there were strong grounds for optimism. Pitt pro-

140. See 4 SECRET JOURNALS OF CONGRESS, *supra* note 101, at 295-96 (Mar. 21, 1787) (recommending that the states "pass an act declaring in general terms that all such acts . . . repugnant to the treaty of peace . . . shall be and thereby are repealed; and that the courts . . . in all causes . . . touching the said treaty, shall decide and adjudge according to the true intent and meaning of the same, any thing in the said acts . . . to the contrary thereof in any wise notwithstanding").

141. See 4 SECRET JOURNALS OF CONGRESS, *supra* note 101, at 296, 329-38 (Apr. 13, 1787). Congress essentially adopted the views Jay had expressed in his report with some further amplification. Its circular letter is often cited as the source of the Supremacy Clause.

142. See CORWIN, *supra* note 62, at 27-28 & n.5; Alexander Hamilton, *The Defence No. IV* (Aug. 1, 1795), reprinted in 19 HAMILTON PAPERS, *supra* note 98, at 77, 83. Although Virginia actually passed repealing legislation, the operation of the act was suspended until the Governor of the state issued a proclamation declaring that Great Britain had ceased violating the Treaty of Peace in two crucial respects: that the British had surrendered the western posts, the main grievance on the American side, and that it had agreed to return, or to pay compensation for, the slaves that the British army had carried away allegedly in violation of the Treaty.

143. During the Treaty of Peace negotiations, one of the British negotiators had discreetly warned the Americans about how dangerous states' rights limitations on the treaty power might prove to be. See Letter from Benjamin Vaughn to John Jay (Nov. 18, 1782), in 2 JOHN JAY: THE WINNING OF THE PEACE 423, 424 (Richard B. Morris ed., 1980). The British government, unsurprisingly, repeated the commissioners' claims to Parliament in justification of its failure to obtain more extensive guarantees for the Loyalists.

144. For discussion of the negotiations and the British attitude toward trade, see BEMIS, *supra* note 64, at 63-64; CURTIS, *supra* note 64, at 282-85; and MORRIS, THE PEACEMAKERS, *supra* note 104, at 429-33. The bulk of U.S. foreign trade remained with the British. Par-

posed a measure in Parliament to establish trade on highly liberal terms, preparatory to the negotiation of a commercial treaty. However, his government quickly fell, and his successors took a different view of British interests.<sup>145</sup> Rather than encourage American commercial development, they preferred a divide-and-conquer strategy: "They determined . . . to deal with this country as a collection of rival States, with each of which they could make their own terms, after the pressure of their policy, and the impossibility of escaping from its effects, had begun to be felt."<sup>146</sup> In justification, they cited the very claims the American commissioners had made during the peace negotiations. Pointing to Articles VI and IX of the Articles of Confederation, Lord Sheffield, in an influential argument against making any further treaties with the United States, contended:

No treaty can be made with the American States that can be binding on the whole of them. The act of Confederation does not enable Congress to form more than general treaties: at the moment of the highest authority of Congress, the power in question was with-held by the several States. . . . When treaties are necessary, they must be made with the

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ticularly crucial for the new nation was trade with the British colonies in the West Indies, which had been open to the colonists before independence.

145. The Treaty of Peace had been negotiated under Lord Shelburne's enlightened government, and Lord Shelburne initially anticipated adopting a liberal trade policy toward the new nation. His proposed bill would have permitted American produce to enter British ports as though British-owned, would have treated American ships carrying such produce the same as other foreign vessels, and would have opened up the West Indies trade to American goods and shipping on the same terms as British goods and shipping. After the conclusion of the Treaty of Peace, however, his government fell, and the new government under Fox reversed directions entirely. Instead of adopting Shelburne's bill (which had been introduced by Pitt), Parliament vested discretionary power over the subject in the King in Council, which in turn issued a series of orders progressively limiting the scope of American commerce, until the West Indies trade was altogether shut off. British policy was heavily influenced by the publication of Lord Sheffield's 1783 pamphlet, *Observations on the Commerce of the American States*. JOHN LORD SHEFFIELD, OBSERVATIONS ON THE COMMERCE OF THE AMERICAN STATES (Dublin, Luke White 2d ed. 1784). Marshaling a wide array of statistics, Lord Sheffield argued vigorously that granting liberal terms of trade to American produce and shipping would seriously undermine British commercial strength. It was also entirely unnecessary. In light of the weakness of the American governmental system, British commercial interests would have no difficulty dominating the American market. See BEMIS, *supra* note 64, at 69; CURTIS, *supra* note 64, at 282-84; MARKS, *supra* note 63, at 52-56; MORRIS, THE PEACEMAKERS, *supra* note 104, at 429-30. According to Bemis,

[T]he mercantilist Lord Sheffield . . . contended that now that the United States had become independent Great Britain should not concern itself in extending to the former colonies the commercial privileges they had enjoyed under the old empire. There was no danger, Sheffield showed, of the United States being able to retaliate with tariffs or navigation laws of its own against British trade which continued to dominate the American market. The American Confederation was too feeble for this. . . . Confidential observers of the Ministry in the United States pointed out that the union was really on the point of dissolution.

BEMIS, *supra* note 64, at 69.

146. CURTIS, *supra* note 64, at 284.

States separately. Each State has reserved every power relative to imports, exports, prohibitions, duties, &c. to itself.<sup>147</sup>

Notwithstanding Lord Sheffield's (probably deliberate) misconstruction of the Articles, his argument demonstrated the grave potential for embarrassment which even the hint of states' rights limitations on the treaty power could create. His view, moreover, received a faint echo even on the other side of the Atlantic. After the conclusion of the Treaty of Peace — and in light of the outright British refusal to agree to consider reasonable commercial terms — Congress in late 1783 began energetic efforts to negotiate commercial treaties throughout Europe. The first task was to develop a model plan for such treaties, name commissioners, and formalize their instructions. Jefferson, then in Congress, took the lead, but progress was snagged by a small number of opponents who argued that any treaties successfully negotiated should, before becoming valid, be submitted to the legislatures of each of the thirteen states for their approval.<sup>148</sup> Opponents also fought a provision, included to answer the doubts raised by Lord Sheffield, that "these United States be considered in all such treaties . . . as one nation upon the principles of the federal Constitution."<sup>149</sup>

Jefferson was outraged and urgently sought a solution.<sup>150</sup> To prompt immediate action, in April 1784, he submitted a resolution to Congress reciting the harms which would be caused by further delay

147. SHEFFIELD, *supra* note 145, at 199-200; *see also id.* at 40-41 n.§ (analyzing Articles VI and IX of the Confederation but badly mischaracterizing them).

148. *See* Resolution on Treaties of Amity and Commerce (Apr., 1784), in 7 THE PAPERS OF THOMAS JEFFERSON 118, 119 (Julian P. Boyd ed., 1954) [hereinafter 7 JEFFERSON PAPERS] (reprinting Jefferson's draft resolution opposing states' rights advocates on this point). Jefferson had prepared a report recommending a draft commercial treaty and had submitted it to Congress on December 20, 1783. *See id.* at 204 (note following the Resolution). Although he regarded the matter as one of great urgency, the report was recommitted three times, *see id.*, and the model treaty was not finally agreed to until May 7, 1784, *see* 26 JOURNALS OF THE CONTINENTAL CONG., *supra* note 94, at 357 (May 7, 1784).

149. Resolution on Treaties of Amity and Commerce, *supra* note 148, at 204 (note following the Resolution). Opponents' efforts to strike this provision was defeated on March 26, 1784. *See* 26 JOURNALS OF THE CONTINENTAL CONG., *supra* note 94, at 169 (Mar. 26, 1784).

150. Writing to Madison, Jefferson claimed that the entire delay was the result of the efforts of one delegate who was motivated solely by his ambition to become Secretary of Foreign Affairs. According to Jefferson,

Tho' he could not change the vote of his state, he intrigued with a young fool from North Caroline and an old one from New York, got them to divide their states by voting in the negative, and there being but eleven states present, one of which was known before to be divided the whole set of instructions were rejected, tho approved by twenty one out of twenty five members present. The whole business has been in the dust for a month . . . He takes now about one half of the time of Congress to himself and in conjunction with Read [and] Spaight obstruct business inconfe]jvably.

Letter from Thomas Jefferson to James Madison, (Apr. 25, 1784), in 7 JEFFERSON PAPERS, *supra* note 148, at 118, 119.



and declaring that "the federal constitution does not require that treaties before their conclusion should be communicated to the thirteen legislatures and should receive all their several approbations."<sup>151</sup> His strategy seemingly worked. Congress quickly solved the problem. Just as Jefferson had urged, it approved the model plan, including the provision asserting the national character of the United States in treaty-making; named commissioners, including Jefferson himself; and approved instructions giving them authority to conduct the necessary negotiations.<sup>152</sup>

With the difficulties in Congress settled, Jefferson energetically pursued his assigned task in Europe. At home, Congress's lack of authority over commerce was precipitating a growing economic and political crisis. Jefferson hoped to find a solution through the conclusion of a comprehensive system of commercial treaties with all of the commercial powers of Europe. In a letter to James Monroe, he gave a rather frank defense of the nationalist view of the treaty power:

Congress, by the Confederation have no original and inherent power over the commerce of the states. But by the 9th. article they are authorised to enter into treaties of commerce. The moment these treaties are concluded the jurisdiction of Congress over the commerce of the states springs into existence, and that of the particular states is superseded so far as the articles of the treaty may have taken up the subject . . . . Congress may by treaty establish any system of commerce they please. But, as I before observed, it is by treaty alone they can do it. Tho' they may exercise their other powers by resolution or ordinance, those over commerce can only be exercised by forming a treaty . . . . If therefore it is better for the states that Congress should regulate their commerce, it is proper that they should form treaties with all nations with whom we may possibly trade. You see that my primary object in the formation of treaties is to take the commerce of the states out of the hands of the states, and to place it under the superintendance of Congress, so far as the imperfect provisions of our constitution will admit . . . . I would say then to

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151. Resolution on Treaties of Amity and Commerce, *supra* note 148, at 203. Lack of commercial treaties, Jefferson claimed, led to "the suppression of every effort for the admission of our citizens to their ports on an equal footing with those of other countries, to a continuance of the occlusion of the West Indian markets against the produce of these states; [and] loses a crisis of favourable disposition in the European powers in general to enter into connections of amity and commerce with us." *Id.*

152. See 26 JOURNALS OF THE CONTINENTAL CONG., *supra* note 94, at 356-61 (May 7, 1784). The frustrating experience in opposing the states' rights uprising on the question of the national character of the United States in treaty-making, especially in light of the denigrating nature of the British attitude on this point, may well explain Jefferson's later impatience with Adams for having spoken of Congress as a "diplomatic assembly." Chiding Adams, Jefferson observed that "[s]eparating into parts the whole sovereignty of our states, some of these parts are yeilded to Congress . . . . It has accordingly been the decision of our courts that the Confederation is a part of the law of the land, and superior in authority to the ordinary laws, because it cannot be altered by the legislature of any one state. I doubt whether they are at all a diplomatic assembly." Letter from Thomas Jefferson to John Adams (Feb. 23, 1787), *supra* note 97, at 177.

every nation on earth, *by treaty*, your people shall trade freely with us, and ours with you, paying no more than the most favoured nation, in order to put an end to the right of individual states acting by fits and starts to interrupt our commerce or to embroil us with any nation.<sup>153</sup>

Unfortunately, the efforts of Jefferson and his fellow commissioners came to naught, yielding only a limited commercial treaty with Prussia in 1785.<sup>154</sup> Other nations, following Great Britain's lead, were doubtful about the extent of Congress's power and of its ability to enforce treaty obligations against the states.<sup>155</sup> Indeed, the British were deliberately insulting, responding to the entreaties of the American commissioners with outright skepticism.<sup>156</sup> The commissioners, moreover, could do nothing to command greater respect. Without the power to regulate commerce, Congress was powerless to retaliate against the discriminatory trade policies of other nations by imposing discriminatory duties on their products and vessels. Yet, the states were utterly incapable of developing an effective coordinated strategy, instead finding themselves locked in their own trade wars and conflicts. As a result, foreign nations saw no advantage in entering into commercial treaties with the United States.<sup>157</sup> Notwithstanding

153. Letter from Thomas Jefferson to James Monroe (June 17, 1785), in 8 THE PAPERS OF THOMAS JEFFERSON 227, 230-31 (Julian P. Boyd ed., 1953). Madison fully concurred in Jefferson's view of the scope of the treaty power. See IRVING BRANT, JAMES MADISON, THE NATIONALIST, 1780-87, at 379 (1948).

154. For discussion, see *supra* notes 94-95 and accompanying text.

155. See BEMIS, *supra* note 64, at 66 (noting that "[a]bortive negotiations with other powers, notably Austria and Denmark, failed because the growing ineptitude and powerlessness of the Confederation to enforce its treaties against the thirteen component states convinced foreign nations that the Continental Congress had ceased to be a responsible body and that the United States itself might soon cease to be a nation").

156. See CURTIS, *supra* note 64, at 289-90; MARKS, *supra*, note 63, at 66-71. In response to the American commissioners' request to open negotiations, the Duke of Dorset replied:

Having communicated to my court the readiness you expressed in your letter to me of the 9th of December to remove to London, for the purpose of treating upon such points as may materially concern the interests, both political and commercial, of Great Britain and America; and having at the same time represented that you declared yourselves to be fully authorized and empowered to negotiate, I have been, in answer thereto, instructed to learn from you, gentlemen, what is the real nature of the powers with which you are invested, — whether you are merely commissioned by Congress, or whether you have received separate powers from the respective States . . . . [R]epeated experience having taught . . . how little the authority of Congress could avail in any respect, where the interest of any one individual State was even concerned, and particularly so where the concerns of that State might be supposed to militate against such resolutions as Congress might think proper to adopt. The apparent determination of the respective States to regulate their own separate interests renders it absolutely necessary . . . that my court should be informed how far the commissioners can be duly authorized to enter into any engagements with Great Britain, which it may not be in the power of any one of the States to render totally fruitless and ineffectual.

CURTIS, *supra* note 64, at 289-90 n.1 (quoting Letter from Duke of Dorset to American Commissioners (Mar. 26, 1785)).

157. See CURTIS, *supra* note 64, at 284-90; MARKS, *supra* note 63, at 69-95. Marks persuasively argues that it was the British trade restrictions that provided the impetus leading first to the Annapolis Convention and ultimately to Philadelphia. See *id.*

Jefferson's heroic exertions, the solution could not be found in the treaty power alone but awaited more fundamental changes that could be achieved only through constitutional reform.

## 2. *The Framing and Ratification of the Constitution of 1787*

The stage was thus set for the great national debate over the proposed Constitution. Through grueling experience, those who took the lead in drafting, debating, and ratifying the Constitution had learned a number of lessons that had a crucial bearing on their deliberations on the treaty power: the overriding importance of maximizing the nation's influence in negotiations with foreign states; the imperative of flexibility and the uncontrollable nature of negotiations; the unavoidable necessity at times of deferring to friends and foes alike on treaty stipulations even when they conflicted with local policies and laws; the potential embarrassment which states' rights limitations on the scope of the treaty power could cause the nation in its ability to pursue the national interest, sometimes on matters of the greatest consequence; the serious dangers posed by state noncompliance with national treaties; and the imperative of affording the federal government the power to carry out the obligations which it undertook to foreign nations.

No doubt it was the forcefulness with which these lessons had been brought to the attention of the Founders that accounts for the surprisingly minimal discussions of the scope of the treaty power both in Philadelphia and in the ensuing national debates from 1787 to 1789. Without provoking serious controversy, the Framers granted the federal government the power over treaties in unqualified terms and framed the Supremacy Clause to express the relationship between treaties and state law in the most unequivocal fashion. For the Confederation's treaty power burdened by Article IX's states' rights proviso, they substituted an outright grant of power. Likewise, for the confusing and limited affirmation of the supremacy of federal treaties in Article VI, which had given rise to arguments for states' rights limitations on the treaty power, they substituted the Supremacy Clause's sweeping declaration that all treaties made under the authority of the United States were to be supreme law of the land and binding on the states.

Remarkably, these changes provoked no controversy. The issue on which debate focused was how such a momentous power could be properly safeguarded, a point which understandably left many feeling unsatisfied. These debates, however, simply served to underscore the widespread consensus on the necessity of broad discretion in the federal government over treaties. Indeed, those who participated in the debates in Philadelphia and in the state ratifying conventions seem uniformly to have understood the grant of the treaty power as comprehensive, excluding the states altogether and placing the national

government in the same position as other sovereign nations. This did not mean that the treaty power was unlimited: like all exercises of governmental authority, it was to be subject to fundamental principles protecting individual rights and could not contravene any constitutional prohibitions. Its scope, however, was to be determined in accordance with international practice and the law of nations. States' rights limitations on its scope were not to apply. Indeed, with only one arguable exception, no one suggested that the treaty power would be limited to those subjects over which Congress could otherwise regulate pursuant to its legislative powers.

By way of background, two points were at the center of the discussions concerning the treaty power and require brief explanation. First, the absence of a bill of rights in the proposed Constitution raised serious concerns in relation specifically to treaties. Could treaties violate individual rights that were secured by the state constitutions but which the Framers in Philadelphia had not seen fit to secure explicitly against the federal government? Second, recent negotiations with Spain over the right of Americans to navigate the Mississippi River had provoked portentous sectional conflict. When Jay, as Foreign Secretary, had requested that Congress amend his instructions to permit him to cede navigation rights for twenty-five years in return for commercial privileges, he had prompted a near split in the Confederation. The American position was that the Treaty of Peace with the British had given the United States the right to free navigation, but Spain, which then held New Orleans, disagreed. Navigation was crucial to southern state interests because further expansion to the west depended upon access to the Mississippi. These states viewed Jay's request as an inexcusable betrayal of the national interest. Although Article IX of the Confederation required the approval of nine states for treaties, only seven states voted in favor of Jay's request. The majority, however, insisted that the nine-state rule was inapplicable to instructions, and so Jay proceeded to negotiate with Spain on the basis of the amended instructions. If he had succeeded, the country would have found itself in a precarious position. Under the then law of nations, the United States could have been charged with a breach of faith for refusing to ratify a treaty which it had instructed its commissioner to conclude; yet, the instructions had not been approved by the requisite majority for approving treaties. Continuing fear that the northern states would make another attempt to cede the nation's territorial rights in the Mississippi River played a major role in the discussions of the treaty power.<sup>158</sup>

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158. There are many accounts of the Mississippi controversy, in which both Madison and Jay played central and opposing roles. See, e.g., BEMIS, *supra* note 64, at 78-80; RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 176-80 (1971); 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, 60-68

a. *The Philadelphia Convention.* The discussions in Philadelphia are notable for their paucity of material directly addressing the scope of the treaty power. What nevertheless emerges is a shared supposition that the power was general and would extend as far as was customary under international practice. Those comments which referred to the extent of the power emphasized, sometimes anxiously, its breadth. Thus, for example, George Mason, with the Mississippi situation in mind, observed that the President and Senate could "already sell the whole Country by means of Treaties."<sup>159</sup> James Wilson emphasized that "the Senate alone can make a Treaty, requiring all the Rice of S. Carolina to be sent to some one particular port."<sup>160</sup> Elbridge Gerry noted that "[i]n Treaties of peace the dearest interests will be at stake, as the fisheries, territory &c. In treaties of peace also there is more danger to the extremities of the Continent, of being sacrificed."<sup>161</sup> He feared "putting the essential rights of the Union in the hands of so small a number."<sup>162</sup>

Crucially, these comments were met with acquiescence, not denial. They were not criticisms made in support of proposals to limit the scope of the treaty power, but arguments for the necessity of providing adequate safeguards for its exercise.<sup>163</sup> Thus, in pointing out that the king of Great Britain had to obtain Parliament's approval for certain treaties, most importantly those dismembering the empire, Madison assumed that the scope of the treaty power in the Constitution was as extensive as the king's in Great Britain; Madison's point was that the British practice furnished precedent for the further safeguard of legis-

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(1979); Solomon Slonim, *Congressional-Executive Agreements*, 14 COLUM. J. TRANSNAT'L L. 434, 443 (1975). The subject was discussed endlessly during the Virginia Ratifying Convention, see *infra* notes 194, 196-200, 202-211 and accompanying text, and underlay the discussion of the treaty power during the whole period.

159. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 297 (Max Farrand ed., rev. ed. 1937) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

160. *Id.* at 393.

161. *Id.* at 541. Corresponding to the profound Southern interest in navigation of the Mississippi, the Northern states were urgently concerned about access to the Newfoundland fisheries. American rights to the fisheries had been the subject of intense dispute during the peace negotiations with the British. See, e.g., MORRIS, THE PEACEMAKERS, *supra* note 104, at 346-81. These two concerns created a common sectional interest in a minority veto over treaties, forming the political basis for the two-thirds rule. For helpful discussion, see Slonim, *supra* note 158, at 443-47. See also Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 GEO. WASH. L. REV. 271, 297 (1934).

162. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 159, at 548.

163. See, e.g., 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 159, at 392-95, 534, 540-41, 543, 548-50. Even on the crucial question of whether the treaty power could dismember the empire — that is, whether territorial rights to navigation of the Mississippi could be ceded — no one proposed a limitation on the scope of the treaty power. Rather, the effort was to provide additional safeguards, which ultimately led to the adoption of the two-thirds rule. Other proposals, however, failed. See *id.* at 548-50.

lative ratification for certain kinds of treaties.<sup>164</sup> This view, moreover, was consistent with a general assumption that the scope of the treaty power would be determined by reference to international practice. Thus, in explanation of his claim that a “treaty might alienate territory &c.,” Mason pointed to precedent: the British cession of islands in the West Indies by treaty “were an example.”<sup>165</sup> Thus, he opined, if Spain should conquer Georgia, “the Senate might by treaty dismember the Union.”<sup>166</sup>

The Framers, moreover, were fully cognizant that the interests of the states would be seriously affected by treaties. No more dramatic example was necessary than the possibility that part or all of the territory of a state might be ceded away by treaty. They responded to this concern, however, not by narrowing the scope of the treaty power, but by vesting the power in the Senate, where the states were equally represented, and, despite Wilson’s cogent objection to putting “it in the power of a minority to controul the will of a majority,”<sup>167</sup> by subjecting treaties to a minority veto. Thus, John Dickinson, in discussing a proposal to require legislative ratification of treaties, noted that it would be “unfavorable to the little States; [which] would otherwise have an *equal* share in making Treaties.”<sup>168</sup> Likewise, Hugh Williamson recalled to Madison how Wilson’s majoritarian objection had been met by the reply “that the Navigation of the Mississippi after what had already happened in Congress was not to be risqued in the Hands of a meer Majority.”<sup>169</sup> At no point did concern over the interests of the states lead to proposals to restrict the scope of the treaty power.<sup>170</sup>

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164. See 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 159, at 394-95. Later, in the Virginia Ratifying Convention, when pressed hard on the Mississippi question, Madison would insist, somewhat inconsistently, that at least in some cases the treaty power did not extend to dismembering the Union because treaties ceding territorial rights were in conflict with the law of nations. See *infra* notes 205-206, 209 and accompanying text. The question of cessions of territory was a pervasive theme during the Founding debates and was never satisfactorily resolved. It has remained a vexed question ever since. See, e.g., 1 WILLOUGHBY, *supra* note 21, § 219; *supra* notes 26, 159-163 and accompanying text; *infra* notes 165-166, 196-207, 210-211, 216, 431, 435, 524 and accompanying text.

165. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 159, at 297-98.

166. *Id.* at 298.

167. *Id.* at 540.

168. *Id.* at 393.

169. Letter from Hugh Williamson to James Madison (June 2, 1788), in 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 159, at 306, 307; see also 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 159, at 392 (remarks of James Madison) (arguing for inclusion of the President in treaty-making because “the Senate represented the States alone”). As William Davie explained to the North Carolina Ratifying Convention:

[T]he extreme jealousy of the little states, and between the commercial states and the non-importing states, produced the necessity of giving an equality of suffrage to the Senate. The same causes made it indispensable to give to the senators, as representatives of states, the power of making, or rather ratifying, treaties . . . . [T]he small states would not consent to confederate without an equal voice in the formation of treaties . . . . Every man was con-

The discussions also emphasized other related points. In light of the experience under the Confederation, there was widespread agreement about the necessity of requiring states to conform to treaties concluded by the national government. Madison, for example, noted the “constant tendency in the States . . . to violate national Treaties,”<sup>171</sup> and that:

[V]iolations of Treaties . . . if not prevented must involve us in the calamities of foreign wars[.] 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. . . . 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 them on the whole.<sup>172</sup>

Finally, the reasons for excluding the states from participation in treaty-making were laid bare with Madison’s customary, devastating clarity: foreign intrigue, the “pernicious machinations” of foreign states, would otherwise divide the Union with possibly catastrophic consequences.<sup>173</sup> Thus, Madison asserted it was crucial that any plan secure the Union agst. the influence of foreign powers over its members. He pretended not to say that any such influence had yet been tried: but it [was] naturally to be expected that occasions would produce it. As lessons which claimed particular attention, he cited the intrigues practiced

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vinced of the inflexibility of the little states in this point. It therefore became necessary to give them an absolute equality in making treaties.

3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 159, at 348; *see also id.* at 342 (remarks of Spaight in North Carolina Ratifying Convention) (noting that power had been given to Senate because of equal representation of the states); MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 131 (1913) (noting that the treaty power was vested in the Senate because it was “the body which most nearly corresponded to the old congress as the representative of the states”). In fact, however, it was not only the interests of the little states that required lodging the power in the Senate under the protection of the two-thirds rule. In light of the Mississippi experience and the Northern states’ concerns about the Newfoundland fisheries, the two-thirds rule was aimed most importantly at protecting sectional interests.

170. It did, however, prompt proposals to provide further procedural safeguards for state interests. For example, an amendment was proposed which would have subjected treaties ceding territorial, navigation, or fishery rights to the additional requirement of approval by the House:

But no Treaty (of peace) shall be made without the concurrence of the House of Representatives, by which the territorial boundaries of the U.S. may be contracted, or by which the common rights of *navigation* or *fishery* recognized to the U. States by the late treaty of peace, or accruing to them by virtue of the laws of nations may be abridged.

4 RECORDS OF THE FEDERAL CONVENTION, *supra* note 159, at 58; *see also id.* at 534, 543 (noting proposal, at moment when peace treaties were exempted from the two-thirds requirement, that peace treaties depriving the United States “of their present Territory or rights” be subject to two-thirds rule).

171. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 159, at 164.

172. *Id.* at 316; *see also id.* at 164 (remarks of Pinkney).

173. *See id.* at 319.

among the Amphictionic Confederates first by the Kings of Persia, and afterwards fatally by Philip of Macedon: Among the Achaeans, first by Macedon & afterwards no less fatally by Rome: Among the Swiss by Austria, France & the lesser neighbouring Powers; among the members of the Germanic <Body> by France, England, Spain & Russia —: and in the Belgic Republic, by all the great neighbouring powers.<sup>174</sup>

*b. The Federalist Papers.* These same themes were addressed and amplified upon in the *Federalist Papers*.<sup>175</sup> Madison, Hamilton, and Jay emphasized, among other things, the special role of the federal government in the field of foreign affairs,<sup>176</sup> the imperative of marshaling the resources of the nation to maximize its influence in foreign negotiations,<sup>177</sup> the vesting of the treaty power in the President and two-thirds of the Senate as an extraordinary safeguard for state interests,<sup>178</sup> the exclusive character of the treaty power,<sup>179</sup> and the urgent

174. *Id.* In fact, despite Madison's delicacy, during the Confederation, Great Britain and, to some extent, Spain had plotted with disaffected elements to break off the northern and southern portions of the country.

The Governor-General of Canada, aware of the imminent contingency of a break-up of the United States, entered into secret negotiations with a separatist element in Vermont, tempting them with especial trade privileges via the Champlain-St. Lawrence system, which were denied to the thirteen states. It was hoped that when the break-up came, Vermont could be easily attached to Canada, and also the entire territory north of the Ohio River . . . It would then be only a matter of time before British sovereignty would be restored over the lost colonies.

BEMIS, *supra* note 64, at 73.

175. By focusing on the *Federalist Papers*, I do not mean to give them undue weight. Nevertheless, their importance is widely recognized.

176. *See, e.g.,* THE FEDERALIST NO. 42 (James Madison) (Clinton Rossiter ed., 1961). As Madison famously put it: "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." THE FEDERALIST, *supra*, NO. 42, at 264.

177. *See, e.g.,* THE FEDERALIST, *supra* note 176, NO. 75 (Alexander Hamilton), at 452. Thus, in defending the inclusion of the President in the treaty-making process in his own right, rather than as an agent appointed by the Senate when it thought useful, Hamilton noted:

[T]he ministerial servant of the Senate could not be expected to enjoy the confidence and respect of foreign powers in the same degree with the constitutional representative of the nation, and, of course, would not be able to act with an equal degree of weight or efficacy. While the Union would, from this cause, lose a considerable advantage in the management of its external concerns, the people would lose the additional security which would result from the co-operation of the executive.

*Id.*

178. *See, for example,* the *Federalist Papers*, in which Jay notes that:

[a]s all States are equally represented in the Senate, and by men the most able and the most willing to promote the interests of their constituents, they will all have an equal degree of influence in that body, especially while they continue to be careful in appointing proper persons, and to insist on their punctual attendance.

THE FEDERALIST, *supra* note 176, NO. 64 (John Jay), at 395.

179. *See* THE FEDERALIST, *supra* note 176, NO. 44 (James Madison), at 281. Madison thought the reasons for excluding states from making treaties so obvious that he need not even repeat the overriding considerations he had laid out in Philadelphia. *See id.* (noting that "[t]he prohibition against treaties, alliances, and confederations makes a part of the ex-



need to prevent state violations of treaties concluded by the national government.<sup>180</sup> For present purposes, however, the crucial point was their repeated stress upon the breadth of the treaty power, their implicit affirmation that its scope was to be determined in accordance with international practice, and, indeed, their explicit rejection of states' rights limitations.

In *Federalist No. 69*, Hamilton sought to demonstrate the weakness of the federal executive in comparison with the British monarch. Contrasting power for power, he argued that the President's powers were uniformly inferior to the king's.<sup>181</sup> In this context, his discussion of the treaty power is particularly illuminating because it offered him the perfect opportunity to specify any limits on the President's treaty powers which were inapplicable to the king's. Yet, the only difference on which he focused was the lack of any Parliamentary check on the king in contrast to the requirement of Senate advice and consent in the case of the President.<sup>182</sup>

The king's power of making treaties, Hamilton noted, was plenary:

He can of his own accord make treaties of peace, commerce, alliance, and of every other description . . . . Every jurist of that kingdom, and every other man acquainted with its Constitution knows, as an established fact, that the prerogative of making treaties exists in the crown in its utmost plenitude . . . .<sup>183</sup>

In this respect, however, the President's powers were to be the same. What differed were the safeguards by which they were to be protected: "The one can perform alone what the other can only do with the concurrence of a branch of the legislature."<sup>184</sup> Thus, rather than specifying limitations on the scope of the treaty power, Hamilton asserted that it would be as extensive as the king's and, implicitly, as that of other nations, and he focused instead on the special procedural requirements imposed by the Constitution.

isting articles of Union; and for reasons which need no explanation, is copied into the new Constitution"); see also *supra* notes 173-174 and accompanying text.

180. See THE FEDERALIST, *supra* note 176, NO. 22 (Alexander Hamilton), at 151; THE FEDERALIST, *supra* note 176, NO. 80 (Alexander Hamilton), at 476. By their violating treaty stipulations, "[t]he faith, the reputation, the peace of the whole Union are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed." THE FEDERALIST, *supra* note 176, NO. 22 (Alexander Hamilton), at 151.

181. See THE FEDERALIST NO. 69 (Alexander Hamilton). Among others, he surveyed the terms of office, impeachment, the veto power, the commander-in-chief power, the pardon power, and the appointment power. He compared these powers of the President, moreover, not only to the powers of the British monarch but also to the powers of the Governor of New York.

182. See *id.* at 419-20.

183. *Id.* at 419-20.

184. *Id.* at 420.

*Federalist No. 75*, moreover, is to the same effect. Here, too, Hamilton emphasized the breadth of the treaty power. Noting that the Constitution granted the President and Senate “the entire power of making treaties,” he recognized that this committed to them “interests of so delicate and momentous a kind, as those which concern [the nation’s] intercourse with the rest of the world.”<sup>185</sup> Since it would not be safe to lodge such extensive powers in the President alone, the Senate was to be conjoined with him in the treaty-making process.<sup>186</sup>

Madison’s comments are even more revealing. Given his extensive experience with treaty-making under the Confederation, and his personal involvement in the controversies over the scope of Congress’s treaty powers in relation to the powers of the states, we have every reason to take seriously his affirmation in *Federalist No. 42* that the treaty power under the Constitution was to be the same as under the Articles of Confederation.<sup>187</sup> We have already seen that states’ rights limitations, though sometimes invoked, were uniformly defeated under the Confederation. Indeed, recalling the difficulties that the states’ rights limitations in Articles VI and IX had precipitated, Madison observed that the power was the same “with this difference only”: the treaty power “*is embarrassed by the plan of the convention, of an exception under which treaties might be substantially frustrated by regulations of the States.*”<sup>188</sup> Thus, the Framers, rather than embracing states’ rights limitations on the scope of the treaty power, self-consciously removed the only provisions that had made states’ rights limitations even plausibly defensible! Those provisions had embarrassed the nation in its dealings with France and Great Britain and had delayed, and even threatened to undermine, the plan for concluding commercial treaties with the European powers.<sup>189</sup> Madison thus made clear that after adoption of the Constitution, the federal

185. THE FEDERALIST, *supra* note 176, NO. 75 (Alexander Hamilton), at 451.

186. See *id.* at 451-52. Jay also emphasized the broad scope of the power and the consequent need for adequate safeguards:

The power of making treaties is an important one, especially as it relates to war, peace, and commerce; and it should not be delegated but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good.

THE FEDERALIST, *supra* note 176, NO. 64 (John Jay), at 390. The President and Senate, he claimed, would be among those “who best understand our national interests, whether considered in relation to the several states or to foreign nations.” *Id.* at 391.

187. See THE FEDERALIST NO. 42 (James Madison). Madison indicated that the grant of the power to make treaties and to receive ambassadors “speak their own propriety. Both of them are comprised in the Articles of Confederation.” *Id.* at 264. For a subsequent comment by Madison to the same effect in the Virginia Ratifying Convention, see *infra* note 209 and accompanying text.

188. THE FEDERALIST, *supra* note 176, NO. 42 (James Madison), at 264 (emphasis added).

189. See *supra* notes 79-102, 106-116, 127-157 and accompanying text.

government was not again to find itself in a similarly embarrassing position.

Equally significant, moreover, Madison's discussion demonstrates how the nationalist conception itself was simply one of the set of background assumptions with which the Founders were working. Immediately after observing that the states' rights limitations on the treaty power had been removed, Madison turned to the provision in the Constitution giving the national government the power to send and receive consuls.<sup>190</sup> The Confederation, he noted, had failed to include a corresponding grant of power, giving the old Congress only the power to send and receive ambassadors but not consuls. As a result, the old Congress could at most only appoint consuls to be sent abroad pursuant to its general powers of appointment.<sup>191</sup> It could not, however, receive consuls from abroad. There was one exception to this rule:

It is true that where treaties of commerce stipulate for the mutual appointment of consuls, whose functions are connected with commerce, the admission of foreign consuls may fall within the power of making commercial treaties . . . . But the admission of consuls into the United States, where no previous treaty has stipulated it, seems to have been nowhere provided for. A supply of the omission is one of the lesser instances in which the convention have improved on the model before them.<sup>192</sup>

Implicit in Madison's point, of course, is precisely the nationalist view of the treaty power: even where Congress is otherwise without legislative power over a particular subject matter — and therefore power over that subject must reside in the states — Congress's power to make treaties may still enable it to deal with the subject through negotiation and agreement with foreign states. The treaty power is a separate delegated power in its own right, which is not confined to those subjects over which Congress has otherwise been delegated authority.<sup>193</sup>

*c. The Virginia Ratifying Convention.* By far the most extensive discussion of the scope of the treaty power occurred during the

190. See THE FEDERALIST, *supra* note 176, NO. 42 (James Madison), at 264-65.

191. As Madison observed, Article IX of the Confederation gave Congress the power to appoint such civil officers as may be necessary for managing the general affairs of the United States. See *id.*

192. *Id.* at 265.

193. Madison made the same point during the Philadelphia convention. Thus, in discussing a proposal to permit states, with Congress's consent, to impose tonnage duties for the purpose of clearing harbors and erecting lighthouses, Madison expressed some lingering doubts about whether such a grant was necessary because the power to regulate foreign commerce might not prevent such state regulation in any case. Even if not, however, the states "may certainly be restrained by Treaty." 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 159, at 625. For Madison, it seems, the thought that treaties might go beyond the legislative powers of Congress was unproblematic.

Virginia Ratifying Convention. This was due in part to Virginia's passionate attachment to the Mississippi, a subject which occupied a substantial bulk of the debates.<sup>194</sup> Given the recent efforts by Jay and the northern majority in Congress to cede navigation rights to Spain, the whole question of the Mississippi was tightly bound up with the treaty power. Thus, it is not surprising that Virginians were among the most apprehensive about the potential lurking dangers, and their concerns are evident throughout the discussions.

It is all the more significant, then, that the Virginia debates powerfully reaffirmed and made more explicit the views which had already emerged both in the Philadelphia Convention and in the *Federalist Papers*. Here, too, there were repeated assertions on both sides about the vast extent of the power. Opponents were unrelenting in their characterizations of the power as unbounded.<sup>195</sup> Crucially, however, this concern did not lead to proposals to limit the scope of the power. Federalists and anti-Federalists alike recognized the imperatives that impelled the Philadelphia Convention to make the grant unqualified. Instead, they focused on a proposed amendment to increase the procedural safeguards that secured it. After ratifying the Constitution, Virginia thus recommended for the consideration of Congress a proposed amendment:

That no commercial treaty shall be ratified without the concurrence of two thirds of the whole number of the members of the Senate; and no treaty ceding, contracting, restraining, or suspending, the territorial rights or claims of the United States, or any of them, or their, or any of their rights or claims to fishing in the American seas, or navigating the American rivers, shall be made, but in cases of the most urgent and extreme necessity; nor shall any such treaty be ratified without the concurrence of three fourths of the whole number of the members of both houses respectively.<sup>196</sup>

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194. See, e.g., 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 311-67 (Jonathan Elliot ed., 2d ed. 1937) [hereinafter DEBATES] (discussing the Mississippi question). Debate on the Mississippi occupied fully 10% of journal pages of the discussions. See Warren, *supra* note 161, at 297.

195. See, e.g., 3 DEBATES, *supra* note 194, at 315 (remarks of Patrick Henry) (claiming that the treaty power is "unlimited and unbounded"); 3 *id.* at 500 (remarks of Patrick Henry) (asserting that "if any thing should be left us, it would be because the President and senators were pleased to admit it"); 3 *id.* at 513 (remarks of Patrick Henry) (claiming that "they can make any treaty . . . [t]hey have a right, from the paramount power given them"). Claims that the treaty power was unlimited were commonplace among Anti-federalists. See, e.g., *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; And to Several Essential and Necessary Alternations in It. In a Number of Letters from the Federal Farmer to the Republican* [hereinafter *Letters from the Federal Farmer*], in 2 THE COMPLETE ANTI-FEDERALIST 214, 246-47 (Herbert J. Storing ed., 1981) (declaring that the President and Senate are empowered to make treaties "indefinitely" and that the power is "absolute").

196. 3 DEBATES, *supra* note 194, at 660.

Focusing on two principal criticisms, Patrick Henry and George Mason led the attack on the treaty power. First, they claimed that the procedure for approving treaties was inadequate to safeguard the “dearest and most valuable rights” of the nation and of the South, which were vulnerable because of the unlimited character of the treaty power.<sup>197</sup> Their main fear, or course, was that the President and Senate would cede the Mississippi, and Henry and Mason argued that it would be easier to do so under the Constitution than it had been under the Confederation.<sup>198</sup> In this regard, there were endless discussions about the mathematical possibilities: under the Confederation, nine states were required to approve a treaty, whereas under the Constitution, only two-thirds of a quorum was sufficient. That meant that the votes of ten Senators, or only five states, might be sufficient to consent to a treaty ceding the Mississippi.<sup>199</sup> Moreover, there was no guarantee that the President would notify the Senators from each of the states whenever he planned to submit a treaty, and thus he might arrange for the Senate to consider a treaty when the Senators from the Southern states were absent.<sup>200</sup>

Their second concern was the possibility that treaties might infringe individual rights. The Supremacy Clause made treaties supreme over state constitutions and laws; hence, the bills of rights in the state constitutions would provide no protection. Yet, the proposed Constitution contained no bill of rights of its own. What prevented a treaty from violating the most fundamental rights of the individual, such as the free exercise of religion, or freedom from cruel and unusual punishments? In this respect, Henry and Mason’s arguments were part of the more general anti-Federalist attack on the Constitution for its failure to include a bill of rights.<sup>201</sup>

The Federalist response was equally energetic. Led by Madison and Governor Edmund Randolph, the Federalists’ foremost aim was to provide some needed reassurance about the Mississippi. Engaging

197. See 3 *id.* at 353 (remarks of Patrick Henry); see also 3 *id.* at 315-16 (remarks of Patrick Henry).

198. See, e.g., 3 *id.* at 316-17, 352-53, 355, 500-01 (remarks of Patrick Henry); 3 *id.* at 340 (remarks of James Monroe); 3 *id.* at 341-43, 350-51 (remarks of William Grayson); 3 *id.* at 499, 507-09 (remarks of George Mason).

199. See, e.g., 3 *id.* at 340 (remarks of James Monroe); 3 *id.* at 343, 351 (remarks of William Grayson); 3 *id.* at 353 (remarks of Patrick Henry); 3 *id.* at 499 (remarks of George Mason). In Philadelphia, motions had been made to require two-thirds of all the members of the Senate to consent, to require a majority of the whole number of the Senate, and to raise the quorum to two-thirds in the Senate. See 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 159, at 549. All three motions failed.

200. See, e.g., 3 DEBATES, *supra* note 194, at 502 (remarks of William Grayson). This claim echoed another failed motion made in Philadelphia “that no Treaty shd. be made witht previous notice to the members, & a reasonable time for their attending.” 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 159, at 549-50 (Sept. 8).

201. See, e.g., 3 DEBATES, *supra* note 194, at 503-04, 512-14 (remarks of Patrick Henry).

in the numbers game, they effectively revealed the highly unrealistic assumptions that underlay the anti-Federalist worries and emphasized the extra security provided by the addition of the President to the treaty-making process.<sup>202</sup> Even more effectively, they pointed out that even though the nine-state rule had prevented the cession of the Mississippi thus far, the national government under the Confederation was too weak to enforce American rights. What good was security if the Mississippi was still off limits to the western settlers? According to Madison, our ability to realize our rights will “be far better secured under the new government than the old, as we shall be more able to enforce our right.”<sup>203</sup> Indeed, acknowledging the crucial importance of maximizing the negotiating strength of the national government, Madison rightly claimed that it was the very weakness of the Confederation that had produced Jay’s project: “A strong system will remove the inducement.”<sup>204</sup>

More important for present purposes was another of the Federalist strategies, which revealed a great deal about the common understanding of the treaty power. The Federalists denied that the treaty power extended to the cession of territory. Why? Not because the power was any less comprehensive than the anti-Federalists claimed but, rather, because its scope was to be determined by reference to international practice and the law of nations. The law of nations, they claimed (albeit with some equivocations and inconsistencies), invalidated treaties dismembering a nation. “I readily confess,” said Madison, “that neither the old Confederation nor the new Constitution involves a right to give up the navigation of the Mississippi. It is repugnant to the law of nations.”<sup>205</sup> It was also inconsistent with the practice of states:

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202. See, e.g., 3 *id.* at 347-48, 500 (remarks of James Madison); 3 *id.* at 357-59 (remarks of Wilson Nicholas); 3 *id.* at 362-63 (remarks of Edmund Randolph); 3 *id.* at 364-65, 509-11 (remarks of Corbin); 3 *id.* at 240, 499 (remarks of George Nicholas).

203. 3 *id.* at 331.

204. 3 *id.* at 348; see also 3 *id.* at 239 (remarks of George Nicholas); 3 *id.* at 331 (remarks of James Madison) (“Our weakness precludes us from it. We are entitled to it; but it is not under an inefficient government that we shall be able to avail ourselves fully of that right.”); 3 *id.* at 500 (remarks of James Madison); 3 *id.* at 356-61 (remarks of Wilson Nicholas) (observing that what the western country needs is “a government which will force from Spain the navigation of that river. . . . [Kentucky] can expect support and succor alone from a strong, efficient government, which can command the resources of the Union when necessary”). This crucial point underscores the keen awareness of the Founders of the importance of maximizing the strength of the federal government in negotiations with foreign countries.

205. 3 *id.* at 345 (remarks of James Madison); see also 3 *id.* at 357 (remarks of Wilson Nicholas); 3 *id.* at 362 (remarks of Edmund Randolph) (noting that “[i]t will . . . be contrary to the law of nations to relinquish territorial rights”); 3 *id.* at 511 (remarks of Corbin). Madison acknowledged, however, that relinquishment of territory might be permissible under extreme circumstances:

The king of Great Britain has the power of making peace, but he has no power of dismembering the empire, or alienating any part of it. Nay, the king of France has no right of alienating part of his dominions to any power whatsoever. The power of making treaties does not involve a right of dismembering the Union.<sup>206</sup>

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Although the right be denied, there may be emergencies which will make it necessary to make a sacrifice. But there is a material difference between emergencies of safety in time of war, and those which may relate to mere commercial regulations. You might, on solid grounds, deny, in peace, what you give up in war.

3 *id.* at 345-46. Even in the old Congress, the argument had been strenuously pressed that the law of nations forbade ceding the Mississippi by treaty. See 3 *id.* at 342 (remarks of William Grayson) (describing the debate in the old Congress). For discussions of the power to cede territory by treaty, see *supra* notes 26, 159-166, 193-204 and accompanying text; *infra* notes 206-207, 210-211, 216, 431, 435, 564 and accompanying text.

206. 3 DEBATES, *supra* note 194, at 501. Like Hamilton in *The Federalist*, see *supra* notes 181-184 and accompanying text, George Nicolas emphasized that the powers of the President and Senate were parallel to the powers of the British monarch:

He compared the king of England's power to make treaties to that given by this clause. He insisted they resembled each other . . . . The power was as unlimited in England as it was here. Let gentlemen, says he, show me that the king can go so far, and no farther, and I will show them a like limitation in America.

3 *id.* at 502; see also *infra* notes 211-212, 221 and accompanying text.

It is at least open to question, however, whether Madison and the other Federalists were being wholly candid. In the Philadelphia Convention, no one had suggested that the treaties ceding territory would be invalid, despite the concerns about the Mississippi and the fisheries. See *supra* notes 159, 161-166 and accompanying text. In any case, it is unclear whether they really meant to deny that a treaty could cede territory, or whether they meant that a treaty could only do so for certain purposes or with the consent of the whole legislature not just the Senate or only with the consent of the part ceded. See, e.g., 3 DEBATES, *supra* note 194, at 509, 511 (remarks of Corbin) (suggesting alternately consent of the part ceded and consent of the whole legislature); *id.* at 508 (remarks of George Mason) (noting that the king of Great Britain could cede territory with the consent of the Parliament). But see *id.* at 602 (remarks of Edmund Randolph) (denying the power of even a unanimous Congress to cede territory).

The Federalists had other grounds for their claim that treaties could not cede territory. Governor Randolph asserted a natural law bar:

There is a prohibition naturally resulting from the nature of things, it being contradictory and repugnant to reason, and the law of nature and nations, to yield the most valuable right of a community, for the exclusive benefit of one particular part of it.

3 *id.* at 362. At the time, of course, the law of nations and the law of nature were closely linked. In addition, he cited the Property Clause of the Constitution, which empowers Congress to dispose of the territory and other property of the United States but with the proviso that "nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or any particular state." 3 *id.* at 363 (quoting U.S. CONST. art. IV, § 3, cl. 2); see also 3 DEBATES, *supra* note 194, at 504-05 (remarks of Edmund Randolph). According to Randolph, this prohibited the national government from ceding territory and bound the treaty power unless "you establish another doctrine — that the creature can destroy the creator, which is the most absurd and ridiculous of all doctrines." 3 *id.* at 363; see also 3 *id.* at 504-05 (remarks of Edmund Randolph). Randolph's interpretation of Article IV, however, is highly questionable, as was effectively pointed out. See 3 *id.* at 505 (remarks of William Grayson). For an even less credible claim that the prohibition on giving preferences to the ports of any state would prevent cession of the Mississippi, see 3 *id.* at 239-40 (remarks of George Nicholas). Madison too claimed on general principle that neither the treaty power nor any other power gave the national government the right "to dismember the empire, or to alienate any great, essential right." 3 *id.* at 514.

Nor did the anti-Federalists disagree. They feared instead that the President and Senate would abuse their power, and, in that event, “the law of nations cannot be applied to relieve you.”<sup>207</sup> This point, however, argued in favor of greater procedural safeguards, not for restricting the scope of the treaty power.

Furthermore, the Federalists explicitly recognized the overriding importance of flexibility in international negotiations and denied that the treaty power could be limited or defined more narrowly. Responding to the claim that “there is no restriction with respect to making treaties,” Governor Randolph replied: “The various contingencies which may form the object of treaties, are, in the nature of things, incapable of definition. *The government ought to have power to provide for every contingency . . . .* I defy the wisdom of that gentleman to show how they ought to be limited.”<sup>208</sup> Madison was equally vehement:

As to its extent, perhaps it will be satisfactory to the committee that the power is, precisely, in the new Constitution as it is in the Confederation. In the existing confederacy, Congress are authorized indefinitely to make treaties. . . . 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. . . . 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, be defective. They might be restrained, by such a definition, from exercising the authority where it would be essential to the interest and safety

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207. 3 DEBATES, *supra* note 194, at 503 (remarks of Patrick Henry); *see also* 3 *id.* at 512 (remarks of Patrick Henry). Henry was not entirely consistent on this point, as on others. Sometimes, as above, he appeared to agree that the law of nations was a limit, but one which could not be counted on in practice. Other times, he appeared to claim that the constitutional grant was entirely unlimited and therefore gave the President and Senate the power to cede the Mississippi. *See, e.g.,* 3 *id.* at 315-16 (arguing that the power is “unlimited and unbounded” and will result in ceding of the Mississippi); 3 *id.* at 353 (challenging the Federalists to “[s]how me any clause in that paper which secures that great right”); 3 *id.* at 501 (claiming that the President and Senate will have a greater power in this respect than the king of Great Britain). William Grayson’s views were similarly inconsistent. Like the Federalists, he, too, at times concurred in the view that the law of nations prohibited the cession of the Mississippi and limited the treaty power, *see* 3 *id.* at 342, 350, but he also doubted its efficacy, *see* 3 *id.* at 350. At other points, however, he proposed a novel theory about what he called the “particular law of nations.” *See* 3 *id.* at 506-07; *see also* 3 *id.* at 501-02. In his view, although the general law of nations might prohibit such treaties, nations could create a particular law of nations which applied only to themselves and which differed from the general law. The Constitution, he claimed, would create such a particular law and would allow cessions of territory by treaty. *See* 3 *id.* At still another point, joining Mason, he seems to have thought that the treaty power did extend to ceding territory. *See* 3 *id.* at 613. For Mason’s views, *see* 3 *id.* at 507-09.

208. 3 *id.* at 363, 504 (emphasis added).



of the community. *It is most safe, therefore, to leave it to be exercised as contingencies may arise.*<sup>209</sup>

Most revealing of all, however, were the extended comments of George Mason, who led the anti-Federalists on the treaty question. Though opposed to the Constitution, Mason had participated in the Philadelphia Convention and had paid particularly close attention to the treaty power. Like Randolph and Madison, he recognized the imperative of flexibility and opposed putting a straitjacket on the treaty power. In his view, even treaties ceding territory were permissible; what was needed were stricter safeguards:

[Y]et I acknowledge such a power must rest somewhere. It is so in all governments. If, in the course of an unsuccessful war, we should be compelled to give up part of our territories, or undergo subjugation if the general government could not make a treaty to give up such a part for the preservation of the residue, the government itself, and consequently the rights of the people, must fall. Such a power must, therefore, rest somewhere. For my own part, I never heard it denied that such a power must be vested in the government. *Our complaint is, that it is not sufficiently guarded . . .*<sup>210</sup>

But Mason was not yet through. The problem was not only with treaties of cession. Recalling the states' rights controversy over whether treaties could permit aliens to own real property in the territories of the states, Mason was equally emphatic. The treaty power would necessarily extend that far but ought to be subject to stricter supervision:

Will any gentleman say that they may not make a treaty, whereby the subjects of France, England, and other powers, may buy what lands they please in this country? This would violate those principles which we have received from the mother country. The indiscriminate admission of all foreigners to the first rights of citizenship, without any permanent security for their attachment to the country, is repugnant to every principle of prudence and good policy. The President and Senate can make any treaty whatsoever. *We wish not to refuse, but to guard, this power, as it is done in England.* The empire there cannot be dismembered without the consent of the national Parliament. We wish an express and explicit declaration, in that paper, that . . . [n]o treaty to dismember the empire

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209. 3 *id.* at 514-15 (emphasis added). Madison's reference to the similarity of the treaty power under the Confederation recalls his position in the *Federalist Papers*. See *supra* notes 187-189 and accompanying text.

210. 3 DEBATES, *supra* note 194, at 507-08 (emphasis added); see also 3 *id.* at 613 (remarks of William Grayson) (noting, like Mason, that the power to cede territory "must be lodged somewhere" because it "may prevent the annihilation of society by procuring a peace"; the point is to secure it more safely). Other anti-Federalists had made this point as well. The Federal Farmer, for example, noted that the power of the President and Senate was "absolute," *Letters from the Federal Farmer*, *supra* note 195, at 247, and that "the judges will be bound to allow full force to whatever rule, article or thing the president and senate shall establish by treaty," *id.* He questioned, however, "whether it [would] be practicable to set any bounds to those who make treaties," noting that "if not, it proves that this power ought to be more safely lodged." *Id.*

ought to be made without the consent of three fourths of the legislature in all its branches. Nor ought such a treaty to be made but in case of the most urgent and unavoidable necessity.<sup>211</sup>

In England, moreover, a treaty permitting “foreign subjects to purchase lands, and have an hereditary indefeasible title . . . would require an express act of Parliament.”<sup>212</sup>

Against all of this evidence, there is only one statement in the course of the Virginia debate — and, indeed, in the whole debate over the Constitution — that even arguably supports the states’ rights view. Even this statement, moreover, when considered in context, is best interpreted otherwise. As the debate wore on, Patrick Henry focused with increasing fervor on the claim that treaties could violate individual rights.<sup>213</sup> As already noted, because the Supremacy Clause declared treaties supreme over state constitutions and laws, Henry claimed that treaties would not be subject to the state bills of rights; yet, the federal Constitution did not contain a bill of its own. Individual rights, he asserted, were thus unprotected against the treaty power.<sup>214</sup> Citing a case where the Czar had demanded that Queen Anne summarily execute an officer who had improperly arrested the Russian ambassador, Henry remarked: “A treaty may be made giving away your rights, and inflicting unusual punishments on its violators.”<sup>215</sup>

This was a powerful argument, and while the Federalists were quick to strike back, denying that treaties could override fundamental rights, their reasoning was less than clear. Randolph immediately replied with a flat denial: “[N]either the life nor property of any citizen . . . can be affected by a treaty . . . . Being creatures of that Constitution, can [the President and Senate] destroy it? Can any particular body, instituted for a particular purpose, destroy the existence of the society for whose benefit it is created?”<sup>216</sup> Madison also brushed the objection aside:

I conceive that, as far as the bills of rights in the states do not express anything foreign to the nature of such things, and express fundamental prin-

211. 3 DEBATES, *supra* note 194, at 509.

212. 3 *id.* at 508.

213. *See* 3 *id.* at 502-04, 512-14.

214. *See* 3 *id.* at 502.

215. 3 *Id.* at 503.

216. 3 *Id.* at 504. Replying once again to the claim that the President and Senate would cede the Mississippi, Randolph also denied that “the particular right of any state” could “be affected by a treaty.” 3 *Id.* Though states’ rights advocates have sometimes pointed to this comment in support of their position, *see, e.g.,* Bradley, *supra* note 2, at 413, in context it is clear that Randolph was addressing the persistent anti-Federalist claim which Grayson and Henry had just once again made about the Mississippi, *see* 3 DEBATES, *supra* note 194, at 501-02, 503.

ciples essential to liberty, and those privileges which are declared necessary to all free people, these rights are not encroached on by this government.<sup>217</sup>

Only George Nicholas attempted a more elaborate response, directly addressing Henry's argument. Under the Supremacy Clause, he claimed, the President and Senate can

make no treaty which shall be repugnant to the spirit of the Constitution, or inconsistent with the delegated powers. The treaties they make must be under the authority of the United States, to be within their province. It is sufficiently secured, because it only declares that, in pursuance of the powers given, they shall be the supreme law of the land, notwithstanding any thing in the constitution or laws of particular states.<sup>218</sup>

To be sure, taken literally this statement could be read to endorse the states' rights view of the treaty power. There are several reasons, however, why it ought not to be so understood. Nicholas was responding specifically to Henry's claim that treaties could violate individual rights,<sup>219</sup> and his response was consistent with the general approach many Federalists had taken when this claim was made in relation to Congress — that Congress could not violate individual rights because it was limited to exercising the delegated powers.<sup>220</sup> It is quite likely that Nicholas meant only to refer to this general argument rather than to propose new states' rights limits on the scope of the treaty power. Indeed, any other construction would render his remarks internally inconsistent. Immediately prior to the quoted statement, he was at pains to express the breadth of the treaty power. He

drew a parallel between the power of the king of Great Britain and that of Congress, with respect to making treaties. He contended that they were on the same foundation . . . . To prove that there was no constitutional limit to the king's power of making treaties . . . he quoted the following lines in Blackstone's Commentaries . . . "It is also the king's prerogative to make treaties, leagues, and alliances, with foreign states and princes . . . . And yet, lest this plentitude of authority should be abused, to the detriment of the public, the constitution has interposed a check . . . ." How does this apply to this Constitution? *The President and Senate have the same power of making treaties; and when made, they are to have the same force and validity.*<sup>221</sup>

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217. 3 DEBATES, *supra* note 194, at 516. Madison's reasons for believing that a bill of rights was unnecessary were, of course, complex, but not necessary to consider here.

218. 3 *id.* at 507.

219. Immediately following the quoted passage, Nicholas argues that Henry's citation of the Russian ambassador case was therefore inapplicable to the Constitution. 3 *id.* at 507.

220. Indeed, this was the position that Nicholas himself had taken earlier in the debate. See 3 *id.* at 246; see also 3 *id.* at 466-69 (remarks of Edmund Randolph).

221. 3 *id.* at 506 (emphasis added). He had made the same point just a short time earlier. See *supra* note 206.

It is thus exceedingly doubtful that Nicholas had in mind the possible implications of his comments for the scope of the treaty power in relation to the states, or that he would have endorsed states' rights limitations on " 'this plentitude of authority' " had he considered the question. He, like the other Federalists and even the anti-Federalists, was fully convinced that the whole treaty power had to be vested in the national government, just as it existed in other sovereign states.<sup>222</sup>

## B. *1789 to 1920: The Dominance of the Nationalist View Through Cyclical Conflicts*

With the adoption of the Constitution, the treaty power was launched on its long and tortured path through American history. For the reasons we have seen, the Constitution gave a decided advantage to those who advocated for the nationalist view. Nevertheless, only rarely has a generation avoided controversy and debate over the fundamental questions which the treaty power necessarily raises.

### 1. *The First Generation*

*a. The Nationalist View Receives Quick Recognition by the Political Branches and the Supreme Court.* Once the new government was established, debates over the treaty power briefly retreated from view. From the outset, however, the potential clash between the treaty power and the powers of the states could not be entirely avoided, especially because of leftover business from the Confederation. Two early events quickly helped consolidate the nationalist view.

First, the old Congress had left a Consular Convention with France to the new government, and Washington promptly submitted it to the

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222. Nevertheless, Professor Bradley cites his remarks as clear support for the states' rights position. See Bradley, *supra* note 2, at 413.

Professor Bradley finds four themes in the Founding materials important: that the Founders wished to make it difficult to make treaties; that they contemplated that treaties would govern "truly *inter-national*" matters, see *id.* at 411; that they expected the Senate to play a special role in protecting the interests of the states; and that they were committed to the principle of delegated and limited powers, a principle for which "[t]here is no evidence" to suggest that "the Founders believed the treaty power to be exempt," *id.* at 412. See *id.* at 410-12. How these themes are thought to support the states' rights view is unclear. In any case, moreover, pitched at this level of generality they provide little or no interpretive guidance. What emerges from the Founding materials is that the Founders well understood that treaties could affect domestic matters of the greatest sensitivity, including matters within the sphere of state authority; that they recognized the necessity of broad discretion in the federal government with respect to the subject matter of treaties; that they acted vigorously to ensure that states' rights would not stand in the way of foreign policy initiatives and embarrass the conduct of foreign affairs, as it had done repeatedly under the Confederation; and that they lodged the advice and consent power in the Senate, fortified by a minority veto, in significant part to protect state interests in light of the necessity for a broad grant of authority.

Senate in 1789 for its advice and consent.<sup>223</sup> The Convention was undoubtedly the most vexed treaty negotiated during the Confederation and had prompted vigorous opposition. It trenched more deeply on state prerogatives than any of the other previous treaties negotiated under the Confederation. Among other things, it granted consular officials and employees and consular premises extensive immunities from the operation of state laws (though not compelled to do so by the law of nations); ceded consuls jurisdiction over a number of different kinds of legal disputes involving French nationals, including the right in certain cases to administer estates of deceased French nationals; opened up the state courts to French nationals; granted consuls the powers of notaries; and empowered consuls to call upon the courts to aid in the arrest of deserters and the execution of consular judgments and orders.<sup>224</sup> Notwithstanding fierce political resistance to the treaty during the Confederation, the Senate seems to have gone along without further controversy. Even John Jay, the first Secretary of State, who had previously been a vigorous opponent, now reluctantly supported the treaty.<sup>225</sup>

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223. See Convention Defining and Establishing the Functions and Privileges of Consuls and Vice Consuls, Nov. 14, 1788, in 2 TREATIES, *supra* note 74, at 228. The Senate resolution granting consent was passed on July 29, 1789. See *id.*

224. See *id.* at 229-39.

225. For a full discussion of the background, see The Consular Convention of 1788, Editorial Note, in 14 THE PAPERS OF THOMAS JEFFERSON 67 (Julian P. Boyd ed., 1958). In the Treaty of Amity and Commerce of 1778, France and the United States had agreed to permit the other to appoint consular officials in their ports and promised to work out the details of their functions and powers in a subsequent agreement. From the outset, this was a matter of some urgency to the French and of considerable ambivalence to the Americans. The commercial states in New England in particular were strongly opposed. When the French Minister pressed the matter in 1781 at a critical juncture in the war, Congress responded by appointing a committee to draft a model convention. It then instructed Franklin to negotiate a treaty in Versailles on the basis of its detailed "Scheme." See 22 JOURNALS OF THE CONTINENTAL CONG., *supra* note 81, at 46-54 (Jan. 25, 1782). Trouble, however, was brewing from the outset. Repeated efforts were made in Congress to delay, modify, and even abandon the negotiations. An infuriated Madison, himself a strong supporter of the proposed Convention, just managed to stave off the threatened interference with Franklin's negotiations. See James Madison, Instructions to Benjamin Franklin *in re* Consuls (Jan. 2, 1783), in 6 THE PAPERS OF JAMES MADISON 5, 5 (William T. Hutchinson & William M.E. Rachal eds., 1969) [hereinafter 6 MADISON PAPERS]; James Madison, Notes on Debates (Jan. 6, 1783), in 6 MADISON PAPERS, *supra*, at 15, 15-16 (describing the various conflicting views about the treaty negotiations and observing that "[e]ven to have suspended the convention after it had been proposed to the Court of France & possibly acceded to would have been indecent and dishonorable"). Franklin, in turn, completed the negotiations and in 1784 sent back the proposed treaty for Congress's assent. See The Consular Convention of 1788, *supra*, at 70 & n.13.

By the time the treaty arrived, Jay was Secretary for Foreign Affairs. In part, his fierce opposition was based on policy objections to foreign consular jurisdiction in general. In at least equal part, however, he acted from intense distrust of the French and a desire to prevent the creation of a French consular establishment in particular. See The Consular Convention of 1788, *supra*, at 71, 80. Franklin's negotiations, however, put him in a difficult spot. With only minimal deviations, Franklin had followed the Scheme that Congress had approved and directed him to use as the basis for the Convention. As a result, under the

Second, although not without its ambiguities, the Supreme Court's 1796 decision in the landmark case *Ware v. Hylton*<sup>226</sup> seemed to settle the issue. British creditors sued to recover pre-War debts owed by Virginia debtors. The Virginians defended their position on the ground that the debts had been discharged under a wartime Virginia statute passed in 1777. The statute had authorized debtors to pay the amounts due on their British debts into a state loan office and, upon making the payments, had discharged them from any further liability. As we have already seen, one of the principal questions in the case was the validity of Article IV of the Treaty of Peace, which promised that British creditors would "meet with no lawful Impediment to the Recovery" of their debts. Notwithstanding the states' rights controversy which this provision had provoked, the Court unanimously upheld its validity and agreed that it was a self-executing obligation that nullified any conflicting state laws. The only disagreement was over its proper interpretation. The majority ruled that it resurrected the

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practice of the time, the French had every right to expect, and even demand, that Congress to approve. See 29 JOURNALS OF THE CONTINENTAL CONG. 1774-1789, at 500, 508 (July 6, 1785) (1933). Jay thus opted for the only available argument: in an elaborate report, he made a lengthy series of hyper-legalistic arguments to demonstrate the various technical respects in which the text that Franklin had agreed upon diverged from the Scheme. See *id.* at 501-08. Jay methodically uncovered every deviation in language no matter how trivial and often greatly exaggerated their significance. See The Consular Convention of 1788, *supra*, at 73-75 (describing in detail the "dominant legalistic tone of [Jay's] report"). At the end of this report, he then added some observations of his own. See 29 JOURNALS OF THE CONTINENTAL CONG., *supra*, at 509-15. Among his many objections, he pointed to Articles 6 and 7 of the Convention, "establishing Consular and Vice consular Chanceries," which he claimed, "create[d] an *Imperium in Imperio*, which in several respects must clash with the internal Policy of these States, and with which it is not clear that Congress can authorize any Persons to interfere." *Id.* at 512.

In thus vaguely invoking, without endorsing, unspecified limits on Congress's powers, Jay was no doubt seeking to take advantage of any states' rights sentiment that might be percolating in Congress. Jay did not elaborate on the basis for his concerns. He pointed only to the conflict between the provisions of the Convention and state laws. But that hardly distinguished the provisions on which he focused from others in the Convention itself and in the other treaties which Congress had concluded. He was forced to concede, however, that the two articles corresponded precisely to the text which Congress had itself adopted in its Scheme for the Convention. See 29 JOURNALS OF THE CONTINENTAL CONG., *supra*, at 504. When Congress delayed acting on the Convention in response to Jay's report, France finally ran out of patience and sent a thinly veiled ultimatum, letting Congress know that good relations (and continued liberality on overdue loan payments) depended upon definite action. See The Consular Convention of 1788, *supra*, at 77. Rufus King wrote to Elbridge Gerry, both strong opponents of the Convention, that "France has required a ratification of the consular convention." *Id.* (quoting a letter dated April 30, 1786). Congress therefore instructed Jefferson, now ambassador to France, to renegotiate the Convention on the basis of the Scheme. See *id.* at 78. In the end, Jefferson once again proved his adroitness as a diplomat and, to everyone's surprise, successfully negotiated a new treaty that was a significant improvement over the 1784 version in several respects, meeting at least some of the many objections which Jay had articulated. See *id.* at 81-82.

226. 3 U.S. (3 Dall.) 199 (1796).

debt owed by the debtors. The sole dissenter, Justice Iredell, disagreed.<sup>227</sup>

In the lead opinion, Justice Chase began by affirming that the power to confiscate debts during the war belonged exclusively to the states: "I am of opinion that the exclusive right of confiscating, during the war, all and every species of British property, within the territorial limits of Virginia, resided only in the Legislature of that commonwealth."<sup>228</sup> Nevertheless, the treaty's Article IV was valid under Article IX of the Confederation because the latter

grant has no restriction, nor is there any limitation on the power in any part of the confederation. A right to make peace, necessarily includes the power of determining on what terms peace shall be made. . . . A war between two nations can only be concluded by *treaty*. Surely, the sacrificing *public*, or *private*, property, to obtain *peace* cannot be the cases in which a treaty would be *void*.<sup>229</sup>

Furthermore, Article IV was self-executing and thus required neither an act of Congress nor that of the state legislature to make it effective.<sup>230</sup> Indeed, as the old Congress had claimed in its circular letter of 1787, the treaty was self-executing even under the Confederacy. The Supremacy Clause made that a foregone conclusion under the Constitution.<sup>231</sup>

Justice Iredell was largely of the same view. He too made clear that the power to confiscate debts belonged to the states:

Congress could have passed no act on this subject, but if they had wished for an act, must have recommended to the States Legislatures to pass it.

227. For citations, see *infra* notes 228-234 and accompanying text. In accordance with the then practice, the five Justices issued seriatim opinions. As a result, determining the view of the Court requires careful analysis of the various views expressed by the Justices. On the interpretation question, see *Ware*, 3 U.S. (3 Dall.) at 238-45 (Chase, J., concurring); *id.* at 245, 247-56 (Paterson, J., concurring); *id.* at 256, 278-80 (Iredell, dissenting) (opinion delivered in the Circuit Court); *id.* at 281 (Wilson, J., concurring); and *id.* at 281, 282, 284 (Cushing, J., concurring). For background on the litigation over the British debts preceding the Court's decision in *Ware*, see NORMAN K. RISJORD, *CHESAPEAKE POLITICS 1781-1800*, at 452-54 (1978).

228. *Ware*, 3 U.S. (3 Dall.) at 222; see also *id.* at 229 ("Before the establishment of the national government, *British* debts could only be sued for in the *state* court. This, alone, proves that the several states possessed a power over debts."). Likewise, Justice Chase explicitly held that the old Congress had no power over the debts. See *id.* at 232-33 (noting that prior to the effective date of the Articles of Confederation, Congress had only those powers which it actually exercised and that it "is an incontrovertible *fact* that Congress never attempted to confiscate any kind of *British* property within the *United States* . . . and thence I conclude that Congress did not conceive the power was vested in them"). In this respect, Justice Chase was rejecting the claim Jay had made in his report on state infractions of the Treaty of Peace — that war time confiscations of debts were exclusively within Congress's powers. See *supra* note 120.

229. *Ware*, 3 U.S. (3 Dall.) at 236; see also *id.* at 237-38 (elaborating on the Treaty of Peace's constitutional validity).

230. See *id.* at 236-37, 242-43.

231. See *id.* at 236-37.

And the very nature of a recommendation implies, that the party recommending *cannot*, but the party to whom the recommendation is made, *can* do the thing recommended.<sup>232</sup>

In contrast to Justice Chase, however, Justice Iredell rejected the claim that under the Confederation treaties were self-executing. Thus, to bring the treaty into operation, it would have been necessary for the states of their own accord to repeal any conflicting laws.<sup>233</sup> Under the Constitution, however, there was no question that the treaty was valid and would supersede all conflicting state laws. That was the point of the Supremacy Clause.<sup>234</sup>

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232. *Id.* at 266.

233. *See id.* at 271-76 (analyzing the question in depth).

234. *See id.* at 272, 276-77. The other opinions were similar. Justice Patterson deemed it unnecessary "to enter on the question, whether the Legislature of *Virginia* had authority to make an act, confiscating the debts due from its citizen to the subjects of the king of *Great Britain*, or whether the authority in such case was exclusively in Congress." *Id.* at 246. Either way, the treaty was valid. *See id.* at 249. Likewise, Justice Cushing declined to consider any question about the authority of the state to confiscate debts. The treaty was in any case valid, "having been sanctioned, in all its parts, by the Constitution of the *United States*, as the supreme law of the land." *Id.* at 282; *see also id.* at 281, 282, 284. Justice Wilson, in contrast, agreed with Jay that the power to confiscate was solely in Congress. *See id.* at 281. Nevertheless, "even if *Virginia* had the power to confiscate, the treaty annuls the confiscation." *Id.*

Admittedly, the decision in *Ware* does present some interpretive difficulties that counsel restraint in making definite claims about its implications. Not only did the Justices issue lengthy seriatim opinions, focusing on different aspects of the case, but there were other complexities as well. Three legal regimes were arguably relevant to the analysis — the period from 1776 until the final adoption of the Articles of Confederation in 1781, the period of the Confederacy, and the period beginning with the adoption of the Constitution. Although the division of powers in the relevant respects between Congress and the states potentially differed during each of these successive regimes, the Justices were not always clear about which period they were considering. *See, e.g., id.* at 232-33 (Chase, J.) (analyzing the power of Congress during the war, but not mentioning that the war continued after the adoption of the Articles of Confederation). Moreover, they did not always carefully distinguish between exclusive and concurrent powers. The fact that the states had a power to confiscate, for example, did not necessarily mean that Congress did not. Exacerbating this difficulty was the peculiar system of the Confederacy. Even when Congress had certain powers, legislative authority over those subjects ordinarily remained in the states. How to characterize the nature of the powers remaining in the states, as well as the powers in Congress, in these areas was itself a vexed question, and it helps account for the less-than-sharp way the issues were presented. Nevertheless, this very lack of clarity strongly suggests that the Justices did not think that these distinctions were of significance. Whether the power to confiscate debts was exclusively in Congress or in the states or held concurrently — and whether this was so in the period before, during, or after the Confederacy — did not matter. Either way, the treaty was a valid exercise of the treaty-making power. This reading is also suggested by the uniformly reverential tenor of all of the opinions on the high respect due the sanctity of treaties. *See, e.g., id.* at 237-38 (Chase, J., concurring) ("I shall never exercise [the power to declare a treaty unconstitutional], but in a very clear case indeed. . . . If Congress had no power (under the confederation) to make the 4th article of the treaty, and for want of power that article is void, would it not be in the *option* of the crown of *Great Britain* to say, whether the *other* articles, in the same treaty, shall be obligatory on the *British* nation?"); *id.* at 270 (Iredell, J., dissenting) ("None can reverence the obligation of treaties more than I do. The peace of mankind, the honour of the human race, the welfare, perhaps the being of future generations, must in no inconsiderable degree depend on the sacred observance of national conventions. . . . [The Treaty of Peace] presented boundless views of future happiness



b. *Brewing Controversy.* The relatively peaceful interlude that greeted the new government was only the calm before the storm. Up ahead loomed one of the sharpest and most traumatic political controversies the nation has ever weathered: the great national debate of 1795-96 provoked by the Jay Treaty. In characteristic fashion, protagonists on both sides invoked the Constitution and sought to level the opposition by branding them constitutional heretics. In the ensuing controversy, the relationship between the treaty power and the legislative power of the states was once again to be a central issue in dispute.<sup>235</sup>

During the first half of the decade, the portentous split between Federalists and Republicans was rapidly widening. A major component of the emerging battleground was the new nation's foreign policy. This development first surfaced in the debate over President Washington's decision in 1793 to declare neutrality in the war between revolutionary France and Great Britain.<sup>236</sup> Washington's unilateral edict could easily be seen as a betrayal both of our legal obligations under the treaty of alliance of 1778 and of our moral obligations given the vital role France had played in supporting the revolutionary effort. Most importantly, it revealed a potentially explosive dividing line in foreign affairs: should the country tilt toward France, with its revolutionary republican ideology, or toward the mother country? Republicans were strongly inclined toward the French, and Federalists toward

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and greatness, which almost overpower the imagination, and which, I trust, will not be altogether unrealized.”).

235. There are a number of accounts of the Jay Treaty controversy, covering the subject from different perspectives. Among the best, notwithstanding occasional errors, are JERALD A. COMBS, *THE JAY TREATY: POLITICAL BATTLEGROUND OF THE FOUNDING FATHERS* 159-88 (1970); ALEXANDER DECONDE, *ENTANGLING ALLIANCE* 101-40 (1958); STEPHEN G. KURTZ, *THE PRESIDENCY OF JOHN ADAMS, THE COLLAPSE OF FEDERALISM 1795-1800*, at 19-77 (1957); JAMES TAGG, *BENJAMIN FRANKLIN BACHE AND THE PHILADELPHIA AURORA* 239-74 (1991); ALFRED F. YOUNG, *THE DEMOCRATIC REPUBLICANS OF NEW YORK: THE ORIGINS, 1763-97*, at 445-67 (1967); and Thomas J. Farnham, *The Virginia Amendments of 1795: An Episode in the Opposition to Jay's Treaty*, 75 VA. MAG. 75 (1967). For the standard account of Jay's negotiations with the British, see SAMUEL FLAGG BEMIS, *JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY* (1923).

236. For discussion of the proclamation of neutrality and the ensuing debate, especially the famous exchange between Hamilton and Madison, writing as Pacificists and Helevidius respectively, see EDWARD S. CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* 7-32 (1917). In response to British attacks on neutral shipping in its war with France, Madison and Jefferson strongly advocated retaliatory commercial measures, including the imposition of discriminatory duties and tonnage. The Federalists in Congress, however, had successfully blocked their strategy. See, e.g., *The Jay Treaty, 1795-96*, in 2 *THE REPUBLIC OF LETTERS, THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776-1826*, at 881, 883 (James Morton Smith ed., 1995) [hereinafter *REPUBLIC OF LETTERS*]; Madison in the Fourth Congress, Editorial Note, in 16 *THE PAPERS OF JAMES MADISON* 141, 141 (J.C.A. Stagg et al. eds., 1989) [hereinafter 16 *MADISON PAPERS*]. Part of the intense hostility of Madison and Jefferson to the treaty was due to the provisions which prohibited the imposition of the discriminatory duties and tonnage and thus blocked the policy which they had promoted.

the British.<sup>237</sup> Furthermore, Republicans were also more and more inclined to view with suspicion both the potentially "monarchical" presidency and the "aristocratic" Senate. No doubt this development was connected to the alignment of political power in these branches, which favored the emerging Federalist party, but it was more than that. Jeffersonians placed increasing faith in the House (where, to be sure, Republicans were strongest) as the most representative branch and as the embodiment of the principle of popular sovereignty. As a result, for Republicans, the treaty power, assigned to the President and Senate, came under an increasingly dark cloud.<sup>238</sup>

By 1794, tensions with Great Britain had reached the breaking point. To avoid war, Washington sent Jay, then Chief Justice of the Supreme Court, to London to negotiate a treaty settling the many outstanding disputes and establishing terms for commercial intercourse. Jay, a high Federalist, was notoriously anti-French and pro-British, and from the outset Republicans feared that the treaty would effectively place the nation in the British camp in the wars then raging in Europe.<sup>239</sup> When the treaty was finally published in late June 1795, their worst fears were fully realized. To Republican eyes, the treaty was nothing less than a national humiliation and, even worse, a sure and calculated means of provoking a calamitous breach in relations with France, which would correctly see the treaty as forming a tacit alliance between the Americans and the British.<sup>240</sup>

In response, Republicans unleashed a torrent of impassioned protest across the nation. Jay was vilified and regularly burned in effigy. Even Washington, previously untouchable and above the spirit of party wrangling, came under sustained attack. Town meetings were

237. See, e.g., TAGG, *supra* note 235, at 239-40; Farnham, *supra* note 235, at 76, 80-81; Wedgwood, *supra* note 8, *passim*.

238. For an engaging account of the eighteenth-century disputes over the treaty power and its connection to the contending Republican and Federalist ideologies, see Wedgwood, *supra* note 8, at 248-68, 311-53.

239. See, e.g., DECONDE, *supra* note 235, at 66-100; TAGG, *supra* note 235, at 241; Farnham, *supra* note 235, at 75-76.

240. See, e.g., COMBS, *supra* note 235, at 159-64; YOUNG, *supra* note 235, at 445-54; Farnham, *supra* note 235, at 77-82. The Republican criticisms were so extensive that they cannot easily be summarized. Some of the main points were that the treaty failed to obtain indemnification for the taking of slaves by the British when they evacuated American territory, even though the British had allegedly acted in violation of the Treaty of Peace; that it did not obtain immediate withdrawal from the posts in the Northwest which the British had retained as a countermeasure for alleged violations of Articles IV and VI of the Treaty of Peace by the states; that it abandoned the policy of free ships make free goods, which dealt with the rights of neutral shipping during war; that it failed to secure trading privileges in the West Indies; that it prevented the United States from imposing retaliatory duties and tonnage on British trade and shipping; that it was strongly pro-British and anti-French; that the promise to treat Great Britain as the most favored nation in commercial matters gave the British the benefit of all commercial concessions which were granted to other nations without requiring any reciprocal concessions on its part; and that in many other respects the treaty was non-reciprocal and humiliating to the United States.

called, resolutions adopted, petitions circulated, and countless essays and pamphlets written expressing revulsion against the treaty and the Federalist leaders who had planned, negotiated, and finally approved it.<sup>241</sup> These were matched, at first weakly and later more aggressively, by counter-meetings, resolutions, petitions, and essays defending the treaty and attacking the Republican "jacobins" for their tactics, demagoguery, and misunderstanding of the national interest. In the end, the Federalists proved more skillful. Never failing to place Washington's towering figure in the foreground, and insisting that rejection meant war and the abandonment of efforts to open navigation on the Mississippi, the Federalists finally wore down the fierce Republican opposition. By late April 1796, the Republicans were incapable of holding onto their numerical majority in the lower House. In a devastating defeat, the House voted 51 to 48 to carry the treaty into effect, bowing to the shift in popular sentiment and the looming sense that rejection could mean a collapse of the government and possibly even of the Union itself.<sup>242</sup>

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241. See, e.g., COMBS, *supra* note 235, at 159-64; YOUNG, *supra* note 235, at 445-54; Farnham, *supra* note 235, at 77-82. For the vicious attacks on Washington in Benjamin Bache Franklin's *Aurora*, see TAGG, *supra* note 235, at 251-52, 275 (quoting Bache's declaration that "[t]he President has rewarded the people of the United States for their confidence and affection by violating their constitution, by making a treaty with a nation that is their abhorrence, and by treating their applications to him against the treaty with the most pointed contempt. Louis XVI, in the meridian of his power & his splendor never treated his subjects with as much insult"). For the widespread attacks on Jay and other Federalist leaders like Hamilton and Rufus King, see YOUNG, *supra* note 235, at 447-49, 451. Hamilton, it was claimed, was stoned when he attempted to speak during a protest meeting in New York. The story may be apocryphal, but the intensity of the hostility was entirely real. Hamilton nearly came to blows with leading Republicans, and only the energetic efforts of his friends averted a duel at the last moment. See *id.* at 451-53. Hamilton's correspondence regarding the planned duel is found in Letter from Alexander Hamilton to James Nicholson (July 20, 1795), in 18 THE PAPERS OF ALEXANDER HAMILTON 471 (Harold C. Syrett ed., 1973) [hereinafter 18 HAMILTON PAPERS]; Letter from James Nicholson to Alexander Hamilton (July 20, 1795), in 18 HAMILTON PAPERS, *supra*, at 472; Letter from Alexander Hamilton to James Nicholson (July 20, 1795), *supra*, at 473; Letter from James Nicholson to Alexander Hamilton (July 21, 1795), in 18 HAMILTON PAPERS, *supra*, at 473; Alexander Hamilton, Drafts of Apology Required from James Nicholson (July 25-26, 1795), in 18 HAMILTON PAPERS, *supra*, at 501. The intensity of the early protests is vividly captured, from opposing perspectives, in writings of Hamilton and Madison. See Alexander Hamilton, *The Defence No. 1*, reprinted in 18 HAMILTON PAPERS, *supra*, at 479-86; Letter from James Madison to James Monroe (Dec. 20, 1795), in 16 MADISON PAPERS, *supra* note 236, at 168, 168-69.

242. For discussion, see, for example, COMBS, *supra* note 235, at 179-87; KURTZ, *supra* note 235, at 25-33, 51-58, 61-77; and YOUNG, *supra* note 235, at 454-55, 460-66. For the final vote in the House, see 5 ANNALS OF CONG. 1291 (1796). Madison had counted a majority of more than twenty, which slowly dwindled away to his horror and dismay. For his letters to Jefferson recounting events as they occurred, see Letter from James Madison to Thomas Jefferson (Apr. 18, 1796), in 2 REPUBLIC OF LETTERS, *supra* note 236, at 933; Letter from James Madison to Thomas Jefferson (Apr. 23, 1796), in 2 REPUBLIC OF LETTERS, *supra* note 236, at 934; and Letter from James Madison to Thomas Jefferson (May 1, 1796), in 2 REPUBLIC OF LETTERS, *supra* note 236, at 936-37. For Madison's post-mortem, see Letter from James Madison to Thomas Jefferson (May 22, 1796), in 2 REPUBLIC OF LETTERS, *supra* note 236, at 938 ("The name of the President and the alarm of war, have had a greater effect, than were apprehended . . . A crisis which ought to have been so managed as to for-

c. *The Jay Treaty Controversy.* The Jay Treaty is today associated principally with the great House debate of March and April 1796, focusing on the House's role in the treaty-making process. When a treaty touches upon subjects over which the Constitution has given Congress legislative authority, does the treaty become effective as domestic law even without the approval of the House? If the House's approval is necessary, does it have any discretion in deciding whether to adopt implementing legislation, or must it in good faith, and without reconsidering the merits, carry out any treaties which the President and Senate have approved? These and other related questions were the subject of the remarkable, and remarkably able, debates that ensued.<sup>243</sup> Their deep resonance in the ideological disputes of the day should be apparent.

Yet, the received wisdom about the Jay Treaty controversy among legal historians is unfortunate. It has successfully deflected attention from the fact that the House debate was only the tail end of a much wider and richer national debate over the scope of the treaty power which held the country spellbound during the nine-month period preceding the House deliberations.<sup>244</sup> Most important for present purposes, legal historians seem never to have noticed that a key element

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tify the Republican cause, has left it in a very crippled condition.”). For disunion sentiment, see KURTZ, *supra* note 235, at 67-68; TAGG, *supra* note 235, at 250; and Farnham, *supra* note 235, at 81-82 (quoting a Richmond newspaper notice declaring that “Notice is hereby given, That in case the Treaty entered into by that d. . . . d Arch Traitor J. . . . n J. . . y with the British tyrant should be ratified — a petition will be presented to the next General Assembly of Virginia at their next session, praying that the said state may recede from the Union”). The Federalist campaign was particularly effective at recruiting the merchants in favor of the treaty. See COMBS, *supra* note 235, at 178-84. As Jefferson explained to Madison, “the general expression of indignation has alarmed them for the strength of the government. They have feared the shock would be too great, and have chosen to tack about & support both treaty & government, rather than risk the government . . . .” Letter from Thomas Jefferson to James Madison (Sept. 21, 1795), in 16 MADISON PAPERS, *supra* note 236, at 88, 88.

243. The debate over the House's role consumed over 350 pages in the *Annals of Congress*. See 5 ANNALS OF CONG. 426-783 (1796). In response to a resolution requesting that he provide the House with Jay's instructions and the diplomatic correspondence concerning the treaty, Washington famously denied that the House had any discretion in deciding whether to implement treaties approved by the Senate and ratified by the President. See 5 ANNALS OF CONG., 760-62 (1796) (reprinting Washington's message). Under Madison's leadership, the House responded in kind, adopting a resolution disclaiming “any agency in making Treaties,” but at the same time insisting that “when a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress.” Furthermore, in all such cases, the House had a “right and duty . . . to deliberate on the expediency or in expediency of carrying such Treaty into effect.” 5 ANNALS OF CONG. 771-72 (1796). The vote was 57 to 35. See *id.* at 781-83.

244. The single best source for the debates is THE AMERICAN REMEMBRANCER; OR AN IMPARTIAL COLLECTION OF ESSAYS, RESOLVES, SPEECHES, &C., RELATIVE OR HAVING AN AFFINITY TO THE TREATY WITH GREAT BRITAIN (Mathew Carey ed., 1795) (3 vols.) [hereinafter AMERICAN REMEMBRANCER]. It reprinted in serial form some of the more important essays produced during the Jay Treaty controversy and was widely distributed during the controversy.

in this impassioned debate — second in significance only to the dispute over the role of the House — was precisely the conflict between the nationalist and states' rights views of the treaty power.<sup>245</sup> Indeed, they seem never to have noticed that Hamilton himself, in his most celebrated constitutional essays after the *Federalist Papers*, explicitly and forcefully endorsed the nationalist conception.<sup>246</sup> By any fair measure, the year-long controversy reaffirmed the nationalist view as the dominant understanding of the Constitution.

*i. The Treaty in the Senate.* The immediate provocation for controversy was an already familiar provision. Like Article XI of the French Treaty of 1778, Article 9 of the Jay Treaty provided

that British Subjects who now hold Lands in the Territories of the United States . . . shall continue to hold them according to the nature and Tenure of their respective Estates and Titles therein, and may grant Sell or Devise the same to whom they please, in like manner as if they were Natives.<sup>247</sup>

Overriding the common law principle subjecting alien-owned real property to forfeiture, this provision was among the most controversial in the treaty. It raised particularly urgent concerns in Virginia and North Carolina, where the enormous Fairfax and Granville estates, already embroiled in controversy, were potentially affected.<sup>248</sup>

When Washington submitted the treaty to the Senate in June 1795, Article 9 immediately met fierce resistance. Led by Senator Henry Tazewell of Virginia, opponents fixed on a familiar argument: Article 9, they claimed, was unconstitutional because it infringed on the legislative powers of the states. Indeed, in an effort to defeat the treaty, Tazewell specifically moved that the Senate decline its consent, inter alia, “[b]ecause the rights of the individual States are by the 9th article

245. Some non-legal historians have noticed this aspect of the debate, but have not focused on its significance for constitutional law. See GEORGE DANGERFIELD, CHANCELLOR ROBERT R. LIVINGSTON OF NEW YORK, 1746-1813, at 272 (1960); Farnham, *supra* note 235, at 78-79.

246. Hamilton collaborated with Rufus King in writing, under the pseudonym Camillus, thirty-eight essays entitled *The Defence*. See *The Defence No. 1: Introductory Note*, in 18 HAMILTON PAPERS, *supra* note 241, at 475, 475-77 (introducing the essays and identifying the twenty-eight written by Hamilton and the ten written by King). The bearing of these essays on a number of constitutional questions has been missed, I suspect, partly out of ignorance of the nature of the arguments to which Hamilton was responding. For discussion, see *infra* notes 284-303 and accompanying text.

247. The Jay Treaty, Nov. 19, 1794, U.S.-Gr. Brit., in 2 TREATIES, *supra* note 74, at 245, 253-54. Jay had completed the negotiations in 1794, but the treaty did not reach Philadelphia until March 1795. To the consternation of Republicans, Washington kept the terms secret, and called for a special session of the Senate to consider the treaty, which convened on July 8, 1795. See COMBS, *supra* note 235, at 159-60.

248. See RISJORD, *supra* note 227, at 456; Farnham, *supra* note 235, at 78-79. For further discussion of the Fairfax and Granville estate issue, see *supra* note 245 and accompanying text; *infra* notes 278, 311-314, 367, 374-410 and accompanying text.

of the treaty, unconstitutionally invaded.<sup>249</sup> The Senate was unmoved. With Rufus King and Oliver Ellsworth (shortly to assume Jay's seat as Chief Justice) taking the lead, the Senate, on June 24, rejected Tazewell's motion by a vote of 19 to 10.<sup>250</sup> It then proceeded to approve the treaty by 20 to 10.<sup>251</sup>

Article 9, of course, had not found its way into the treaty by accident. Jay's instructions had specifically directed him to propose "that the disabilities, arising from alienage in cases of inheritance, should be put upon a liberal footing, or rather abolished."<sup>252</sup> This instruction, modeled after Article XI of the French Treaty, was in fact substantially broader than the provision to which Jay actually agreed. Indeed, given the intensity of the reaction to Article 9, Hamilton feared that revelation of this instruction would seriously embarrass the administration and advised Washington, months later, to resist House efforts to obtain it.<sup>253</sup>

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249. (*Authentic*) *Treaty of Amity, Commerce, and Navigation, Between His Britannick Majesty, and the United States of America. By Their President, with the Advice and Consent of Their Senate with an Addition of TWO IMPORTANT MOTIONS Made During the Discussion of the Question of Ratification by MESSRS. BURR AND TAZEWELL* (Philadelphia 1795), reprinted in 18 HAMILTON PAPERS, *supra* note 241, at 391 [hereinafter (*Authentic*) *Treaty*]. Tazewell's motion was printed in the *Annals of Congress* without attribution. See 4 ANNALS OF CONG. 861-62 (1795). He sent a letter reproducing the motion to Monroe. See Letter from Henry Tazewell to James Monroe (June 27, 1795) (MSS James Monroe Papers, Library of Congress) (on file with author). Tazewell's motion specified a number of other familiar objections to the treaty, including that it was unconstitutional for another reason: "Because the Treaty asserts a power in the President and Senate, to control and even annihilate the constitutional right of the Congress of the United States over their commercial intercourse with foreign nations." (*Authentic*) *Treaty, supra*, at 392. This became a standard Republican charge against the treaty. Aaron Burr made a similar resolution, also detailing a number of objections and urging, *inter alia*, that Article 9 be rejected. See *id.* at 391. It is likely that his constitutional objections were similar to Tazewell's, but the motion did not specify.

250. See 4 ANNALS OF CONG. 862 (1795). Unfortunately, no official records were made of the Senate's deliberations. Senator Pierce Butler kept cursory notes during the first part of the debate and sent copies to Madison, along with copies of the treaty provisions, even though the Senate had imposed an injunction of secrecy. See Letter from Pierce Butler to James Madison (June 26, 1795), in 16 MADISON PAPERS, *supra* note 236, at 24; see also *Senator Pierce Butler's Notes of the Debates on Jay's Treaty*, 62 S.C. HIST. MAG. 1 (1961). Butler's notes indicated that Article 9 had been debated on June 16 and that King and Ellsworth had supported it. See Letter from Pierce Butler to James Madison, *supra*, at 27. For the injunction of secrecy and its partial lifting after approval of the treaty, see 4 ANNALS OF CONG. 855, 867 (1795).

251. See 4 ANNALS OF CONG. 865 (1795).

252. Instructions to Mr. Jay, by Edmund Randolph, Secretary of State (May 6, 1794), in 1 AMERICAN STATE PAPERS, *supra* note 110, at 472, 473. Although the instructions were penned by then Secretary of State Randolph, Hamilton was intimately involved in the whole project.

253. The young New York Republican Edward Livingston provoked the famous House debate by moving for a resolution calling upon the President to lay Jay's instructions and other diplomatic papers before the House. See 5 ANNALS OF CONG. 400-01 (1796); COMBS, *supra* note 235, at 175-76; Madison in the Fourth Congress, Editorial Note, *supra* note 236, at 144-45. Following the advice of Hamilton and others, Washington refused. See COMBS, *supra* note 235, at 176-78; Madison in the Fourth Congress, Editorial Note, *supra* note 236, at

Washington, characteristically, was sensitive to the points made on both sides of the Senate debate and, after the vote, hesitated briefly before ratifying the treaty. Writing to Hamilton, he asked for an in-depth analysis of the treaty and the arguments pro and con as to each article.<sup>254</sup> Although no longer in the government, Hamilton quickly obliged, forwarding a comprehensive analysis of the treaty in all of its dimensions.<sup>255</sup> Crucial for present purposes, in the course of his analysis, he explicitly affirmed the nationalist view of the treaty power. Referring to Tazewell's charge that Article 9 unconstitutionally "entrenched upon the authorities of the States," Hamilton replied:

But this objection is inadmissable. It would totally subvert the power of making Treaties. There can hardly be made a Treaty which does not make some alteration in the existing laws and which does not, as to its objects, controul the legislative authority — and from the nature of our constitution this must apply to the State laws and legislatures as well as to those of the Union.

A Treaty cannot be made which alters the constitutions of the country or which infringes any express exceptions to the power in the constitution of the United States. But it is difficult to assign any other bounds to

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146. For letters of Hamilton to Washington arguing against complying with the House's request, see Letter from Alexander Hamilton to George Washington (Mar. 26, 1796), in 20 HAMILTON PAPERS, *supra* note 21, at 82; Letter from Alexander Hamilton to George Washington (Mar. 28, 1796), in 20 HAMILTON PAPERS, *supra* note 21, at 83; Letter from Alexander Hamilton to George Washington (Mar. 29, 1796), in 20 HAMILTON PAPERS, *supra* note 21, at 85. In a letter urging Washington to deny the House's request, Hamilton noted, among other things, that

[t]he negotiator is expressly instructed to accede to the *intire abolition of alienism* as to inheritances of land. You have seen what clamour has been made about the moderate modification of this idea in the Treaty & can thence judge what a load would fall on this part of the instruction.

Letter from Alexander Hamilton to George Washington (Mar. 28, 1796), *supra*, at 83-84.

254. See Letter from George Washington to Alexander Hamilton (July 3, 1795), in 18 HAMILTON PAPERS, *supra* note 241, at 398, 398-99 (noting that it "is not the opinions of those who were determined (before it was promulgated) to support, or oppose it, that I am solicitous to obtain; for these I well know rarely do more than examine the side to which they lean . . . . My desire is to learn from dispassionate men, who have knowledge of the subject, and abilities to judge of it, the genuine opinion they entertain of each article of the instrument; and the result of it in the aggregate"); see also Letter from George Washington to Alexander Hamilton (July 29, 1795), in 18 HAMILTON PAPERS, *supra* note 241, at 524. Later in August, after having decided in favor of the treaty, Washington again hesitated because of a new British order-in-council which had reimposed restrictions on neutral shipping. When a scandal involving his Secretary of State Edmund Randolph erupted — which led to suspicion that Randolph had taken a bribe from the French Minister Adet — Washington fired Randolph and abruptly decided to ratify the treaty. On the Randolph affair and its relation to Washington's decision to ratify the treaty, see COMBS, *supra* note 235, at 165-70, and Letter from Oliver Wolcott, Junior, to Alexander Hamilton (July 30, 1795), in 18 HAMILTON PAPERS, *supra* note 241, at 526.

255. See Alexander Hamilton, Remarks on the Treaty of Amity Commerce and Navigation Lately Made Between the United States and Great Britain (July 9-11, 1795), in 18 HAMILTON PAPERS, *supra* note 241, at 404-54 [hereinafter Hamilton's Remarks on the Treaty].

the power. It may certainly alter the provisions of the statute and municipal laws & modify the rules of property.<sup>256</sup>

For support, Hamilton pointed to practice under the Confederation. In the Treaty of Peace, and even more dramatically in the French Treaty, he noted, the old Congress had approved stipulations limiting the power of the states to confiscate real property on the basis of alienage. Provisions of this kind, moreover, were common in both peace and commercial treaties. Since the treaty power “is *plenary* under our present constitution, more so than it was under the confederation [given the proviso to Article IX of the Confederation],” Hamilton concluded, “the objection to the constitutionality of this article is manifestly futile.”<sup>257</sup>

Washington apparently agreed. Notwithstanding the raging public controversy, he subsequently ratified the treaty.<sup>258</sup> The Jay Treaty thus established a precedent of enormous significance in favor of the nationalist view. All the more so because it was the first treaty with a foreign nation to be negotiated and approved under the new Constitution and because its approval demonstrated the concurrence of both the Executive and the Senate in that view. Hamilton’s explicit affirmation, moreover, utterly belies the oft-repeated claim that the nationalist view was beyond the ken of the Founding Fathers.

*ii. The Public Debate.* The story of Article 9, however, did not end with the debates on the floor of the Senate Chamber and the secret deliberations of high executive officials. Just after the vote, Virginia’s other Senator, Stevens Thomson Mason, leaked a copy of the treaty to a leading Republican newspaper which published it along with Tazewell’s motion.<sup>259</sup> The reaction was incendiary. By the time the

256. *Id.* at 428. Hamilton noted that Article 9 had been misunderstood and “caused at first much uneasiness.” *Id.* at 427. The echo of Hamilton’s argument a decade before, written as Phocion, should be evident. See *supra* notes 131-136 and accompanying text.

257. Hamilton’s Remarks on the Treaty, *supra* note 255, at 429. Hamilton cited Articles V and VI of the Treaty of Peace, both of which secured British subjects certain rights in real property. See *id.* at 428. As we shall see, Article VI subsequently played a major role in the debate over the nationalist and states’ rights views of the treaty power. See *infra* notes 377-420, 432-439 and accompanying text. For its role in debates under the Confederation, see *supra* notes 104-140 and accompanying text. As to the French Treaty, he cited Article XI. See Hamilton’s Remarks on the Treaty, *supra* note 255, at 428. Provisions of this kind were, moreover, common in treaties of peace and commerce. See *id.* at 429.

258. See *supra* note 254.

259. For discussion of the sensational publication of the treaty by Bache in the *Aurora*, see COMBS, *supra* note 235, at 162; TAGG, *supra* note 235, at 246-47; and Letter from Alexander Hamilton to Oliver Wolcott, Junior (June 26, 1795) (notes following), in 18 HAMILTON PAPERS, *supra* note 241, at 389-90. The Washington administration made a serious blunder in failing to publish the treaty at an earlier point. The Senate had approved the treaty on June 24, and the administration had arranged for its publication on July 1. Bache, however, published an abstract of the treaty on June 29 and circulated the entire treaty, in pamphlet form, on July 1. On July 3, Bache released a second wave of pamphlets, which included the entire treaty and Tazewell’s motion. By this time, of course, the public was in



dust finally settled a year later, however, the Republican challenge had only served to consolidate even more clearly the nationalist conception as the dominant view.

With the presses still warm, Republican activists throughout the country rushed to organize protest meetings and rallies. The first step was to draft elaborate memorials to the President, which identified the treaty's various constitutional infirmities and specified its grave shortcomings in upholding national rights, interests, and honor. The next step was to take the battle to the press. Republican polemicists of all stripes produced a massive outpouring of articles and essays critically scrutinizing the treaty's provisions and providing support for the constitutional attacks already underway. The hope was that under the pressure of intense popular discontent, Washington would refuse to ratify the treaty.<sup>260</sup> When that failed, the next line of defense was the House: it had to be convinced to assert its authority and block implementation of the hated and unconstitutional treaty.<sup>261</sup> In the wake of

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an uproar. See Letter from Alexander Hamilton to Oliver Wolcott, Junior, *supra*, at 389-90 n.2.

260. See, e.g., COMBS, *supra* note 235, at 162-63; TAGG, *supra* note 235, at 248-56; YOUNG, *supra* note 235, at 447-57. Washington's response to the large number of memorials was uniformly curt, asserting that he had to make his own judgment on the merits of the treaty. See, e.g., Draft of the Petition to the General Assembly of the Commonwealth of Virginia, Editorial Note, in 16 MADISON PAPERS, *supra* note 236, at 62, 64 [hereinafter Draft of Petition to General Assembly]; COMBS, *supra* note 235, at 163-64. For Bache's energetic efforts, and inflammatory rhetoric in the *Aurora*, see TAGG, *supra* note 235, at 252-60. Newspapers throughout the country were operating at a feverish pitch. See, e.g., Farnham, *supra* note 235, at 78-82.

261. The Republican leadership worried that the members of the House would resist discussing the treaty out of a concern that the House had no discretion to exercise in connection with treaties. See Farnham, *supra* note 235, at 82-83. With Madison's active efforts kept carefully in the background, Republicans turned to the Virginia General Assembly as the focus of their efforts. For Madison's role, see Draft of Petition to General Assembly, *supra* note 260, at 62-69; Letter from Joseph Jones to James Madison (Oct. 29, 1795), in 16 MADISON PAPERS, *supra* note 236, at 113-14 (correspondence concerning the Virginia legislative debate and Madison's role); Letter from Joseph Jones to James Madison (Nov. 22, 1795), in 16 MADISON PAPERS, *supra* note 236, at 132-36 (same); *infra* notes 326-333 and accompanying text. If the General Assembly would condemn the treaty, it would encourage timid Republicans in the House to take a more assertive stance. See KURTZ, *supra* note 235, at 24-25; RISJORD, *supra* note 227, at 457-60; Farnham, *supra* note 235, at 82-85. Republicans made their move as soon as the legislative session began in November, proposing a resolution lauding their two Senators, Tazewell and Mason, for having voted against the treaty in the Senate. A lengthy debate then ensued in which John Marshall gave a famous three-hour constitutional oration, but the Republicans nevertheless easily carried the resolution. See KURTZ, *supra* note 235, at 22-23; RISJORD, *supra* note 227, at 457-58; Farnham, *supra* note 235, at 83-84. In December, they then pushed through a resolution recommending that Congress adopt four constitutional amendments. The first, and most important, would have required that any treaty on a subject within the powers delegated to Congress had to be ratified by the House as well as the Senate. That was just a reiteration of the main Republican attack on the treaty. The second and third were designed to express dissatisfaction with the Senate by transferring the Senate's impeachment powers to a special tribunal and reducing the Senators' terms to three years. The fourth was a personal slap at John Jay, prohibiting federal judges from holding any other office. Apparently, the main purpose of the proposed amendments was to force the House to take up the whole question of the

the treaty's publication, the Republicans clearly had the upper hand. For a time, Federalists, stunned by the force and intensity of the response, remained silent, encouraging the inflammatory rhetoric of some of the extremists in the Republican camp. Quickly, however, the Federalists regrouped and soon matched the Republicans, meeting for meeting, memorial for memorial, and article for article.<sup>262</sup>

The main focus of discontent on the constitutional front was the exclusion of the House from the process. Even among Republicans, though, a wide variety of different and conflicting views were expressed. On the moderate side was the minimalist position ultimately adopted by the House, which insisted only that treaty stipulations touching on subjects within Congress's legislative authority required an act of Congress to bring them into force as domestic law and that the House could exercise discretion in deciding whether to adopt any necessary implementing legislation.<sup>263</sup> On the extremist side were resolute denials that the treaty power could ever extend to subjects of congressional power.<sup>264</sup> Republicans, however, were not content to identify this constitutional defect alone. Their uncontrollable enthusiasm found constitutional infirmities in virtually every provision in the treaty, a point which Federalists were ultimately to use to devastating advantage.

Article 9 was no exception; indeed, for some, it was a central case-in-point. Perhaps prompted by Tazewell's motion, Republican firebrands — like the young Virginian, John Thompson — loosed their cannons at the usurpation of state authority which Article 9 represented. "The ninth article," Thompson claimed in a widely publicized speech during a Petersburg, Virginia, protest, "invades the rights of

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treaty. Virginia then sent the proposed amendments to the legislatures of the other states. See KURTZ, *supra* note 235, at 5; RISJORD, *supra* note 227, at 458; Farnham, *supra* note 235, at 84-85.

262. For the federalist response, see, for example, COMBS, *supra* note 235, at 178-85, and KURTZ, *supra* note 235, at 33, 51-55, 71-74. The most telling early indication that the Republicans were losing public support was the nearly uniformly hostile reaction to Virginia's amendment proposals in the other state legislatures. See KURTZ, *supra* note 235, at 25-30; RISJORD, *supra* note 227, at 460-62; Farnham, *supra* note 235, at 85-88. For the disappointment of Madison and his lieutenants to the reaction, and its forebodings for the House debate, see Letter from James Madison to James Monroe, *supra* note 241, at 170; Letter from James Madison to Thomas Jefferson (Jan. 31, 1796), in 16 MADISON PAPERS, *supra* note 236, at 208, 209; and Letter from Joseph Jones to James Madison (Feb. 17, 1796), in 16 MADISON PAPERS, *supra* note 236, at 224, 224-25, 232-34 (Joseph Jones had played a central role in promoting the Virginia resolutions).

263. See *supra* note 243 and accompanying text. By dubbing this position "moderate," I do not mean to suggest that it was the best, or even a persuasive, interpretation of the Constitution — only that it was moderate in comparison to the positions of other Republicans. For recent debate over this question, see *supra* note 20.

264. See *infra* notes 272-274, 278, 290, 296-297, 305, 318-320, 328-333, 338-350, 388-398, 431, 436-439 and accompanying text; *supra* note 249 and accompanying text (describing Tazewell's proposed resolution disapproving the treaty).

this commonwealth, by contemplating the case of Denny Fairfax.<sup>265</sup> Likewise, in New York, a town meeting adopted a resolution condemning, inter alia, Article 9 for permitting British subjects to hold lands previously purchased in the United States, which, they claimed, would override New York State's laws confiscating Tory land and prohibiting alien landholding.<sup>266</sup>

Republican fury was forged into more reasoned efforts than these conclusory public pronouncements in the flood of essays filling newspapers across the country.<sup>267</sup> This is not to suggest that there was a carefully coordinated strategy or even that the various authors were in agreement on many crucial points, although they all reviled the treaty. Attacks on the constitutionality of Article 9, however, were raised by enough writers at least to suggest that many of the more strident Republicans affirmed the states' rights view. On the other hand, the silence of others equally suggested that, even among Republicans, there was serious doubt about the cogency of the states' rights conception.

In the tremendous outburst of writing immediately following publication of the treaty, the influential Livingston family of New York played a particularly notable role. Robert Livingston had been a leading revolutionary in the generation of 1776, served as Secretary of Foreign Affairs during the Confederation, and was among the most passionate opponents of the treaty.<sup>268</sup> With the help of his younger brother Edward, who as a member of the House was shortly to play a

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265. John Thompson, J. Thompson's Speech, in 1 AMERICAN REMEMBRANCER, *supra* note 244, at 27.

266. See YOUNG, *supra* note 235, at 453-54. The resolutions were adopted at a follow-up to an earlier meeting at which Hamilton had attempted, unsuccessfully, to address the assembly. That meeting had nearly ended in violence. See *id.* at 449-53; *supra* note 241. The influential Livingston family took the lead in organizing and conducting the meetings, and the resolutions closely followed the line of argument which Robert and Brockholst Livingston had taken in a series of essays published in New York newspapers and carried widely around the country. For discussion of the essays, see *infra* notes 269-277, 279-280, 283, 286-288, 291, 309, 344, 355, 407, 502 and accompanying text. Another resolution condemned the treaty for usurping the powers of Congress. See YOUNG, *supra* note 235, at 454; see also Resolutions, 1 AMERICAN REMEMBRANCER, *supra* note 244, at 102-03 (reprinting similar resolutions of a town meeting in Peterburg, Virginia).

267. For discussion of some of the Republican writers, see TAGG, *supra* note 235, at 252-54. The *Aurora* published essays, inter alia, by Hancock, Valerius, Belisarius, Atticus, Pittachus, Diplomaticus, and Americanus. Writers of a more serious character were Cato, Cinna, Decius, Columbus, as well as the author of the series "Features of Mr. Jay's Treaty." For discussion, see *infra* notes 269-280, 438-439 and accompanying text. There were countless others. For Hamilton's efforts to obtain information about the identities of some of these writers, see Letter from Alexander Hamilton to Oliver Wolcott, Junior (Sept. 20, 1795), in 19 HAMILTON PAPERS, *supra* note 98, at 278, 278-79 & n.2 (inquiring about identities, with note indicating that Valerius wrote eleven articles, Hancock wrote five, Belisarius wrote five, and Atticus wrote at least nine); Letter from Oliver Wolcott, Junior to Alexander Hamilton (Sept. 26, 1795), in 19 HAMILTON PAPERS, *supra* note 98, at 294 (providing speculations).

268. On Robert Livingston and the Livingston family, see DANGERFIELD, *supra* note 245, at 268-73, and YOUNG, *supra* note 235, at 447-54, 458.

key part in the debate over the role of the House in treaty-making, he penned a series of sixteen widely circulated essays under the pseudonym Cato, which were among the most influential and most elaborately reasoned.<sup>269</sup> Brockholst Livingston, a close relative, likewise produced two sets of widely distributed essays under the signatures Decius and Cinna.<sup>270</sup> During the Jay Treaty controversy, all three adhered to some version of the states' rights view. Ironically, however, as we shall see, all three were more or less explicitly to renounce that view in later political crises.<sup>271</sup>

As with many Republican writers, Cato adjudged large portions of the treaty to be unconstitutional.<sup>272</sup> Most important for present pur-

269. See DANGERFIELD, *supra* note 245, at 272. The Cato essays were ultimately published in pamphlet form and widely circulated. See YOUNG, *supra* note 235, at 458.

270. See DANGERFIELD, *supra* note 245, at 272. On the attribution of the Livingstons as authors of Cato, Cinna, and Decius, as well as detailed publication information, see *The Defence No. 1: Introductory Note*, *supra* note 246, at 475-77.

271. See *infra* note 355 and accompanying text (describing Robert Livingston's role in negotiating the Louisiana Purchase and the states' rights dilemmas thereby created); *infra* note 407 and accompanying text (noting then Supreme Court Justice Brockholst Livingston's concurrence without comment in a decision upholding Article 9 of the Jay Treaty); *infra* notes 503-507 and accompanying text (describing the endorsement of Edward Livingston, then Secretary of State in the Jackson administration, of the nationalist view and explicitly of the power to make treaty stipulations dealing with alien ownership of real property).

272. The Jay Treaty, he claimed, was "at war with every check, with every provision, by which [the Constitution] guards against the intrusion of one branch upon the rights of another, and which, if suffered, would terminate in despotism." Robert Livingston, *Cato No. XIII*, reprinted in 1 AMERICAN REMEMBRANCER, *supra* note 244, at 246-47. A treaty cannot, he claimed, touch on any subject within Congress's legislative authority without obtaining the prior approval of the House as well as the President and Senate. See *id.* at 249-50. Thus, innumerable provisions of the treaty were bad on this ground: those which stipulated for the payment of money, for example, in settling claims for unpaid debts to British creditors and even for the salaries of commissioners who were assigned to arbitrate disputed cases, see *id.* at 248, 252; those which promised commercial advantages, for example granting Great Britain most favored nation status, see *id.* at 248; those which created crimes (dealing principally with piracy), see *id.* at 248; and those which created new offices, for example commissioners to arbitrate disputed claims, and which vested their appointment in the President and Senate, see *id.* at 250-51. The provisions for appointment of five commissioners to resolve outstanding disputes were also unconstitutional because they invaded the rights of the judiciary under Article III, which has jurisdiction of all cases arising under treaties (notwithstanding the "inconveniences [which] may arise from there not existing a power in the United States to determine controversies arising under treaties by the intervention of commissioners"), *id.* at 252; see *id.* at 250-52; Robert Livingston, *Cato No. XIV*, in 2 AMERICAN REMEMBRANCER, *supra* note 244, at 3; violated the appointments clause because they allowed the British government (as well as the United States) to appoint two commissioners with a fifth being determined by lot, see Observations on Mr. Jay's Treaty, 2 AMERICAN REMEMBRANCER, *supra* note 244, at 3; disregarded the principle of due process because the commissioners were permitted to consider evidence that would be inadmissible in a court of the United States, see *id.* at 4; and violated an unspecified principle which prohibited the assumption of responsibility for private debts, see *id.* at 4. Furthermore, the treaty was unconstitutional insofar as it prohibited the export of certain goods from the states. See Robert Livingston, *Cato No. XIII*, reprinted in 1 AMERICAN REMEMBRANCER, *supra* note 244, at 248. Remarkably, however, Cato was at this point only beginning to warm up. An outbreak of yellow fever in New York compelled him to leave the city and "lay aside

poses, he found a parallel between the relationship of the treaty power to congressional power and to state legislative authority. Treaties, he claimed, could not touch on subjects that the Constitution assigned to Congress without obtaining the prior approval of the House. So too the treaty power could not interfere with the legislative powers of the states on matters beyond congressional authority without first obtaining the individual consent of the states: "It will be found that no ratification by the president and senate can carry this treaty into effect, without the concurrence of congress; nor, in some points, even with such concurrence, without the aid of the state legislatures."<sup>273</sup> This was remarkable doctrine and was all the more remarkable because Cato failed even to make a passing reference to the Supremacy Clause. If Congress needed to pass legislation to execute treaty stipulations on subjects falling within its legislative authority, and the states to pass legislation for stipulations falling within their legislative authority, what was the point of including treaties in the Supremacy Clause?<sup>274</sup>

For Cato, Article 9, of course, was a case in point.<sup>275</sup> This Article, he noted,

appears to infringe the constitutional independence of the respective states. — Congress alone have the power to naturalize; but neither congress, nor any member of the federal government, appear to me to have any right to declare the tenure by which lands shall be holden in the terri-

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my pen," even though "[s]everal articles, which appear to me exceptionable, remain to be discussed . . ." Robert Livingston, *Cato No. XVI*, reprinted in 3 AMERICAN REMEMBRANCER, *supra* note 244, at 65. Never completing his essays, he was thus abruptly forced to break off his constitutional analysis.

273. Robert Livingston, *Cato No. XIII*, reprinted in 1 AMERICAN REMEMBRANCER, *supra* note 244, at 247. He continued:

Whatever has been said with respect to the rights of the president and senate, as opposed to the exclusive rights of congress, applies with equal force to the rights of states; where the treaty is made relative to objects not surrendered by them, the treaty that is binding upon them, must be constitutionally made, and consist with the powers yielded to the federal government; otherwise the president might barter away the independence of individual states, which makes a necessary part of the constitution of the United States, and which is expressly guaranteed.

*Id.* at 250.

274. Even Livingston's biographer found him "most bizarre when he declared that a treaty might well depend, not upon the advice and consent of the Senate, or even upon the concurrence of the whole Congress, but upon the agreement also of individual states." DANGERFIELD, *supra* note 245, at 272. In the House debate, Madison gently rejected this claim. See *infra* notes 338-346 and accompanying text. Indeed, in order to avoid the overpowering force of the Supremacy Clause in making treaties self-executing, Madison carefully pointed out that the Clause in terms applies only to state judges and state laws and constitutions. See *id.*

275. It was not the only case, however. According to Cato, the provisions for commissioners authorized them to consider evidence that would be inadmissible in this country. "[T]he rules of evidence," he then declared, "not being given to congress, I presume are exclusively invested in the state legislatures." Robert Livingston, *Cato No. XVI*, reprinted in 2 AMERICAN REMEMBRANCER, *supra* note 244, at 3.

ories of the individual states, without naturalization. This is an act of sovereignty which is confined to the state legislatures, and which they have not ceded to congress, about which, therefore, I am led to doubt the right of the president and senate to treat . . . .<sup>276</sup>

Quoting the Tenth Amendment, he then asked: "Is this right of the state abridged by the power of the president and senate to make treaties? Are not their powers to treat confined to such objects as the constitution entrusts to the federal government?"<sup>277</sup>

Cato was probably alone in suggesting that the consent of the states might be required to validate a treaty. In the first blush of excitement generated by publication of the treaty, however, he had company in asserting a states' rights subject-matter limitation on the scope of the treaty power. Alexander Dallas, a leading Pennsylvania Republican, and Brockholst Livingston, for example, agreed.<sup>278</sup> Writ-

276. Robert Livingston, *Cato No. XVI*, reprinted in 3 AMERICAN REMEMBRANCER, *supra* note 244, at 63.

277. Robert Livingston, *Cato No. XVI*, reprinted in 3 AMERICAN REMEMBRANCER, *supra* note 244, at 63-64. Cato further claimed that under Article 9, half of the lands in New York could be owned by British subjects. *See id.* at 64-65. Moreover, if valid, it would permit the federal government to agree to transfer all of the vacant lands in every state to the British king. *See id.* at 65. Finally, he also claimed that the stipulation violated Article 4, § 3 of the Constitution which provides that nothing in the Constitution shall prejudice any claims of the United States or of any particular states. *See id.*

278. Dallas wrote an important series entitled *Features of Mr. Jay's Treaty*. *See* GEORGE MIFFLIN DALLAS, LIFE AND WRITINGS OF ALEXANDER JAMES DALLAS 160-204 (1871):

It may not be amiss here to intimate a doubt of the power of the federal government to regulate the tenure of real estates; it is nowhere expressly given, and therefore cannot be constitutionally implied; and it seems to be among the necessary and natural objects of State legislation. . . . [I]s every man whose estate was liable to confiscation as a traitor or as an alien, in consequence of the Revolution, entitled *now to hold lands as a native?* The Fairfax claim in Virginia, the claim of the Penns in Pennsylvania, and the claims of Galloway, Allen, etc., may hence derive a dangerous principle of resuscitation. *Look to it well.*

*Id.* at 190-91 (emphases in original). For a description of Dallas's role in the anti-treaty campaign, see Letter from Alexander Hamilton to Oliver Wolcott, Junior (Sept. 20, 1795), *supra* note 267, at 278-79, and Letter from Alexander Hamilton to Oliver Wolcott, Junior (Sept. 26, 1795), in 19 HAMILTON PAPERS, *supra* note 98, at 294-95 n.1. Dallas dropped out of the campaign when Washington decided to ratify the treaty.

Dallas was, if anything, even more comprehensive than Cato in finding constitutional defects in the treaty. Jay's appointment had been unconstitutional, since he was then sitting on the Supreme Court, *see* DALLAS, *supra*, at 161; the appointment of commissioners to hear matters within the judicial power violated Article III, *see id.* at 188-90; the public assumption of private debts violated fundamental principles, *see id.* at 189-90; the naturalization of certain British subjects, the extensive regulations of commerce, the provisions dealing with trade with Indian tribes, the removal of duties on certain products, and the definition and punishment of certain offences violated Congress's powers, *see id.* at 190-94; the imposition of limitations on the conduct of Americans abroad (in joining in foreign attacks on the British) violated their liberty, *see id.* at 192-93; the prohibition on exports of certain goods violated the provision preventing the imposition of duties on exports from the states, *see id.* at 193-94; and the probable ceding of territory to the British under a provision settling the border violated the guarantee of a republican form of government to every state, *see id.* at 194.

ing as Decius, Brockholst Livingston declared that Article 9 “infringes the rights of the different States.”<sup>279</sup> He also mistakenly claimed that it was unprecedented, since all previous treaties, including the French Treaty of 1778, had, in his view, covered only personal property.<sup>280</sup> Still another writer, Atticus, noted:

The 9th article of the treaty contains the following extraordinary stipulation: By what part of the constitution have the president and senate the power of regulating the tenure of real estates? We look in vain for such a grant in the constitution, even to congress itself; this right then, *not being delegated to the United States*, nor “prohibited” by the constitution to the states, is “*reserved to the states respectively, or to the people.*” Shall the president dare to invade the chartered rights of the states?<sup>281</sup>

Republicans, however, had moved too fast with too little serious thought, and Federalists were quick to exploit their vulnerability. Noah Webster as Curtius was first to respond: “It has been said that this article infringes the rights of the states. As I have never seen any argument to prove this assertion, it will be sufficient to answer it by another assertion, and say it does *not*.”<sup>282</sup> He then demonstrated the gross errors in Decius’s claim that the French Treaty did not include protection for real property.<sup>283</sup>

Federalists, however, left their heavy lifting to Hamilton. In a series of thirty-eight masterful essays entitled *The Defence*, Hamilton, under the signature Camillus and with the aid of Rufus King, undertook a sweeping defense of the treaty. It is not possible here to convey the magnitude or brilliance of Hamilton’s achievement or its profound impact on the shape of the public debate. Even a dispirited Jefferson, vainly imploring Madison to oppose him, acknowledged that

279. Brockholst Livingston, *Decius No. II*, reprinted in 2 AMERICAN REMEMBRANCER, *supra* note 244, at 125.

280. *See id.*, at 126-27. Decius interpreted the term “immoveable property” in the English version of the French Treaty not to include real property. For this error, Hamilton, with Rufus King’s aid, effectively tore him to pieces. *See infra* notes 283, 285-288 and accompanying text.

281. *Atticus No. IX*, reprinted in 3 AMERICAN REMEMBRANCER, *supra* note 244, at 152-53 (emphases in original). For other minor Republican writers apparently objecting to Article 9 on states’ rights grounds, see, e.g., TAGG, *supra* note 235, at 253.

282. Noah Webster, *Curtius No. V*, reprinted in NOAH WEBSTER, A COLLECTION OF PAPERS ON POLITICAL, LITERARY, AND MORAL SUBJECTS 194, 195 (1843) (emphasis in original). Curtius was defending the observations made by William Loughton Smith in his *Candid Remarks on the Treaty of Amity and Commerce Between the United States and Great Britain*, which appeared in *The New York Daily Advertiser*, July 4, 1795. *See* Brockholst Livingston, *Decius No. II*, reprinted in 2 AMERICAN REMEMBRANCER, *supra* note 244, at 127. For attribution of the latter essay to Smith, see Letter from John Beckley to James Madison (Sept. 10, 1795), in 16 MADISON PAPERS *supra* note 236, at 85, 86 n.3. Curtius also defended Article 9 on policy grounds.

283. *See* Noah Webster, *Curtius No. V*, *supra* note 282, at 196-97.

“Hamilton is really a colossus to the antirepublican party. Without numbers, he is an host within himself.”<sup>284</sup>

Hamilton spent the greater part of his essays defending the treaty on the merits, leaving his response to the constitutional objections for the last three numbers. In *The Defence No. XVII*, he specifically addressed all but the constitutional arguments that had been made in response to Article 9.<sup>285</sup> The “loud and virulent clamour” which this Article had raised was based, he claimed, largely on misrepresentations about its scope.<sup>286</sup> Most important, after undertaking a painstaking analysis of the provision and its proper construction, he demolished Decius’s claim that the French Treaty of 1778 did not protect real property. Decius was obviously unfamiliar with French law, and Hamilton spared him no embarrassment in meticulously demonstrating the errors into which he had fallen.<sup>287</sup> “Where now DECIUS,”

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284. Letter from Thomas Jefferson to James Madison, *supra* note 242, at 88. After noting that the Republicans have “only midling performances to oppose to him” and that “[i]n truth, when he comes forward, there is nobody but yourself who can meet him,” he concluded: “For god’s sake take up your pen, and give a fundamental reply to Curtius & Camillus.” *Id.* at 88-89. Jefferson employed strikingly similar language in 1793 when he urgently suggested that Madison write in opposition to Hamilton’s Pacificus letters in the controversy over Washington’s declaration of neutrality. That time, however, Madison reluctantly followed his advice. See CORWIN, *supra* note 236, at 16 (quoting Jefferson’s exhortation that “[n]obody answers him and his doctrines will therefore be taken for confessed. For God’s sake, my dear Sir, take up your pen, select the most striking heresies, and cut him to pieces in face of the public. There is nobody else who can and will enter the lists against him”). On differing evaluations of the weight of the Camillus letters, see *The Defence No. I: Introductory Note*, *supra* note 246, at 478-79.

285. Alexander Hamilton, *The Defence No. XVII* (Sept. 22, 1795), reprinted in 19 HAMILTON PAPERS, *supra* note 98, at 279. Hamilton based this essay on extensive notes prepared by King. See *id.* at 279-81 n.1. In writing the Camillus letters, Hamilton was responding to Cato, Decius, and Dallas, among others.

286. *Id.* at 285; see *id.* at 282 (noting that the “misapprehension of this article . . . did more, it is believed, to excite prejudices against the Treaty, than any thing that is really contained in it”).

287. See *id.* at 282-90. Decius’s error was in interpreting the English translation of the French term “*biens*” (“goods”) as having the same meaning assigned that term in the English common law. See *id.* at 285-88. As Hamilton demonstrated, however, the terms “goods or ‘biens’ in the French law [included] all kinds of property *real* as well as *personal*.” *Id.* at 286. Hamilton’s final *riposte* was to quote Jefferson’s unequivocal construction of Article XI of the French Treaty as including real property in his diplomatic discussions with the French and in reporting to Congress. See *id.* at 290-91. For discussion, see *supra* notes 95-98 and accompanying text. He then answered the policy-based arguments against the provision. See Hamilton, *supra* note 285, at 292-94. In an earlier essay, Hamilton had addressed similar arguments against Article 2 of the Jay Treaty, which provided British subjects in the areas around the newly ceded posts the right to continue to hold their real property, irrespective of whether they became U.S. citizens. See Alexander Hamilton, *The Defence No. IX* (Aug. 21, 1795), reprinted in 19 HAMILTON PAPERS, *supra* note 98, at 163. Among other things, he pointed out that property held at the time the Treaty of Peace was concluded was already protected by Article VI of that treaty, which prohibited further confiscations of British estates. Recognizing that the territory around the posts had been ceded to the United States, the British had refrained from making any further grants of property after the Treaty of Peace. They continued to hold the posts only as a countermeasure to the violations of the



Hamilton asked, "is thy mighty Triumph? . . . Learn that in political as in other science 'shallow Draughts intoxicate the Brain, And drinking largely sobers us again.'"<sup>288</sup>

Hamilton, however, saved his most devastating remarks for last.<sup>289</sup> His aim was to provide a comprehensive reply to the myriad constitutional arguments advanced against the treaty. As he framed the issue, the central question was whether, as the more extreme Republicans had claimed, "all objects upon which the legislative power may act in relation to our own Country are excepted out of the power to make Treaties."<sup>290</sup> Although this question principally involved the relationship between the treaty power and Congress's legislative powers, Hamilton noted the same parallel which Cato had drawn: the subject matter of treaties overlaps with the legislative objects assigned not only to Congress but to the states as well. Thus, in the course of his argument, he addressed both aspects of the question.

His first move was to emphasize the broad terms of the grant:

It was impossible for words more comprehensive to be used than those which grant the power to make treaties. They are such as would naturally be employed to confer a *plenipotentiary* authority. A power "to make Treaties," granted in these indefinite terms, extends to all kinds of treaties and with all the latitude which such a power under any form of Government can possess. . . . With regard to the objects of the Treaty, there being no specification, there is of course a *charte blanche*. The

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treaty's Article IV by the states, which had blocked recovery of British debts. *See id.* at 169-71.

288. Hamilton, *supra* note 285, at 292 (quoting ALEXANDER POPE, AN ESSAY ON CRITICISM ll. 217-218, reprinted in ALEXANDER POPE, PASTORAL POETRY AND AN ESSAY ON CRITICISM 239, 264-65 (E. Audra & Aubrey Williamseds., 1961)).

289. The last three essays were dedicated solely to constitutional questions. *See* Alexander Hamilton, *The Defence No. XXXVI* (Jan. 2, 1796), reprinted in 20 HAMILTON PAPERS, *supra* note 21, at 3; Alexander Hamilton, *The Defence No. XXXVII* (Jan. 6, 1796), reprinted in 20 HAMILTON PAPERS, *supra* note 21, at 13; Alexander Hamilton, *The Defence No. XXXVIII* (Jan. 9, 1796), reprinted in 20 HAMILTON PAPERS, *supra* note 21, at 22.

290. Hamilton, *The Defence No. XXXVI*, *supra* note 289, at 7. In so framing the question, Hamilton chose to focus on the more extreme Republican claims that denied altogether that the treaty power extended to treaty stipulations on subjects falling within Congress's legislative powers. In so doing, he certainly lowered the burden which he would have to overcome. That position, as he effectively argued, was virtually indefensible and would clearly destroy the treaty power. At the same time, however, the weakness of Hamilton's argument was that it did not address what he could have, and had, already anticipated would be the position that Republicans would stake out in the House — that the House had discretion in deciding whether to carry into effect any stipulation falling within one of its delegated legislative powers. At the very beginning of his argument, Hamilton did briefly respond to this point, resting on the terms of the Supremacy Clause. *See id.* at 4-5. It was only later, when the House first asserted its position, that he turned his full attention to this crucial question. Writing a lengthy essay for Washington to use in responding to the House, he argued against the House position in much more elaborate terms. *See* Letter from Alexander Hamilton to George Washington (Mar. 29, 1796), *supra* note 253, at 85.

general proposition must therefore be that whatever is a proper subject of compact between Nation & Nation may be embraced by a Treaty.<sup>291</sup>

Of course, Hamilton acknowledged that, as with any other delegated power, a treaty cannot violate the Constitution, and he further conceded a natural law limitation which prevents any palpable abuse of a granted power. "Beyond these exceptions to the Power," however, Hamilton found "none . . . that [could] be supported."<sup>292</sup>

Turning directly to the claim that the treaty power could not touch on objects assigned to legislative authority, he underlined the fundamental distinction between legislation and treaties: legislation regulates persons and things falling within the jurisdiction of the nation and can have no binding effect on foreign nations or persons and things outside its jurisdiction; treaties, in contrast, are contracts based on consent that impose mutually binding obligations on independent sovereigns.

It follows that there is no ground for the inference pretended to be drawn . . . . It is the province of the [treaty-making power] to do what [legislation] cannot do. Congress . . . may regulate by law our own Trade and that which foreigners *come* to carry on with us, but they cannot regulate the Trade which we may *go* to carry on in foreign countries, they can give to us no rights [and] no privileges there. This must depend on the will and regulation of those countries; and consequently it is the province of the power of Treaty to establish the rule of commercial intercourse *between* foreign nations and the U[nited] States. The Legislature may regulate our own Trade but Treaty only can regulate the mutual Trade between our own and another Country.<sup>293</sup>

This was sufficient, moreover, to demonstrate the fallacy of the states' rights view. What was true of congressional powers, he ob-

291. Hamilton, *The Defence No. XXXVI*, *supra* note 289, at 6.

292. *Id.* at 7; *see id.* at 6-7. Because "a delegated authority cannot rightfully transcend the constituting act," treaties were bound by constitutional limitations. As an example, he cited the separation of powers: "A treaty for example cannot transfer the legislative power to the Executive Department nor the power of this last Department to the Judiciary; in other words it can not stipulate that the President and not Congress shall make laws for the U[nited] States; that the Judges and not the President shall command the national forces . . ." *Id.*

293. *Id.* at 8-9. He further explained:

Though a Treaty may effect what a law can, yet a law cannot effect what a Treaty may. These discriminations are obvious and decisive; and however the operation of a Treaty may in some things resemble that of a law, no two ideas are more distinct than that of *legislating* and that of *contracting*.

*Id.* at 8. This point led to his final conclusion:

In considering the power of Legislation, in its relations to the Power of Treaty, instead of saying that the objects of the former are excepted out of the latter, it will be more correct, indeed it will be intirely [sic] correct to invert the rule and to say that the Power of Treaty is the power of making exceptions in particular cases to the power of Legislation. The stipulations of Treaty are in good faith restraints upon the exercise of the last mentioned power.

Hamilton, *The Defence No. XXXVII*, *supra* note 289, at 21.

served, was equally true of the legislative powers assigned to the states. The same reasoning

extend[s] the power of Treaties to those objects which are consigned to the legislation of individual states; but here the constitution has announced its meaning in express terms, by declaring that the treaties which have been and shall be made under the authority of the U[nited] States shall be the supreme law of the land *any thing in the constitution or laws of any state to the contrary notwithstanding*. This manifestly recognises the supremacy of the power of treaties over the laws of particular states and goes even a step farther. The obvious reason for this special provision in regard to the laws of individual states is that there might otherwise have been room for question whether a Treaty of the Union could embrace objects the internal regulation of which belonged to the separate authorities of the States.<sup>294</sup>

Furthermore, critics of Article 9 had been ostentatiously inconsistent: they had denied that state laws imposing impediments to the recovery of the British debts amounted to violations of Article IV of the Treaty of Peace because, they claimed, "Treaties controul the laws of states." Yet, "[t]o impeach the constitutionality of [Jay's] Treaty it is objected that in some points it interferes with the objects of state-legislation. The express provision of the constitution in this particular quoted above has not been sufficient to check the rage for objection."<sup>295</sup>

Hamilton's argument did not stop here. Although hereafter addressed principally to the main Republican claim about the relationship of the treaty power to Congress's legislative authority, his further arguments were equally applicable to the states' rights position. The Republican view, he observed, would render the power to make treaties, "granted in such comprehensive and indefinite terms and guarded with so much precaution . . . essentially nugatory."<sup>296</sup> Since virtually all treaties overlap with legislative powers, this construction would "frustrate one principal object of the institution of a General Government"

294. Hamilton, *The Defence No. XXXVII*, *supra* note 289, at 15-16.

295. *Id.* at 17. Hamilton was referring to arguments made by Republicans that state laws passed during the Confederation, which imposed legal obstacles to the collection of British debts, did not place the United States in violation of Article IV of the Treaty of Peace because under the Confederation treaties were self-executing and overrode conflicting state laws. Jefferson had made this argument in 1792 in response to British Minister Hammond's diplomatic protests, *see supra* notes 121-122 and accompanying text, and Republican polemicists like Cinna (Brockholst Livingston) reasserted it strenuously. Hamilton responded vigorously to the point in several essays — not to deny the doctrine but to demonstrate that, given its uncertain status, the British justifiably refused to rely on the state courts to vindicate the treaty against state laws. For Hamilton's essays, *see* Alexander Hamilton, *The Defence No. IV* (Aug. 1, 1795), *reprinted in* 19 HAMILTON PAPERS, *supra* note 98, at 77; Alexander Hamilton, *Philo Camillus No. 3* (Aug. 12, 1795), *reprinted in* 19 HAMILTON PAPERS, *supra* note 98, at 124; Alexander Hamilton, *Philo Camillus No. 4* (Aug. 19, 1795), *reprinted in* 19 HAMILTON PAPERS, *supra* note 98, at 153. *See also supra* notes 98, 134.

296. Hamilton, *The Defence No. XXXVII*, *supra* note 289, at 18.

and “would then exhibit the ridiculous spectacle of a Government without a power to make Treaties with foreign nations: a result as inadmissible as it is absurd, since in fact our Constitution grants the power of making Treaties in the most explicit and ample Terms.”<sup>297</sup> Furthermore, the Framers in Philadelphia had intended to give the treaty power “the most ample latitude to render it competent to all the stipulations, which the exigencies of National Affairs might require.”<sup>298</sup> This intent was confirmed, moreover, by the discussions in the *Federalist Papers* and in the ratifying conventions.

Its great extent & importance . . . were mutually taken for granted — and, upon this basis, it was insisted by way of objection — that there were not adequate guards for the safe exercise of so vast a power — that there ought to have been reservations of certain rights, a better disposition of the power to impeach, and a participation, general or special, of the House of Representatives. The reply to these objections, acknowledging the delicacy and magnitude of the power, was directed to shew that its organisation was a proper one and that it was sufficiently guarded.<sup>299</sup>

Finally, he compared the treaty power under the Constitution with the power under the Articles of Confederation. The powers were similar, but the Constitution’s grant was more comprehensive, “for it is divested of the restriction in the proviso.” “This is evidence, (as was the fact),” he noted, “of a disposition in the Convention to disembarass and reinforce the power of making Treaties.”<sup>300</sup> In any case, the old Congress had repeatedly made treaties on subjects that were within the exclusive legislative authority of the states. Among many other examples, the French Treaty permitted French subjects to own real property in the United States, and the Treaty of Peace had interfered with the legislative authority of the states in the same and a number of other critical respects.<sup>301</sup>

297. *Id.* at 18-19. Through exhaustive analysis and illustration, Hamilton demonstrated how virtually every imaginable treaty stipulation would run afoul of a rule prohibiting treaties to be made on subjects within the legislative powers. *See id.* at 17-21.

298. Hamilton, *The Defence No. XXXVII*, *supra* note 289, at 22.

299. *Id.* at 24. In making this point, Hamilton surveyed much of the material discussed previously in connection with the Founders’ intent. *See supra* notes 175-222 and accompanying text. Among other things, he discussed the objections of Mason and Gerry to the treaty power, the relevant passages from the *Federalist*, and the debates in the ratifying conventions, particularly in Virginia. *See id.* at 23-25.

300. *Id.* at 26.

301. *See id.* at 29. Article VI of the Treaty of Peace, Hamilton pointed out,

prohibits the future confiscation of the property of adherents to G Britain, declares that no person shall on account of the part he took in the war suffer any future loss or damage in his person liberty or property and provides for the release of such persons from confinement & the discontinuance of prosecutions against them. It is difficult to conceive a higher act of controul both of the legislative & judiciary authority than by this article. These provisions are analogous in principle to those stipulations which in the [second and ninth] articles of the Treaty under examination have given occasion to a constitutional objection.

[T]he principle legislative powers with regard to the objects embraced by the Treaties of Congress were not vested in that body but remained with the individual states. Such are the power of *specific* taxation, the power of regulating Trade, the power of naturalization &c. If in theory, the objects of legislative power are excepted out of the power of Treaty, this must have been equally, at least, the case with the legislative powers of the state Governments, as with those of the U[nited] States. Indeed the argument was much stronger for the exception, where distinct Governments were the depositories of that power and of the power of Treaty. Nothing but the intrinsic force of the power of Treaty could have enabled it to penetrate the separate spheres of the State Governments. The practice under the confederation, for so many years acquiesced in by all the states is therefore a conclusive illustration of the Power of Treaty and an irresistible refutation of the novel and preposterous doctrine which impeaches the Constitutionality of that lately negotiated.<sup>302</sup>

*iii. The Treaty in the House.* Hamilton had begun his constitutional argument with a challenge to the members of the House who would soon take up the treaty. It is difficult to believe, he said, "that any man in either House of Congress who values his reputation for discernment or sincerity will publicly hazard it by a serious attempt to controvert" the constitutionality of the treaty.<sup>303</sup> His prediction proved on the mark. The uncontainable fervor of the period immediately following publication of the treaty gave way to more sober reflection. By the time of the House debate in March and April 1796, Republicans had performed a *volte face* and now limited themselves to defending their minimalist position. In a retreat from the position earlier staked out by Republican polemicists, the House, Republicans now declared, "do[es] not claim any agency in making Treaties."<sup>304</sup>

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*Id.* For Hamilton's 1784 remarks, written as Phocion, to the same effect regarding Article VI of the Treaty of Peace, see *supra* notes 131-136 and accompanying text. Hamilton also invoked the Consular Convention with France, which had been so controversial during the Confederation:

The Consular Convention with France . . . grants to the Consuls of that Country various authorities and jurisdictions, some of the *judicial* nature, which are actual transfers to them of portions of the internal jurisdiction and ordinary judiciary power of the Country the exercise of which our Government is bound to aid with its whole strength. It also grants exemptions to French Consuls from certain kinds of taxes & to them and French Citizens from all personal services; all which are very delicate interferences with our internal police and ordinary jurisdiction. . . . Though all reflecting men have thought ill of the propriety of some of them, as inconveniently breaking in upon our interior administration, legislative, executive and judiciary; only acquiescing in them from the difficulty of getting rid of stipulations entered into by our public agents under competent powers, yet no question has been heard about their constitutionality.

*Id.* at 28, 32. Hamilton noted as well that the Convention had been negotiated under the Confederation but approved under the Constitution, making it illustrative of the treaty power under both. *See id.* at 32.

302. *Id.* at 30.

303. Hamilton, *The Defence No. XXXVI*, *supra* note 289, at 3.

304. 5 ANNALS OF CONG. 771 (1796).

Rather, they claimed only that a treaty stipulation on a subject within Congress's legislative authority could not become domestic law until implemented by legislation approved by the House, and that in considering such legislation the House could exercise its discretion.<sup>305</sup>

The significance of this retreat should not be underestimated. As Hamilton had predicted (or perhaps dared), when the House finally turned in mid-April to debating the merits of the treaty, the countless constitutional charges so vigorously asserted only months before had disappeared. This was certainly not for lack of opportunity or motive. Republican opposition to the treaty was as furious as ever. Federalists, moreover, readily conceded that if the treaty was unconstitutional, it ought not be implemented by the House,<sup>306</sup> and they repeatedly challenged Republicans to make good on their earlier claims.<sup>307</sup> Hearing no response, Federalists then concluded, without contradiction, that the constitutionality of the treaty was now "allowed on all hands."<sup>308</sup> As Representative Tracy noted, "[a]t first the cry had been,

305. For the House resolution, see 5 ANNALS OF CONG. 771-72 (1796). For discussion, see *supra* notes 243, 249, 263-264 and accompanying text.

306. See, e.g., 5 ANNALS OF CONG. 436-37 (1796) (remarks of Rep. Murray); *id.* at 438 (remarks of Rep. Smith of South Carolina); *id.* at 593 (remarks of Rep. Smith of New Hampshire); *id.* at 989 (remarks of Rep. S. Lyman) (noting that if the treaty was unconstitutional, "we ought to prevent its operation, for we are sent here as the guardians of the rights of our fellow-citizens, and for that purpose are sworn to support their Constitution; if it is unconstitutional, it is a nullity; it is not binding upon the nation; we ought to reject it").

307. See, e.g., 5 ANNALS OF CONG. 438-39 (1796) (remarks of Rep. Smith of South Carolina) (author of the newspapers essays "A Vindication . . ."); *id.* at 989 (remarks of Rep. S. Lyman); *id.* at 1103 (remarks of Rep. Bourne) (challenging opponents of the treaty to "come forward at once, and show the instrument to be unconstitutional"); *id.* at 1155 (remarks of S. Smith).

308. 5 ANNALS OF CONG. 1204 (1796) (remarks of Rep. Gilbert). The only exception simply underscored the general abandonment of the constitutional objections to the Jay Treaty. Republican outlier, Representative Page of Virginia, summarily espoused a number of the constitutional claims made by Cato and Dallas. Several of the articles were unconstitutional, he claimed, because they dealt with foreign commerce, a subject which belonged exclusively to Congress and power over which it could not alienate; Article 2 was unconstitutional because by granting British subjects naturalization in certain cases it overrode Congress's powers and was also not uniform; and Article 8 was unconstitutional

because it interferes with the authority of the Judiciary, by establishing a Court of Commissioners, a kind of supreme court of appeals, within the United States, with powers to proceed, unknown to our laws; with temptations to defendants to make no defence; with a right to bind the United States to pay debts which they owe not, and to any extent or amount which that Court may think fit to decree; and it is unconstitutional, because it authorizes the PRESIDENT to create certain offices, and annex salaries thereto.

*Id.* at 1098-99; see also *id.* at 558-62 (remarks of Rep. Page) (demonstrating the extreme, and untenable, positions he held, including the view that the Founders had not expected there to be any commercial treaties). The response to Page was immediate and derisive, see *id.* at 1102-03 (remarks of Rep. Bourne) (denying the plausibility of Page's claims), and the sole Republican to come to his aid was willing only to defend his integrity, not the constitutional positions which he had staked out, see *id.* at 1108-09 (remarks of Rep. Findley) (refusing to comment on the constitutionality of the appointment of commissioners). Thereafter, Page's remarks were ignored, except for occasional comments affirming the constitutionality of using commissioners to settle the dispute over the debts. See *id.* at 1143-46 (remarks of Rep.

the Treaty was unconstitutional, that ground was now given up.”<sup>309</sup> Even Republicans were willing to concede that a fair investigation of the treaty “could not be obtained from the passionate publications which were produced by the first impression of the Treaty.”<sup>310</sup>

This Republican silence, moreover, was nowhere more deafening than in their discussion of Article 9 of the Jay Treaty. Not a voice was heard on the floor of the House hazarding the earlier loudly proclaimed position that Article 9 abridged the rights of the states. Nor was this from any lack of concern about the impact of the provision. It was widely discussed — and fiercely opposed — throughout the debate, particularly by members of Congress from states like North Carolina and Virginia.<sup>311</sup> Thus, Representative Macon claimed that if

Coit); *id.* at 1178 (remarks of Rep. Griswold); *id.* at 1264-65 (remarks of N. Smith). Near the end of the debate, Representative Smith asked:

[I]s the Treaty Constitutional? On that point he had held himself open to conviction, and waited its discussion. He had not heard any gentleman declare it unconstitutional, except one, [Mr. Page,] who seemed to give his opinion as if he still doubted; and having carefully considered the subject, he was now of opinion that there was nothing directly repugnant to the Constitution in the instrument.

*Id.* at 1155 (remarks of S. Smith) (bracketed materials in original).

309. 5 ANNALS OF CONG. 1224 (1796) (remarks of Rep. Tracy); *see also id.* at 438-39 (remarks of Smith of South Carolina) (noting that “it had not been said that the Treaty was unconstitutional . . . that ground was therefore abandoned even by the friends of the resolution [opponents of the treaty] . . . the question of constitutionality was renounced”); *id.* at 1166 (remarks of Rep. Henderson) (noting that it “is generally admitted, that, upon Constitutional ground, it may be supported”). Representative Edward Livingston (brother of Robert, and collaborator in the Cato essays) had provoked the House debate when he precipitously moved for a resolution asking the President for all papers concerning the negotiation of the treaty. In introducing the resolution, he had justified it by pointing out that the discussion “must give rise in the House to some very important constitutional questions.” *Id.* at 426. When challenged, however, he quickly retreated and asserted other justifications instead. *See id.* at 427 (remarks of Rep. Livingston); *id.* at 438-39 (remarks of Smith of South Carolina). In the end, Livingston, somewhat pathetically, identified the constitutional question to which he had referred as whether the Senate had in fact given in advance its advice and consent to the negotiation of the treaty, which he claimed had been the previous practice. *See id.* at 628 (remarks of Rep. Livingston).

In addressing the merits of the treaty, Republicans generally transformed the constitutional objections asserted by Cato, Dallas, and others into substantive criticisms of the treaty provisions and made no reference to the original formulation of these arguments in constitutional terms. *See, e.g.,* 5 ANNALS OF CONG. 1029-34 (1796) (remarks of Rep. Giles) (making criticisms of Articles 2, 6, and 9 in terms reminiscent of the objections of Cato and Dallas but without the constitutional grounding); *id.* at 1108-09 (remarks of Rep. Findley) (similar); *id.* at 1191-93 (remarks of Rep. Gallatin) (similar). Following the Republican lead, Federalists likewise defended against these criticisms without referring to any constitutional objections. *See, e.g., id.* at 1143-46 (remarks of Rep. Coit); *id.* at 1178-81 (remarks of Rep. Griswold).

310. 5 ANNALS OF CONG. 1004 (1796) (remarks of Nicholas).

311. Thus, Republicans argued that the provision was susceptible to a broad interpretation which would revive the proprietary estates given by the Crown to British aristocrats during the colonial era. This would have meant that huge tracts of land in a number of states would be returned to British ownership. Most dramatically, in North Carolina, Lord Granville’s estate could claim approximately half of the territory of the state. *See, e.g.,* 5 ANNALS OF CONG. 1033-34 (1796) (remarks of Rep. Giles); *id.* at 1062-63 (remarks of Rep. Heath); *id.* at 1121-24 (remarks of Rep. Moore) (noting that in some states half of the state’s

Article 9 should receive a broad construction, as many Republicans claimed it would, it “would be of greater importance to the State of North Carolina than the Declaration of Independence itself.”<sup>312</sup> His colleague Representative Holland concurred, asserting, in the last remark before the final vote, that “if the construction of the 9th article were to extend to the lands in North Carolina, late Lord Grenville’s, as had been supposed by some gentlemen, the claim would certainly be resisted by force.”<sup>313</sup> Despite the many hours of impassioned debate — and pages in the *Annals* — dedicated to issue, no one breathed a word questioning its constitutionality.<sup>314</sup> The fair inference would

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property will be transferred back to British ownership); *id.* at 1136-37 (remarks of Rep. Kittera) (worrying that Article 9 “might be attended with more melancholy effects, particularly upon the citizens and State [North Carolina] he had the honor to represent, than all the other exceptionable clauses contained in the instrument” and, referring to the Supreme Court’s decision only a month earlier in *Ware v. Hylton*, noting that “the decisions are in favor of Treaties and ancient claims”); *id.* at 1191-93 (remarks of Rep. Gallatin) (making similar claims); *id.* at 1233-34 (remarks of Rep. Preston) (noting that this “extremely objectionable, and immensely important” Article will cause “this country [to be] thrown into a scene of litigation and confusion. Sir, it will never be submitted to, if this construction be right, and I can see no other meaning it can have”); *id.* at 1281 (remarks of Reps. Macon, Holland, and Gillespie) (similar); *id.* at 1290-91 (remarks of Rep. Holland) (same). In the face of these claims, several representatives from the affected states understandably became hysterical. *See, e.g., id.* at 1281 (remarks of Reps. Macon, Holland, and Gillespie); *id.* at 1281 (remarks of Rep. Holland). Federalists quite rightly criticized this interpretation of Article 9 and accused Republicans of being deliberately alarmist. *See, e.g., id.* at 1126 (remarks of Rep. Kittera); *id.* at 1146 (remarks of Rep. Coit); *id.* at 1178 (remarks of Rep. Griswold); *id.* at 1211-12 (remarks of Rep. Gilbert). In some instances, they devoted lengthy speeches to addressing the complex legal issues and the history of state laws dealing with the old proprietary estates. *See, e.g., id.* at 1213-19 (remarks of Rep. Tracy). In all of this discussion, there was no suggestion of a states’ rights constitutional objection to this Article. For further discussion of the Lord Granville estate, see *infra* notes 312-314, 375.

312. 5 ANNALS OF CONG. 1281 (1796). Representatives Holland and Gillespie concurred. *See id.* Note that the proper spelling is “Granville,” but “Grenville” was improperly used throughout in the *Annals*.

313. 5 ANNALS OF CONG. 1290-91 (1796).

314. Gallatin strongly supported the broad construction of Article 9 and suggested that it could seriously prejudice Virginia (the Fairfax estate), Delaware (the Penn estate), Maryland, and especially North Carolina (Lord Granville’s estate). *See* 5 ANNALS OF CONG. 1191-93 (1796). He further recognized the delicate interference which it would work on state prerogatives, stating that it was

a restriction over the Legislative powers; and an exception to the laws of the different States on a subject of a delicate nature, might involve not only some of our citizens, but even several of the States, in complex law suits and serious embarrassment, and, although it might thus create much mischief, would give us no possible benefit.

*Id.* at 1193. Nevertheless, he did not claim it was unconstitutional. *See also* Letter from James Monroe to James Madison (Sept. 8, 1795), in 16 MADISON PAPERS, *supra* note 236, at 77, 78 (beginning his discussion of the treaty by criticizing Article 9 but making no suggestion of an objection of constitutional dimension).

Even Representative Page, while asserting a number of the Cato and Dallas claims, did not argue that Article 9 was unconstitutional. *See supra* note 308. Indeed, in his somewhat ambiguous remarks, he seemed to construe the Supremacy Clause, with its roots in the experience of state obstruction of Article IV of the Treaty of Peace, as “intended to remove all obstacles, which had arisen or might arise from State Legislatures.” *Id.* at 558. He thus seems to have accepted the nationalist view of the treaty power and for that reason have re-



seem to be that even the Republicans now recognized that the states' rights view could not withstand the light of public scrutiny.<sup>315</sup>

*iv. The Views of Jefferson and Madison.* There is one further aspect of the debate that merits consideration — the views of Jefferson and Madison. When the Jay Treaty controversy broke out, Jefferson was in “retirement” in Monticello but nevertheless played an active behind-the-scenes role in prompting the Republican response. Madison, on the other hand, was generally acknowledged as the leading Republican in Congress and was widely expected to play a prominent role in attacking the treaty. Both were uncompromising in their opposition to the treaty.<sup>316</sup>

Jefferson's views about the treaty power had undergone a slow shift after the adoption of the Constitution. At first, he seemed to retain the broad view that he had repeatedly expressed — and, as diplomat, implemented — under the Confederation; but this attitude began to shift in 1793, during the crisis over Washington's declaration of neutrality in the British-French war.<sup>317</sup> Now is not the time for a full

frained from condemning Article 9 on constitutional grounds, even as he attacked many of the treaty's other provisions.

315. Ironically, at the same time that the House was considering the Jay Treaty, Washington also referred to the House a treaty with Spain which was hugely popular with Republicans. See Treaty of Friendship, Limits, and Navigation, Oct. 27, 1795, U.S.-Spain, in 2 TREATIES, *supra* note 74, at 318. Most important, the treaty with Spain contained a provision permitting American navigation on the Mississippi, *see id.*, art. IV, at 321-22, but it also contained a provision comparable to Article 9. Under Article XI, subjects of Spain were allowed to inherit real property so long as they sold it to an American citizen within a reasonable time. *Id.*, art. XI, at 326-27. Federalists attempted a strategic link of the two treaties in order to gain support for the Jay Treaty. Although this effort may have borne fruit in public sentiment in the western territories, it failed in Congress. For a discussion of the relationship between the treaty with Spain and the Jay Treaty, *see, e.g.*, COMBS, *supra* note 235, at 180-81.

It is noteworthy that Professor Bradley cites the Jay Treaty controversy as establishing the principle that the treaty power is limited in scope. See Bradley, *supra* note 2, at 414-15. He says nothing about the debate's bearing on the states' rights view.

316. For discussion of the roles of Jefferson and Madison, *see* ADRIENNE KOCH, JEFFERSON AND MADISON, THE GREAT COLLABORATION 155-60 (1950); KURTZ, *supra* note 235, at 19-21; and The Jay Treaty, *reprinted in* 2 REPUBLIC OF LETTERS, *supra* note 236, at 881-95.

317. In 1791 and 1792, as Secretary of State, Jefferson seemed to accept the view that the House had no constitutional role in treaty-making. See Letter from Thomas Jefferson to — (unaddressed letter) (Mar. 13, 1816), in 13 THE WRITINGS OF THOMAS JEFFERSON 442, 443-44 (Albert Ellery Bergh ed., 1907) (describing his own views in the context of the first federal treaty, concluded with the Creek Indians); The Anas, 1 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 262, 305-07 (describing same in relation to a 1792 treaty with Algiers). By 1793, however, he adopted an extremely hostile stance in a cabinet debate with Hamilton over Washington's neutrality declaration. See *id.* at 407-08 (noting that though “I was sensible of the weak points in this position,” the treaty power extends only to those “powers [the President and Senate] might constitutionally exercise,” which would exclude, *inter alia*, “treaties of neutrality, treaties offensive and defensive, &c”). As to the indefensibility of this view, *see* 3 STORY, *supra* note 19, § 1502, at 356 n.2 (asking “What are such powers given to the president and senate? Could they make appointments by treaty?”).

exploration of Jefferson's complex constitutional thought. Surely, there were a number of factors that prompted the evolution in his views. His dedication to strict construction; his commitment to a certain conception of popular sovereignty, impelling him to adopt a favorable stance toward the House and a less favorable stance toward the Executive and Senate; and his assessment of short and medium-term political considerations — all these and more necessarily played a role in his increasing insistence on a role for the House in treaty-making.<sup>318</sup> In any case, during the heated period leading up to and including the Jay Treaty controversy, he developed a legendary hostility to the treaty power, which he routinely expressed in his private correspondence with Madison, Monroe, and others.<sup>319</sup> As he expressed to Madison in support of the House's position in the Jay Treaty dispute, "I see no harm in rendering [the House's] sanction necessary, and not much harm in annihilating the whole treaty making power."<sup>320</sup>

Madison was characteristically more circumspect than Jefferson. Indeed, although he ultimately defended — indeed, probably formulated — the relatively moderate position adopted by the House in March and April 1796, he failed, both in public and in private, to support any of the constitutional claims made by his less cautious friends and allies during the raging newspaper wars of the summer and fall of 1795. This fact alone gives rise to an inference that, unable to offer his concurrence, he found silence the more palatable option. All the more so, since he repeatedly expressed in detail his opposition to the treaty on the merits.

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318. Throughout the Jay Treaty controversy, Jefferson asserted that the powers assigned to Congress were exceptions from the treaty power. He was not careful, however, to specify his position precisely or consistently. Sometimes he seemed to accept the extreme Republican position, *see* Letter from Thomas Jefferson to James Madison (Nov. 26, 1795), in 7 THE WRITINGS OF THOMAS JEFFERSON 38 (Paul Leicester Ford ed., 1896); Letter from Thomas Jefferson to William Branch Giles (Dec. 31, 1795), in 7 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 41; Letter from Thomas Jefferson to James Monroe (Mar. 21, 1796), in 7 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 67-68; Letter from Thomas Jefferson to James Madison (Mar. 27, 1796), in 7 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 68-69; at others he articulated the more moderate position ultimately asserted by the House, *see* Letter from Thomas Jefferson to Edward Rutledge (Nov. 30, 1795), in 7 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 40. For a thoughtful discussion of Jefferson's constitutional views, *see* Edward Dumbauld, *Thomas Jefferson and American Constitutional Law*, 2 J. PUB. L. 370 (1953). *See also* JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* (1997).

319. *See, e.g.*, Letter from Thomas Jefferson to Henry Tazewell (Sept. 13, 1795), in 7 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 318, at 30 (indicating with irony that "I am not satisfied we should not be better without treaties with any nation"); Letter from Thomas Jefferson to James Monroe (Mar. 21, 1796), in 7 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 318, at 67-68 (noting sarcastically that Federalist doctrine would transfer the legislative power "from the P. Senate & H. of R. to the P. Senate & Pianningo or any other Indian, Algerine or other chief").

320. Letter from Thomas Jefferson to James Madison (Mar. 27, 1796), in 16 MADISON PAPERS, *supra* note 236, at 280, 280. Jefferson did recognize an exception for peace treaties. *See id.*

The strength of this inference is increased, moreover, when his actual activities are examined. Even when the treaty was still before the Senate — and under an injunction of secrecy — Madison began receiving correspondence asserting the unconstitutionality of the treaty and urgently requesting his views.<sup>321</sup> On July 6, 1795, Robert Livingston strongly urged him to write both to the President and to the public “to shew the evils the unconstitutionality of the treaty.”<sup>322</sup> After Hamilton’s *Camillus* essays began to appear, Jefferson, fearful that the “midling performances” of the Republican polemicists would only “give time to his talents & indefatigableness to extricate [the Federalists],” declared: “For god’s sake take up your pen, and give a fundamental reply to Curtius & Camillus.”<sup>323</sup> Yet, Madison refused every request. Although both he and Jefferson avidly followed the newspaper wars, Madison strictly avoided touching on the constitutional issues in the many letters he wrote, including to those who had specifically asked for his views.<sup>324</sup> Instead, he worked assiduously to

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321. See Letter from Pierce Butler to James Madison (June 12, 1795), in 16 MADISON PAPERS, *supra* note 236, at 14, 14-15 (providing Madison with copies of the treaty, sheet by sheet; informing him that Butler, a Republican Senator from South Carolina, “have in Contemplation to Question . . . the Constitutionality” of the treaty in several respects; and entreating Madison to “oblige me by giving me Your free opinion of it,” which, with Butler, “shall be as in Your own breast”).

322. Letter from Robert R. Livingston to James Madison (July 6, 1795), in 16 MADISON PAPERS, *supra* note 236, at 34, 34-35. Livingston could barely contain his rage, asserting that the treaty “sacrifices every essential interest & prostrates the honor of our country” and blaming it on Jay’s “hatred to France.” *Id.* at 34. In this case, however, “I own that our disgrace & humiliation has . . . greatly exceeded my expectations,” and he warned of the possibility of civil war. *Id.* After exhorting Madison to write to the President and the public, he noted Madison’s special official position and concluded: “Adieu my dear Sir remember you are answerable to your country for every neglect or omission on this important occasion.” *Id.* at 35.

323. Letter from Thomas Jefferson to James Madison, *supra* note 242, at 88-89. The treaty was “the boldest act [Hamilton, Jay, and others] ever ventured on to undermine the constitution.” *Id.* at 88. For further discussion of Jefferson’s urgent plea, see *supra* note 284 and accompanying text.

324. For additional letters requesting Madison’s views, see, e.g., Letter from James Madison to an Unidentified Correspondent (Aug. 23, 1795), in 16 MADISON PAPERS, *supra* note 236, at 56, 57 (noting that the correspondent had sought “any ideas, in relation to the Treaty that may occur to my reflections”); Letter from John Minor, Jr., and Others to James Madison (Aug. 25, 1795), in 16 MADISON PAPERS, *supra* note 236, at 59, 59-60 (petition to Madison from his constituents declaring the treaty unconstitutional and urging Madison to “use your most strenuous exertions in Congress, to oppose the said treaty in every point where it infringes the constitution”); Letter from Henry Tazewell to James Madison (Aug. 30, 1795), in 16 MADISON PAPERS, *supra* note 236, at 60, 60-62 (noting his own view that the treaty gives “to the foederal Constitution an operation not originally designed by its Authors” and advising Madison that Tazewell “should be pleased to know your Sentiments” upon “Mr. Jay’s famous Treaty”); Letter from George Nicholas to James Madison (Nov. 6, 1795), in 16 MADISON PAPERS, *supra* note 236, at 118, 118-19 (asserting that the treaty has “violated the constitution in it’s most essential parts”); Letter from Robert R. Livingston to James Madison (Nov. 16, 1795), in 16 MADISON PAPERS, *supra* note 236, at 125, 125-26 (reaffirming his constitutional objections and informing Madison that Livingston was the author of the *Cato* series).

develop a comprehensive critique of the treaty and delicately warned his allies “to avoid laying too much stress on minute or doubtful objections, which may give an occasion to the other party to divert the public attention from the palpable and decisive ones, and to involve the question in uncertainty, if not to claim an apparent victory.”<sup>325</sup>

On only one occasion did Madison lend his hand, albeit anonymously, to an assertion of the central Republican constitutional claim — that the treaty power did not extend to subjects within Congress’s legislative authority. The circumstances under which he did so, however, simply underscore his essential reticence on this point — and

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In response to these letters, Madison unequivocally condemned the treaty — making more or less detailed substantive critiques of its provisions — but he uniformly declined to pick up the constitutional bait. See, e.g., Letter from James Madison to Robert R. Livingston (Aug. 10, 1795), in 16 MADISON PAPERS, *supra* note 236, at 46, 46-48 (condemning the treaty in the strongest terms; specifying its defects; agreeing with Livingston’s assessment of Jay, who cannot be screened “from the most illiberal suspicions without referring his conduct to the blindest partiality to the British Nation & Govt. and to the most vindictive sensations towards the French Republic” and who belongs to “a British party, systematically aiming at an exclusive connection with the British Governmt. & ready to sacrifice to that object as well the dearest interests of our Commerce, as the most sacred dictates of national honor”; and reviewing the political events which demonstrate popular revulsion toward the treaty; but never mentioning any question about its constitutionality); Letter from James Madison to an Unidentified Correspondent, *supra*, at 56-58 (similar and specifying Madison’s objections to the treaty on the merits in greater depth); Letter from James Madison to Henry Tazewell (Sept. 25, 1795), in 16 MADISON PAPERS, *supra* note 236, at 93, 93-94 (sympathizing with Tazewell’s views against the treaty, which “cannot appear to you in a worse light than it does to me,” but failing to mention any constitutional objections); see also Madison in the Fourth Congress, Editorial Note, *supra* note 236, at 141-42 (noting that “the assumption that JM would write for the newspapers in opposition to the treaty was a widespread one, particularly after Alexander Hamilton had opened his vigorous press campaign,” but that “JM declined all invitations and suggestions that he involve himself in the newspaper wars raging over the treaty throughout the summer and fall of 1795”).

For the intense interest of Jefferson and Madison in the public debate the treaty had engendered, see, e.g., Letter from Thomas Jefferson to James Madison (Aug. 3, 1795), in 16 MADISON PAPERS, *supra* note 236, at 42; Letter from James Madison to Thomas Jefferson (Aug. 6, 1795), in 16 MADISON PAPERS, *supra* note 236, at 45; Letter from Joseph Jones to James Madison (Aug. 19, 1795), in 16 MADISON PAPERS, *supra* note 236, at 52; Letter from John Beckley to James Madison (Sept. 10, 1795), in 16 MADISON PAPERS, *supra* note 236, at 85; Letter from James Madison to Thomas Jefferson (Oct. 18, 1795), in 16 MADISON PAPERS, *supra* note 236, at 104; Letter from Joseph Jones to James Madison (Oct. 29, 1795), in 16 MADISON PAPERS, *supra* note 236, at 113; Letter from Thomas Jefferson to James Madison (Nov. 26, 1795), in 16 MADISON PAPERS, *supra* note 236, at 135 (quoting letter from Thomas Mann Randolph, Jr., to Thomas Jefferson (Nov. 22, 1795)); Letter from James Madison to Thomas Jefferson (Dec. 13, 1795), in 16 MADISON PAPERS, *supra* note 236, at 163; Letter from James Madison to James Monroe (Dec. 20, 1795), in 16 MADISON PAPERS, *supra* note 236, at 168; and Letter from James Madison to Thomas Jefferson (Apr. 4, 1796), in 16 MADISON PAPERS, *supra* note 236, at 285.

325. Letter from James Madison to an Unidentified Correspondent, *supra* note 324, at 57. This letter was apparently unfinished and never sent. See Letter from James Madison to an Unidentified Correspondent, Editorial Note, in 16 MADISON PAPERS, *supra* note 236, at 55, 55-56. Madison nevertheless got the message through to his friends. See Letter from Joseph Jones to James Madison (Oct. 29, 1795), in 16 MADISON PAPERS, *supra* note 236, at 113, 113 (proposing for Madison’s advice that the Virginia Legislature take up the treaty and condemn “the exceptionable parts of it I mean such as are clear and solid objections that a proper tone may be given similar meetings”).

even more so on the other more questionable claims made by Cato, Decius, Dallas, and others. In September 1795, working intently behind the scenes to support the opposition, Madison undertook to write a lengthy analysis of the treaty and its defects. The idea was to draft the body of a document that would form a petition to the Virginia General Assembly encouraging the Assembly to proclaim its opposition to the treaty. Madison and others hoped that some sort of resolution of support from the Assembly would encourage the House to assert a constitutional authority over treaties and, exercising that authority, to refuse to implement the Jay Treaty at the next legislative session.<sup>326</sup> Consistent with his approach throughout, Madison stuck strictly to the merits of the treaty.<sup>327</sup>

In early October, Madison and his new wife visited Jefferson in Monticello.<sup>328</sup> There is little doubt that Jefferson and Madison discussed both the treaty and Madison's draft petition extensively. The result was a revised petition which now included a short paragraph conclusorily asserting a broad version of the Republican position on the House's role in treaty-making.<sup>329</sup> It is quite likely that this paragraph was added at the insistence of Jefferson, who underlined this portion of the petition in his copy of a widely-circulated collection of

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326. For background on Madison's drafting of the petition, see Draft of Petition to General Assembly, *supra* note 260, at 62-69. For further discussion of Republican efforts to use the Virginia legislature as a forum for encouraging House resistance to implementing the treaty, see *supra* notes 261-262 and accompanying text.

327. See James Madison, Draft of Petition to the General Assembly of the Commonwealth of Virginia (Sept. 1795), in 16 MADISON PAPERS, *supra* note 236, at 69 (making elaborate criticisms of the treaty on the merits but not suggesting any constitutional infirmities).

328. In the same letter that Jefferson plead with Madison to reply to Camillus, he requested Madison to visit Monticello with Mrs. Madison. See Letter from Thomas Jefferson to James Madison, *supra* note 242, at 88-89 (noting that "I expect the execution of your promise to bring Mrs. Madison to see us").

329. See James Madison, Petition to the General Assembly of the Commonwealth of Virginia (Oct. 12, 1795), in 16 MADISON PAPERS, *supra* note 236, at 95. The revised petition now asserted: "The President and Senate by ratifying this Treaty, usurp the powers of regulating commerce, of making rules with respect to aliens, of establishing tribunals of justice, and of defining piracy." *Id.* at 102. It then added coyly (in a Madisonian touch) that "[a] formal demonstration of every part of this complex proposition is not requisite." *Id.* The petition was widely printed in the newspapers. See Madison, *supra* note 327, at 67-68. It should be noted that the reference to aliens in the petition referred not to Article 9 but to Article 2, which gave British subjects living in areas around the posts, which the British had agreed to abandon, a right to claim American citizenship or retain their British nationality and in either case to continue to hold their property. See The Jay Treaty, *supra* note 316, at 245, 246. This provision too had given rise to constitutional objections, both as invading Congress's power over naturalization and the territories of the United States and as stipulating a non-uniform rule of naturalization. See *supra* notes 278, 288, 308-309. In contrast to Article 9, Article 2 did not raise states' rights concerns apparently because the posts were understood to be subject to Congress's power to govern the territories.

public documents on the Jay Treaty.<sup>330</sup> The addition was probably politically astute and certainly helped to prompt an extensive debate over the constitutionality of the treaty in the Virginia General Assembly.<sup>331</sup> Madison, however, carefully preserved his anonymity and even tried in later years to obscure his role in drafting the petition.<sup>332</sup> Thus, he avoided accountability for asserting a position which he was unwilling to defend.<sup>333</sup>

The negative inference arising from Madison's activities during the heated months in the summer and fall of 1795 is further supported, moreover, by the insights that can be gleaned from a careful reading of his speeches in the subsequent House debate. The most crucial point, of course, was his failure, along with his Republican colleagues more generally, to raise any constitutional objections to the treaty. Notwithstanding the profusion of constitutional objections fiercely pressed in the previous summer and fall, Madison, like the others, chose to stand on a single claim: that the House had discretion in deciding whether to carry into effect treaty stipulations touching upon subjects within Congress's legislative authority.<sup>334</sup> Perhaps the most revealing

330. For the views of historians, see Madison, *supra* note 327, at 66-67, and JACK N. RAKOVE, ORIGINAL MEANINGS, POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 357, 420 n.46 (1996).

331. For discussion of the debate, in which John Marshall featured prominently, see *supra* note 261.

332. See Madison, *supra* note 327, at 62-63. "That JM had ever composed such a petition, either wholly or in part, was probably unknown to most of his contemporaries, and JM himself, later in life, seems to have arranged his papers in ways that have misled or confused editors and scholars ever since." *Id.* at 62.

333. Madison had difficulty enough with the position which he ultimately did take in the House debate — that the House had discretion to refuse implementation of treaty stipulations on subjects within its legislative authority. See *supra* notes 243, 249, 263-264 and accompanying text. His main speech was widely criticized for the somewhat equivocal way he went about defending that view, and he was accused of inconsistency and of disregarding what the Framers had agreed upon in Philadelphia. See Madison in the Fourth Congress, Editorial Note, *supra* note 236, at 145 (noting that the speech provoked "scorn and ridicule from his political opponents" and that "Fisher Ames (Massachusetts) dismissed the speech as 'cobweb,' while Theodore Sedgwick found it 'perfectly unaccountable to his mind' that a man of JM's reputation and ability should declare himself to be so uncertain about where the Framers of the Constitution had placed the treaty-making powers"); RAKOVE, *supra* note 330, at 357-64 (describing the widespread skepticism that Madison's speech provoked). In a letter to Jefferson, Madison had admitted the "real obscurity in the constitutional part of the question, & a diversity of sincere opinions about it." Letter from James Madison to Thomas Jefferson (Dec. 13, 1795), in 16 MADISON PAPERS, *supra* note 236, at 163, 163-64. And in the speech, he conceded that the question was not "perfectly free from difficulties." James Madison, Jay's Treaty, Speech in the House of Representatives (Mar. 10, 1796), reprinted in 16 MADISON PAPERS, *supra* note 236, at 255, 262 [hereinafter Madison, Jay's Treaty Speech (Mar. 10, 1796)]. Historians have remained skeptical about Madison's *bona fides* in this respect. See, e.g., RAKOVE, *supra* note 330, at 357-64.

334. For Madison's speeches on the floor of the House during the Jay Treaty debate, see James Madison, Jay's Treaty, Speech in the House of Representatives (Mar. 7, 1796), reprinted in 16 MADISON PAPERS, *supra* note 236, at 254; Madison, Jay's Treaty Speech (Mar. 10, 1796), *supra* note 333, at 255-63; James Madison, Jay's Treaty, Speech in the House of Representatives (Apr. 6, 1796), in 16 MADISON PAPERS, *supra* note 236, at 290; James

point for present purposes, however, was Madison's approach to Article 9. Throughout the entire controversy, Madison had been in constant communication with Senator Tazewell, and they spoke extensively about Article 9 even as Madison was preparing his final speech criticizing the treaty on the merits.<sup>335</sup> Indeed, after their conversation, Tazewell prepared an elaborate memorandum on the Article for Madison's use.<sup>336</sup> Despite this prompting, however, in the course of his lengthy and detailed analysis of the treaty, Madison simply passed over Article 9. In this context, with the whole anti-treaty effort on the line, his failure even to mention the Article strongly suggests that he did not believe that there was a plausible constitutional objection to be made.<sup>337</sup>

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Madison, Jay's Treaty, Speech in the House of Representatives (Apr. 15, 1796), in 16 MADISON PAPERS, *supra* note 236, at 313. I rely on the versions in the *Madison Papers* rather than in the *Annals of Congress* because I assume the former to be more accurate. For the cites to the *Annals*, see 5 ANNALS OF CONG. 437-38, 487-95, 771-81, 976-87 (1796).

335. See, e.g., Letter from Henry Tazewell to James Madison (June 26, 1795), in 16 MADISON PAPERS, *supra* note 236, at 29; Letter from Henry Tazewell to James Madison (June 29, 1795), in 16 MADISON PAPERS, *supra* note 236, at 32; Letter from Henry Tazewell to James Madison (Aug. 30, 1795), *supra* note 324, at 60; Letter from James Madison to Henry Tazewell (Sept. 25, 1795), *supra* note 324, at 93-94. When the new session of Congress began in December, they were both in Philadelphia and no doubt continued their interchanges in person. Tazewell's memorandum, which he gave to Madison immediately preceding Madison's final speech on the merits of the treaty, notes their conversation of the previous day on the subject of Article 9. See Letter from Henry Tazewell to James Madison, (Apr. 15, 1796), in 16 MADISON PAPERS, *supra* note 236, at 311.

336. See Letter from Henry Tazewell to James Madison (Apr. 15, 1796), *supra* note 335, at 311, 311-13.

337. Madison did address Article 2 in his remarks and vaguely referred to the constitutional dispute which the Article had raised by permitting British subjects to hold real property in the area of the posts. For discussion of Article 2, see *supra* notes 278, 287, 308, 329. Madison observed that this permission was "a very extraordinary feature in this part of the treaty," and he claimed that

no example of such a stipulation was to be found in any treaty that ever was made, either where territory was ceded or where it was acknowledged by one nation to another. Although it was common and right in such cases to make regulation in favor of the property of the inhabitants, yet he believed that in every case that had ever happened, the owners of landed property were universally required to swear allegiance to the new sovereign, or to dispose of their landed property within a reasonable time.

Madison, Jay's Treaty Speech (Apr. 15, 1796), *supra* note 334, at 317. These observations bore on Article 2's granting to British subjects in the area of the posts the right to continue to hold their real property and the option to retain both their residences and their British citizenship, or to obtain United States citizenship. Obviously, Madison could not have believed that no treaty had ever permitted aliens to hold real property. See *supra* notes 77-93, 116, 287, 301 and accompanying text. He was referring to the special problem presented by Article 2 — where one nation acknowledges that certain territory belongs to another nation, thus raising the problem of what to do with subjects of the first who reside in and own real property in the ceded territory. "He would not," he said, "enquire how far this might be authorized by constitutional principles." Madison, Jay's Treaty Speech (Apr. 15, 1796), *supra* note 334, at 317. After all that had already occurred, however, not to inquire was obviously to concede the constitutional point.

It is perhaps arguable that Madison intended his remarks to apply both to Article 2 and to Article 9. Perhaps, he considered Article 9 to be an after-the-fact concession of the right

Some brief remarks found in another of his speeches further support this view. Madison actually devoted two lengthy speeches to defending the House's role in deliberating on whether to carry treaty stipulations into effect.<sup>338</sup> A principal argument in favor of the Federalist position was the Supremacy Clause, which declares treaties to be the supreme law of the land. Federalists claimed that this eliminated any role for the House.<sup>339</sup> In a nifty move, Madison sought to deflect this hefty objection by pointing to the rest of the Clause, which provides that "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."<sup>340</sup> "The term *supreme*," he then noticed, "evidently meant a supremacy over the State Constitutions and laws, and not over the Constitution & laws of the U. States."<sup>341</sup> Having made this nice observation, he then further noted that, strictly speaking, the language applied to "the Judicial authority & the existing laws, alone of the States." It was a nice question, then, what would happen in case a treaty required affirmative legislation by the states.<sup>342</sup>

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of British subjects to hold real property in territories "acknowledged" or "ceded" by the king in the Treaty of Peace. Such an interpretation, however, would be quite strained. Among other things, Article 9 only applied to British subjects then holding real property in the United States, and thirteen years had already passed since the Treaty of Peace had been concluded. Moreover, the problem of British-owned property in the United States had been dealt with in the Treaty of Peace itself in Article VI, which had prohibited any further confiscations of British landed estates. For discussion, see *supra* notes 116, 287, 301 and *infra* notes 377-421, 437-439 and accompanying text. In any case, if Madison was referring to Article 9, he simply chose to forgo making, beyond vague allusion, any comment on Tazewell's constitutional objection. Surely, if he thought that the provision was unconstitutional, he would have said so.

338. See Madison, Jay's Treaty Speech (Mar. 10, 1796), *supra* note 333, at 255; Madison, Jay's Treaty Speech (Apr. 6, 1796), *supra* note 334, at 290.

339. See, e.g., Hamilton, *The Defence No. XXXVI*, *supra* note 289, at 6; Letter from Alexander Hamilton to George Washington (Mar. 29, 1796), *supra* note 253, at 89. The Federalists generally did recognize that Congress would sometimes have to pass legislation to implement a treaty — most importantly, when the treaty called for the appropriation of money. The Constitution itself provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." U.S. CONST. art. I, § 9, cl. 7. In the Federalist view, however, even here, the House would have no choice but to carry out obediently the treaty stipulations. See Hamilton, *The Defence No. XXXVII*, *supra* note 289, at 20-21.

340. U.S. CONST. art. VI, § 2.

341. Madison, Jay's Treaty Speech (Mar. 10, 1796), *supra* note 333, at 256.

342. See *id.* Madison said:

The injunction [of the Supremacy Clause] was not extended to the Legislative authority of the States or to laws requisite to be passed by the States, for giving effect to Treaties; and it might be a problem worthy of the consideration, though not needing the decision of the Committee, in what manner the requisite provisions were to be obtained from the States.

*Id.* at 256.



It is far from clear what Madison had in mind in cryptically referring to the possible necessity of affirmative state legislation.<sup>343</sup> Conceivably, he was noticing the potential parallel raised by his argument between the legislative powers of Congress and those of the state legislatures. As Cato had claimed, did the Republican position that congressional legislation was necessary for treaties on subjects within Congress's legislative authority imply that the same would be the case for the state legislatures when treaties trenched on state legislative subjects? If this is in fact what he had in mind, Madison later proceeded to answer his own query. The problem was chimerical because the Constitution did not require treaties to obtain the sanction of the state legislatures. Those who opposed requiring the House's approval had objected to the Republican position, he noted, on the ground that the treaty power would be frustrated "if Treaties were to depend in any degree on the [Federal] Legislature."<sup>344</sup> This was untrue, he claimed, because the President, House, and Senate form "but one Government" and the "will of the nation" is always expressed through certain checks, in the case of treaties as well as laws. However, this objection "would have weight," he conceded, "if the voluntary cooperation of the different States was to be obtained."<sup>345</sup> Thus, even treaties trenching on subjects within state legislative competence would not require state legislation to carry them into effect. The validity of treaties could not be made to "depend in any degree" upon obtaining the approval of an ever-expanding number of state legislatures, as experience under the Confederation had amply demonstrated. Madison thus seems quietly to have conceded the untenability of the states' rights position.<sup>346</sup>

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343. Some of Madison's colleagues, too, seemed to have difficulty comprehending "the problematical mystery" to which he was referring. See 5 ANNALS OF CONG. 681 (1796) (remarks of Rep. Gilbert). Representative Gilbert "could not possibly conceive how the State Legislature, by acting, by legislating, one way or the other, could constitutionally affect the operations of a Treaty." *Id.* Perhaps, prefiguring *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), Madison was thinking of cases in which treaty stipulations obligated state governmental officials to undertake affirmative obligations — for example, directing state executive authorities to provide specified services for aliens or for consular officials. Perhaps, he had the French Consular Convention of 1788 in mind. See *supra* notes 223-225 and accompanying text. I consider a broader reading in the text above.

344. Madison, Jay's Treaty Speech (Mar. 10, 1796), *supra* note 333, at 262.

345. *Id.* For Madison's unequivocal remarks during the Philadelphia and Virginia Ratifying Conventions on the severe dangers posed by state refusals to comply with treaties, see *supra* notes 171-172 and accompanying text; *infra* note 796 and accompanying text.

346. To be sure, Madison's brief, and rather opaque, remarks do not permit any definite inferences to be drawn. I claim only that my reading is the most compelling in light of the context. In a subsequent speech, Madison made clear that he did not believe that the treaty power was necessarily limited to those subjects over which Congress had been given legislative power, the basic claim of the states' rights view. Thus, in explaining the Virginia Ratifying Convention's proposed amendment to the Constitution to require that treaties ceding territory require a three-fourths vote in both houses, Madison explained that the Virginia

In light of this history, it is ironic that the irrepressible Jefferson would soon seize an opportunity to memorialize some of the seemingly abandoned constitutional claims urged by Republican polemicists during the initial outrage following publication of the treaty. The crushing Republican defeat in the great treaty fight was followed by their rout in the elections of 1796. As Adams's Vice President and presiding officer of the Senate, Jefferson perhaps had less to do than could satisfy his prodigious energies and talents, and he soon undertook the yeoman's task of compiling a manual of parliamentary practice for the Senate. Although the treaty controversy was finally beginning to fade into the background, he could not restrain himself from needling the Federalists one more time on the treaty question, inserting some ultra vires commentary on the scope of the treaty power.

With considerable understatement, he began by conceding: "To what subjects this power extends, has not been defined in detail by the Constitution; nor are we entirely agreed among ourselves."<sup>347</sup> He then proceeded to offer his own (highly restrictive) view. First, treaties can only be used, he claimed, on "objects which are usually regulated by treaty," and, even then, only when those objects "cannot be otherwise regulated."<sup>348</sup> Second, he reinvoled the more extreme Republican view about the relationship between the treaty power and congress-

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Convention "might not consider the territorial rights and other objects for which they required the concurrence of three fourths of the members of both houses, as coming within any of the enumerated powers of Congress." Madison, Jay's Treaty Speech (Apr. 6, 1796), *supra* note 334, at 297. For Madison's similar affirmation of the constitutionality of the Louisiana Purchase notwithstanding Jefferson's doubts, see *infra* note 360 and accompanying text.

In any case, although Madison did not explicitly draw out the point, the nationalist view was implicit in his reading of the Supremacy Clause — because otherwise the inclusion of the term "treaties" would have been pointless. Under Madison's approach, treaties on subjects falling within Congress's legislative powers required congressional implementation to become effective as domestic law. Thus, the reference in the Supremacy Clause to "treaties" could not have been meant to apply to treaties of this kind; they were supreme over state laws only because Congress had implemented them through passage of a "law." Yet, if treaties on subjects within the exclusive legislative competence of the states required implementation by the state legislatures, then clearly the Supremacy Clause had no application to them. Treaties of this kind were emphatically not supreme over state law, but dependent upon it. What, then, was left for the Supremacy Clause to do? That the states' rights view would render the Supremacy Clause's reference to "treaties" otiose and misleading was surely reason enough to condemn it. All the more so, since rendering it meaningless was radically inconsistent with the importance that the Founders had placed on that Clause and the history that gave rise to it. See *supra* notes 95-98, 121-122, 127-142, 171-174, 180 and accompanying text; *infra* note 796 and accompanying text. Madison would surely have retreated in the face of such an implication.

347. Thomas Jefferson, A Manual of Parliamentary Practice § 52, in 1 THE WRITINGS OF THOMAS JEFFERSON 335, 442 (Albert Ellery Bergh ed., 1907).

348. *Id.* This was actually Jefferson's second point. His first was undoubtedly correct — that a treaty "must concern the foreign nation party to the contract, or it would be a mere nullity." *Id.*

sional authority: treaties, he claimed, cannot cover “those subjects of legislation in which [the Constitution] gave a participation to the House of Representatives.” In language reminiscent of his earlier expressions of hostility to the treaty power, he then rather flippantly explained: “This last exception 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>349</sup> Finally, he turned to the problem of states’ rights: the Constitution, he asserted, “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.”<sup>350</sup>

It is understandable that states’ rights advocates have focused on this latter statement as the strongest support for their view in the early history. Of course, that does not make Jefferson’s claim “consistent with the prevailing views of the time” — or “the consensus of the Founding Fathers’” — as Professor Bradley claims.<sup>351</sup> States’ rights advocates have relied on this comment without any appreciation of the highly charged political context out of which it arose or the idiosyncratic character of Jefferson’s view of the treaty power. In light of the course of the debate in 1795-96, Jefferson’s claim appears more as a stubborn refusal to accept the outcome of the extended public discussion than as a fair-minded expression of a generally accepted viewpoint. It may have been precisely claims like these that Madison had in mind when, in the course of reviewing Jefferson’s career, he observed that “[a]llowances . . . ought to be made for a habit in Mr. Jefferson as in others of great genius of expressing in strong and round terms, impressions of the moment.”<sup>352</sup>

349. *Id.* Jefferson here was apparently rejecting the moderate version of the Republican claim — that the House claimed no agency in making treaties but that it had discretion in deciding whether to execute treaty stipulations on subjects within its legislative powers. See *supra* notes 243, 249, 263-264, 272-274, 278, 305, 318-320 and accompanying text. Jefferson seemed to be suggesting the more radical view that treaties on such matters are subject to the prior “ratification of the Representatives.” Jefferson, *supra* note 347, at 442.

350. Jefferson, *supra* note 347, at 442.

351. See Bradley, *supra* note 2, at 416; *id.* at 416 n.148 (quoting George A. Finch, *The Need to Restrain the Treaty-Making Power of the United States Within Constitutional Limits*, 48 AM. J. INT’L L. 57, 61 (1954) (internal quotation marks omitted)).

352. Letter from James Madison to N.P. Trist (May 1832), in 9 THE WRITINGS OF JAMES MADISON 478, 479 (Gaillard Hunt ed., 1910) (explaining the necessity in understanding Jefferson’s remarks of recalling “the aspects of things at different epochs of the Government, particularly as presented at its outset, in the unrepresentative formalities introduced and attempted, not by President Washington but by the vitiated political taste of others taking the lead on the occasion; and again in the proceedings which marked the Vice Presidency of Mr. Jefferson”). Joseph Ellis’s remarks about Jefferson’s constitutional position during the Jay Treaty controversy itself apply as fully to Jefferson’s codification of those views in the *Manual*:

Jefferson’s more extreme position reflected his more cavalier attitude toward constitutional questions in general. Unlike Madison, who had a deep appreciation for the Constitution as an artful arrangement of juxtaposed principles and powers with abiding influence over fu-

Be that as it may, Jefferson himself would soon come to see the difficulties which his restrictive view of the treaty power would pose for the fundamental interests of the nation — when in his first term as President, he unexpectedly stumbled into a bargain that would forever change the course of the nation's history but which would also require a revision of his earlier views.<sup>353</sup> Coincidentally, it was the willingness of his Minister to France, the redoubtable Robert Livingston, to jettison his instructions and negotiate an agreement with Bonaparte for the sale of the whole of the Louisiana territory that provoked the constitutional difficulty.<sup>354</sup> Livingston was fully aware of — and, given his Cato essays, no doubt shared — Jefferson's doubts about the constitutional authority of the treaty power to acquire new territory. Nowhere in the Constitution had the national government been expressly delegated a power to acquire territory, and if the treaty power could not extend beyond those objects that the Constitution had placed in the hands of the federal government — which was the essential logic of the position taken by Jefferson and Livingston during the Jay Treaty debate — then the treaty power could not legitimately be utilized to acquire Louisiana. Despite this difficulty, however, Livingston, with Monroe's help, seized “the fugitive occurrence” and concluded the agreement.<sup>355</sup>

There were a number of constitutional difficulties with the Louisiana Treaty, and the many complexities are too great to permit explication here.<sup>356</sup> Suffice it to say that the two main questions were

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ture generations, Jefferson tended to view it as a merely convenient agreement about political institutions that ought not to bind future generations or prevent the seminal source of all political power — popular opinion — from dictating government policy. His casual remarks in the spring of 1796 during the height of the debate over the Jay Treaty were uncharacteristic only in the sense that Jefferson customarily left constitutional questions in Madison's capable hands. But precisely because he did not feel the obligation to filter his opinions through Madison, his statements more accurately reflected his greater willingness to bend constitutional arguments to serve what he saw as a higher purpose . . . . Upsetting delicate constitutional balances or setting dangerous precedents did not trouble him in such moments.

ELLIS, *supra* note 318, at 162.

353. For extended treatments of the Louisiana Purchase and the constitutional issues it raised, see BROWN, *supra* note 29, at 1-83; 4 DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805*, at 270-332 (1970); and DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 215-16, 244-51 (1994).

354. For Livingston's role in negotiating the treaty, see 4 MALONE, *supra* note 353, at 285-89, 298-99, 304-10, and KETCHAM, *supra* note 158, at 419-20.

355. Letter from Thomas Jefferson to J.C. Breckenridge (Aug. 12, 1803), in 8 *THE WRITINGS OF THOMAS JEFFERSON* 244 n.1 (Paul L. Ford ed., New York: G.P. Putnam's Sons 1897). Jefferson appointed Monroe to aid Livingston and make clear the importance the administration placed upon the Mississippi River question. See 4 MALONE, *supra* note 353, at 269-70, 285-89, 298-301, 303-10. Unsurprisingly, the appointment of Monroe created serious tensions between Livingston and Monroe and competition for recognition and credit. See 4 *id.* at 289-91, 298-301, 304.

356. For extended discussion of the constitutional issues, see BROWN, *supra* note 29, at 1-83; and 4 MALONE, *supra* note 353, at 311-32.

whether the treaty power extended to acquiring new territory and whether it was constitutional to incorporate new territory into the union by treaty or otherwise.<sup>357</sup> The states' rights view had a potential bearing on both, but it was the first that raised the problem most clearly. As Jefferson explained in a letter to his skeptical friend and close ally Wilson Cary Nicholas:

If [the treaty power] is [boundless], then we have no Constitution. If it has bounds they can be no others than the definitions of the powers which that instrument gives. It specifies & delineates the operations permitted to the federal government, and gives all the powers necessary to carry these into execution. Whatever of these enumerated objects is proper for a law, Congress may make the law; whatever is proper to be executed by way of a treaty, the President & Senate may enter into the treaty; whatever is to be done by a judicial sentence, the judges may pass the sentence.<sup>358</sup>

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357. The power to acquire territory by treaty proved the easier to resolve and was entirely put to rest by the Supreme Court in *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 541 (1828) (Marshall, C.J.) (noting that the "Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty"). The problem of incorporating new territory into the United States proved much more complex. Beginning with the Louisiana Purchase and running through the Missouri Compromise, the annexation of Texas, the *Dred Scott* decision, see *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (declaring the Missouri Compromise unconstitutional), and finally the *Insular Cases*, see, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901) (resolving the constitutional questions raised by the acquisition of Puerto Rico), the issue was endlessly controversial and raised profound questions about the character of the Union.

358. Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 355, at 247 n.1, 247-248 n.1. In his letter to Jefferson, Nicholas, then a Senator from Virginia, explicitly rejected the position that the Republicans had taken during the Jay Treaty controversy and came very close to endorsing explicitly the nationalist view of the treaty power. See Letter from Wilson C. Nicholas to Thomas Jefferson (Sept. 3, 1803), *quoted in* BROWN, *supra* note 29, at 26-27 (noting his awareness "that this is to us delicate ground, and perhaps my opinions may clash with the opinions given by our friends during the discussion of the British treaty"). This perspective was also evident in his remarks in the Senate:

[T]he Legislative power is limited in a manner that it was neither intended, nor was it practicable to limit the treaty-making power. The power of legislation was only meant to be given for certain and particular purposes; all other Legislative powers were reserved to the States, whereas the whole treaty-making power of the nation was vested in the President, to be exercised with the advice and consent of the Senate. . . . [I]t must not be inferred from this, that we believe the treaty-making power is unlimited. The Constitution imposes particular and general limitations upon the powers of the Government of the United States. No department of the Government can do any of the things that are prohibited by the Constitution. Nor would they be justifiable in not doing what is positively enjoined upon them to do. I do not believe therefore that the President and Senate would cede a State or any part of a State, because our common defence was one of the great purposes for which the Government was formed, and because the Constitution guaranties to every State in the Union a Republican form of government, and engages to protect each of them against invasion. . . . Upon every other subject proper for a national compact, not inconsistent with our Constitution, and under the limitations by me stated, a treaty may be negotiated and absolutely concluded by the treaty-making power, so as to bind the nation.

8 ANNALS OF CONG. 69-70 (1803) (remarks of Sen. Nicholas). It may well have been the force with which Nicholson expressed these points that provoked Jefferson to reassert his

This is perhaps the fullest early expression of the states' rights view, clearly recognizing that the ultimate issue is whether the treaty power is a delegated power in its own right or simply another mode of exercising powers otherwise granted to the federal government. The Louisiana problem was simple: since the Constitution nowhere gave Congress the power to acquire territory, it was, under that view, not permissible to acquire Louisiana by treaty. That power resided either in the states or in the people, but, in any case, not in the President and Senate.<sup>359</sup>

Understandably, given his earlier views, Jefferson was deeply troubled by this problem and sought the advice of his Cabinet. Most famously, Gallatin, his Secretary of the Treasury and former Republican leader during the Jay Treaty debate, sought to dispel Jefferson's constitutional doubts, giving, with Madison's concurrence, an admirable restatement of the nationalist view. "[T]he existence of the United States as a nation," Gallatin first asserted, "presupposes the power enjoyed by every nation of extending their territory by treaties, and the general power given to the President and Senate of making treaties designates the organ through which the acquisition may be made."<sup>360</sup> He then directly addressed the states' rights objection:

The only possible objection must be derived from the [Tenth] Amendment, which declares that powers not delegated to the United

earlier view, even though Jefferson had apparently conceded the point in response to Gallatin. For Gallatin's view and Jefferson's response, see *infra* notes 360-362 and accompanying text. For a later use of Jefferson's letter to Nicholas to support the states' rights view, in connection with the question of whether to annex Texas, see *infra* note 530.

359. There is, of course, an important difference between the issue raised by a treaty acquiring territory and that raised by a treaty granting aliens the right to own real property. Whereas the latter directly interfered with the legislative authority of the states, the former did not. No one claimed that the states had reserved to themselves the right to acquire territory by treaty or otherwise. *But cf.* Letter from Levi Lincoln, Attorney General, to Thomas Jefferson (Jan. 10, 1803), *quoted in* BROWN, *supra* note 29, at 18 (proposing that one way out of the constitutional difficulties Jefferson perceived would be to extend the boundaries of the State of Georgia and of the Mississippi Territory to include territory ceded by France, rather than to acquire territory for the United States, an idea that was immediately rejected as implausible). Thus, even though the power to acquire territory had not been given to the federal government, it was also "prohibited to the states." Under the Tenth Amendment, that meant that it must be "reserved to the people." Under the logic of the Tenth Amendment argument for the states' rights view, however, the two cases amount to the same thing: the treaty power is not a delegated power within the meaning of the Tenth Amendment, and thus extends only to those subjects that are otherwise granted to the federal government. Some subjects beyond federal authority are reserved to the states (e.g., power over real property), while others are reserved to the people. Either way, the point is the same: the treaty power does not extend to them.

360. Letter from Albert Gallatin to Thomas Jefferson (Jan. 13, 1803), *in* 1 THE WRITINGS OF ALBERT GALLATIN 111 (Henry Adams ed., 1879). According to Ralph Ketcham, Madison agreed with Gallatin on the constitutional question. He "never really doubted the power of the United States to add to its territory by treaty, but in deference to Jefferson, after he and Gallatin had expressed their views in January 1803, he was generally silent or vague." KETCHAM, *supra* note 158, at 421-42; *see also* 4 MALONE, *supra* note 353, at 313-14.

States, nor prohibited by it to the States, are reserved to the States or to the people. *As the States are expressly prohibited from making treaties, it is evident that, if the power of acquiring territory by treaty is not considered within the meaning of the Amendment as delegated to the United States, it must be reserved to the people.* If that be the true construction of the Constitution, it substantially amounts to this: that the United States are precluded from, and renounce altogether, the enlargement of territory . . . .<sup>361</sup>

Jefferson was at least initially convinced and wrote to Gallatin, "You are right, in my opinion as to Mr. L's proposition; there is no constitutional difficulty as to the acquisition of territory . . . ."<sup>362</sup> Although at times Jefferson seemed subsequently to revert to his earlier view,<sup>363</sup> his closest interpreters have generally concluded that he ultimately accepted Gallatin's position that territory could be acquired by treaty and focused his concerns on the more difficult problem of incorporating territory into the union.<sup>364</sup> In any case, as he expressed to Nicholson in the same letter reasserting the states' rights position: "If, however, our friends shall think differently, certainly I acquiesce with satisfaction; confiding, that the good sense of our country will correct the evil of construction when it shall produce ill effects."<sup>365</sup> In fact, he apparently stood alone among his Cabinet and Republican allies.<sup>366</sup> In

361. Letter from Albert Gallatin to Thomas Jefferson, *supra* note 360, at 114 (emphasis added).

362. Letter from Thomas Jefferson to Gallatin (Jan. 1803), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 355, at 241 n.1, 241 n.1.

363. *See, e.g.*, Letter from Thomas Jefferson to John Dickinson (Aug. 9, 1803), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 355, at 261, 262-63 (stating that the Constitution "has not given [the federal government] a power of holding foreign territory, & still less of incorporating it into the Union"); Letter from Thomas Jefferson to J.C. Breckenridge (Aug. 18, 1803), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 355, at 244 n.1.

364. *See, e.g.*, BROWN, *supra* note 29, at 20-29 (arguing that Jefferson conceded this point); 4 MALONE, *supra* note 353, at 313-14 (same); MAYER, *supra* note 353, at 248 (same); *see also* Downes v. Bidwell, 182 U.S. 244, 251-55 (1901) (Brown, J.) (recounting the constitutional controversy over the Louisiana Purchase and discussing Jefferson's views); *id.* at 323-30 (White, J., concurring in the judgment) (same). Dumas Malone explains Jefferson's sometimes inconsistent remarks in letters as designed to anticipate the objections of his old friends and allies and to smooth their way to acceptance of the treaty. *See* 4 MALONE, *supra* note 353, at 313-14. He also points out that the proposed constitutional amendments that Jefferson drafted as possible solutions to the constitutional dilemma he perceived only dealt with the incorporation issue and simply accepted the acquisition of Louisiana as a *fait accompli*. *See id.* at 314-18; *see also* BROWN, *supra* note 29, at 20-29; MAYER, *supra* note 353, at 248.

365. Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), *supra* note 358, at 248 n.1.

366. *See* BROWN, *supra* note 29, at 28-29; 4 MALONE, *supra* note 353, at 313-18; MAYER, *supra* note 353, at 249. Jefferson's willingness to overlook his constitutional doubts has ever after been a matter of controversy and recrimination. *See* BROWN, *supra* note 29, at 29-33; 4 MALONE, *supra* note 353, at 319. John Quincy Adams, for one, remained highly critical of what he perceived as Jefferson's hypocritical stand. *See* BROWN, *supra* note 29, at 30-31.

the end, waiving any remaining constitutional scruples, he ratified and implemented the Louisiana Purchase, the outstanding achievement of his administration.

*d. The Supreme Court Affirms the Nationalist View.* It is hardly unusual to find John Marshall at the center of an early constitutional controversy. Uniquely, however, he was involved here as a political activist, attorney, and litigant, rather than as Chief Justice of the United States Supreme Court. Remarkably, it was the combination of the 1783 Treaty of Peace, the Jay Treaty, and Marshall's extensive land speculations in the Northern Neck of Virginia that produced the first Supreme Court decision after *Ware v. Hylton* affirming the nationalist view of the treaty power. In *Fairfax's Devisee v. Hunter's Lessee*,<sup>367</sup> the Court explicitly upheld Article 9 of the Jay Treaty, overruling the contrary Virginia Court of Appeals decision of Judge Roane, the ardent Jeffersonian jurist and Marshall's great states' rights antagonist.<sup>368</sup> Equally remarkable, it was this very decision that formed the prequel to the celebrated confrontation between the United States Supreme Court, and Judge Roane and the Virginia Court of Appeals, in *Martin v. Hunter's Lessee*.<sup>369</sup>

During 1795 to 1796, Marshall, cooperating closely with Hamilton and King, was one of the leading advocates for the Jay Treaty in Virginia.<sup>370</sup> Indeed, quickly recognizing the effectiveness of his advocacy, the Federalist leadership rewarded him with an appointment to an important diplomatic post to France, thus launching his career in

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The treaty also gave rise to an extended debate in the House and Senate. Ironically, the Republicans and Federalists now found themselves arguing points that they had attacked only a few years before and struggling mightily to avoid outright inconsistency. For an extended discussion of the debates, see *id.* at 36-74. In the *Insular Cases*, Justice Brown was unwilling to consider the arguments of individual legislators because they were "so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts." *Downes*, 182 U.S. at 254.

367. 11 U.S. (7 Cranch) 603 (1812).

368. See *Hunter v. Fairfax's Devisee*, 15 Va. (1 Munf.) 218 (1810), *rev'd*, *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1812).

369. 14 U.S. (1 Wheat.) 304 (1816), *rev'g* 18 Va. (4 Munf.) 1 (1814).

370. See, e.g., Letter from Charles Lee to John Marshall (Apr. 17, 1796), in 3 MARSHALL PAPERS, *supra* note 125, at 19; Letter from John Marshall to Rufus King (Apr. 25, 1796), in 3 MARSHALL PAPERS, *supra* note 125, at 22; Letter from John Marshall to Alexander Hamilton (Apr. 25, 1796), in 3 MARSHALL PAPERS, *supra* note 125, at 23. For accounts of Marshall's efforts in defending the Jay Treaty, see, for example, 2 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 122-62 (1916); KURTZ, *supra* note 235, at 22-25, 50-51, 57; Farnham, *supra* note 235, at 84. For correspondence of Jefferson and Madison on Marshall's role, see Letter from Joseph Jones to James Madison (Nov. 22, 1795), in 16 MADISON PAPERS, *supra* note 236, at 132; Letter from Thomas Jefferson to James Madison (with enclosure) (Nov. 26, 1795), in 16 MADISON PAPERS, *supra* note 236, at 134.



national politics.<sup>371</sup> Throughout the controversy, Marshall was repeatedly called upon to defend the treaty's constitutionality, including, most notably, in a three-hour oration he delivered in the Virginia General Assembly where the treaty was under sustained Republican attack. Unfortunately, only the most scanty accounts of his speeches have been preserved.<sup>372</sup> For reasons that will appear shortly, however, it is safe to assume that he defended Article 9 against the aggressive states' rights attacks that had been raised, including, or perhaps especially, in Virginia.<sup>373</sup>

Marshall's personal involvement with the problem of alien land ownership began in the mid-1780s, when he undertook legal representation of Denny Martin Fairfax.<sup>374</sup> The latter's uncle, Thomas, Sixth Lord Fairfax, had very extensive landholdings (that is, in the millions of acres) in the Northern Neck of Virginia under royal grants. Lord Fairfax nevertheless remained a citizen of Virginia after the Declaration of Independence and until his death in 1781. Not so his sole heir, Denny Fairfax, who was and remained a British subject and thus an alien.<sup>375</sup> In light of the common law disability of aliens to hold real

371. See, e.g., 2 BEVERIDGE, *supra* note 370, at 198-99; KURTZ, *supra* note 235, at 235; Mission to France, Editorial Note, in 3 MARSHALL PAPERS, *supra* note 125, at 73. Marshall was appointed special envoy to France in connection with the so-called XYZ affair that threatened war with France. Earlier, Washington had offered to appoint him Attorney General and then for other diplomatic posts, but he had declined. See 2 BEVERIDGE, *supra* note 370, at 122-23, 144-46, 200-02. Marshall probably declined out of concern over his financial position, which was tied up in the Fairfax estate dispute. See *id.* at 202-13. When he did finally accept the post in the XYZ affair, it was apparently out of a desperate desire to help his brother in London make the necessary financial arrangements for purchasing the Fairfax lands. See *id.* at 211; Mission to France, *supra*, at 80.

372. The only first-hand accounts I have seen of his speech are in contemporaneous letters. See, e.g., Letter from Joseph Jones to James Madison, *supra* note 370, at 132-34; Letter from Thomas Jefferson to James Madison, *supra* note 370, at 134-37. For discussions of his speech and other citations, see, e.g., 2 BEVERIDGE, *supra* note 370, at 133-40; KURTZ, *supra* note 235, at 22-25; and Farnham, *supra* note 235, at 84.

373. Marshall's biographer, Albert Beveridge, seems to have thought so. See 2 BEVERIDGE, *supra* note 370, at 128-29 (noting the constitutional attacks on Article 9 of the Jay Treaty "touched Marshall closely"). For further discussion, see *infra* notes 374-387, 402 and accompanying text.

374. There are many accounts of the complex history of the Fairfax estate dispute, but the most accurate and complete are in the *Marshall Papers*. See, e.g., Marshall and the Fairfax Litigation: From the Compromise of 1796 to *Martin v. Hunter's Lessee*, Editorial Note, in 8 THE PAPERS OF JOHN MARSHALL 108 (Charles F. Hobson ed., 1995); Fairfax Lands, Editorial Note, in 2 THE PAPERS OF JOHN MARSHALL 140 (Charles T. Cullen & Herbert A. Johnson eds., 1977); *Fairfax v. Hunter*, Editorial Note, in 5 THE PAPERS OF JOHN MARSHALL 228 (Charles F. Hobson ed., 1987) [hereinafter 5 MARSHALL PAPERS]. Marshall first began to represent Denny Fairfax in 1786 in connection with the *Hite v. Fairfax* litigation involving title questions under the colonial-era grants. See Fairfax Lands, *supra*, at 140-43. For other accounts, see, e.g., 2 BEVERIDGE, *supra* note 370, at 203-11; 4 BEVERIDGE, *supra* note 370, at 146-57.

375. See Fairfax Lands, *supra* note 374, at 140-41; *Fairfax v. Hunter*, Editorial Note, *supra* note 374, at 228-29. The lands comprised 5.2 million acres. See Fairfax Lands, *supra* note 374, at 141. The lands were divided into three categories: lands that Lord Fairfax had granted during his lifetime; lands that were ungranted, sometimes referred to as "waste and

property, there ensued an epic three-decade-long legal struggle between the Virginia legislature, and Denny Fairfax and John Marshall, over ownership of the Fairfax lands — a struggle that would occupy Marshall for much of the rest of his life.<sup>376</sup> In the end, Marshall prevailed not only in his legal contentions but in securing for himself and his family considerable landed wealth.

At the core of the conflict was the Treaty of Peace of 1783. Recall that Article VI provided: “[T]here shall be no future Confiscations made . . . .”<sup>377</sup> Although this provision clearly applied to confiscations made against enemy aliens as a result of the war, Marshall staked his reputation and family fortune on the claim that it also protected British subjects from the application of state common law rules prohibiting ordinary aliens from holding real property. It thus operated much like Article XI of the French Treaty of 1778, albeit in a somewhat more limited fashion. Under this construction of Article VI, Denny Fairfax held good title to the Fairfax lands because he had taken title under Lord Fairfax’s will in 1781, and the State of Virginia had not confiscated his lands by the time the Treaty of Peace had come into force in 1783.<sup>378</sup> As we have already seen, this claim directly

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unappropriated” lands; and lands that Lord Fairfax had granted to himself or his family, the so-called manor lands. One issue was whether Lord Fairfax held only a proprietary, or seigniorial, right to the lands, not a fee simple, and thus whether his interests had terminated with independence. See *Fairfax v. Hunter*, Case Agreed, in 5 MARSHALL PAPERS, *supra* note 374, at 240, 246 n.16. A similar question had arisen in the debates over the Jay Treaty in connection with Lord Granville’s interests in North Carolina lands. See *supra* note 311 and accompanying text. For a fascinating history of the dispute over Lord Granville’s estate, which was much discussed during the debate over the Jay Treaty, see Henry G. Connor, *The Granville Estate and North Carolina*, 62 U. PA. L. REV. 671 (1914). See also *supra* notes 311-314 and accompanying text.

376. See Marshall and the Fairfax Litigation, *supra* note 374, at 108-19 (describing Marshall’s involvement in extensive litigation concerning the Fairfax lands throughout most of the rest of his life); Fairfax Lands, *supra* note 374, at 140-49; *Fairfax v. Hunter*, Editorial Note, *supra* note 374, at 228-34. “How important [the Fairfax dispute] was to him cannot be fully understood without a close study of the numerous cases in the state courts of Virginia in which he and his brother, as purchasers of the Fairfax estate, were parties — litigation that continually engaged them throughout much of their remaining lives.” *Id.* at 233-34.

377. Definitive Treaty of Peace, art. 6, *supra* note 99, at 155.

378. See Fairfax Lands, *supra* note 374, at 141-42, 144-45; *Fairfax v. Hunter*, Editorial Note, *supra* note 374, at 229-33. These claims were discussed in great detail in the various court decisions discussed *infra* at notes 380, 383, 387-400, 416-421 and accompanying text. The first issue was the scope of Article VI of the Treaty of Peace. Did it override the ordinary laws of the states regarding the capacity of aliens to own real property, or was it limited to prohibiting confiscations of property on the ground that the owner was, or had been, an enemy alien? The second issue was a complicated common law question about the proper procedure for taking property by way of confiscation, forfeiture, or escheat. The ordinary procedure required that an office of inquest be initiated and the putative owner be given a chance to contest the taking. It was agreed by all that such a procedure was not absolutely necessary, but what was in dispute was whether acts of the Virginia legislature in 1782 and 1785 effectively took the Northern Neck properties without an office. If the 1782 act did so, then the Treaty of Peace, even broadly construed, would have had no effect on the Fairfax estate, since it already would have been confiscated by the time the treaty became effective.

raised the question of whether the treaty power — under both the Confederation and the Constitution — could override a state legislature on a matter of internal state policy.<sup>379</sup>

Unsurprisingly, the State of Virginia violently objected both to Marshall's construction of the Treaty of Peace and to the claim that the Fairfax lands had not been confiscated prior to the treaty's effective date.<sup>380</sup> Beginning as early as 1782, the legislature had passed a series of acts dealing with the Northern Neck properties, and starting in 1786, both sides initiated a large number of complex litigations in the Virginia state courts seeking alternatively to challenge or uphold the Fairfax title.<sup>381</sup> In the meantime, with his estate under increasingly intense attack, Denny Fairfax began in the early 1790s to consider selling off his lands to avoid their ultimate escheat to the state. Marshall jumped at the opportunity thus presented. Organizing a collective effort among his close relatives and friends to purchase some of the best portions of the estate, he and his brother, James Marshall, negotiated a complex purchase agreement with Fairfax in 1793.<sup>382</sup> They thereafter instituted further litigations, including in the federal circuit court, seeking once again to affirm the Fairfax title, and hence their own, under the Treaty of Peace of 1783.<sup>383</sup>

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379. See *supra* notes 77-94, 110-111, 116-136 and accompanying text; *infra* notes 387-400, 416-421 and accompanying text.

380. See *Fairfax Lands*, *supra* note 374, at 141-42, 144-45; *Fairfax v. Hunter*, Editorial Note, *supra* note 374, at 229-33. After the federal circuit court issued a ruling in favor of Fairfax, the Virginia legislature nearly adopted a resolution declaring that the federal courts had no jurisdiction over grants of real property by the state to its citizens and denying the binding effect of any judgment they might render. See *Petition for Postponement* (Jan. 22, 1796), in 5 MARSHALL PAPERS, *supra* note 374, at 252, 253 n.1; *infra* note 408 and accompanying text. For discussion of the intense political controversy surrounding the case and the later decision in *Martin*, see, e.g., 4 BEVERIDGE, *supra* note 370, at 145-67; 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 785-817 (1953); and 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 151-53 (rev. ed. 1935).

381. The various acts are described in detail in the various court opinions discussed *infra* notes 387-400 and accompanying text. There were a remarkable number of separate actions pending simultaneously in different courts. Some of the actions were brought by Fairfax in an effort to block the granting of the waste lands; one was an ejectment action brought against Fairfax by David Hunter, who claimed title to some of the waste lands under patents granted by the state; and still others were escheat actions brought by the state against the Fairfax lands, ultimately including the manor lands. See *Fairfax Lands*, *supra* note 374, at 143-47; *Fairfax v. Hunter*, Editorial Note, *supra* note 374, at 229-33. Later Marshall instituted a number of actions in his own name and a federal court action on behalf of Fairfax. See *infra* note 383.

382. See *Fairfax Lands*, *supra* note 374, at 143; *Fairfax v. Hunter*, Editorial Note, *supra* note 374, at 228-31. The Marshall syndicate purchased the manor lands.

383. Marshall was convinced that the federal courts would be more sympathetic to his treaty claim. Moreover, he had to shape the litigation with great care in order to ensure that he would ultimately be able to appeal the case to the United States Supreme Court notwithstanding the Eleventh Amendment, which was then pending in the Virginia legislature and which had caused the Virginia Court of Appeals to delay action on the various pending appeals. See *Fairfax Lands*, *supra* note 374, at 144-47; *Fairfax v. Hunter*, Editorial Note, *supra*

These various litigations — as well as Marshall's ultimately successful efforts to arrange a legislative compromise in the General Assembly — came to a head during the period of 1794 to 1796, just as the storm caused by the Jay Treaty was underway. A number of the Fairfax estate cases were then pending in the Virginia Court of Appeals, and Marshall, having prevailed in the federal circuit court, was busily preparing for a long-planned and much-anticipated showdown in the United States Supreme Court. Before any definitive rulings were rendered in either court, however, a compromise agreement was reached in the General Assembly in December 1796, whereby title to the portions of the estate purchased by Marshall and his associates were confirmed and the remainder of the estate was transferred to the State of Virginia.<sup>384</sup>

In light of this background, there can be no question about Marshall's view of Article 9 of the Jay Treaty. Surely, he welcomed the provision, which, by confirming the title of British subjects then holding lands in the United States, served to strengthen his legal position and give the Virginia legislature a substantial added inducement to settle the longstanding Fairfax dispute.<sup>385</sup> More important, the constitutionality of Article 9 rested on similar, though even stronger, grounds as the constitutionality of Article VI of the Treaty of Peace, which, of course, was the principal basis for Marshall's legal position. With Marshall actively defending the constitutionality of the Jay Treaty just as the long-lasting Fairfax estate dispute reached its climax in the United States Supreme Court, the Virginia Court of Appeals, and the Virginia General Assembly, it seems certain that Marshall would have publicly affirmed the constitutionality of Article 9 in the course of the then feverish debates.<sup>386</sup>

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note 374, at 231-32. As part of this strategy, Marshall instituted the federal ejectment action against Hunter in 1795, and it was promptly heard by Judges James Wilson and Cyrus Griffin. They agreed with Marshall and confirmed title in Fairfax. *See id.* at 231-33. Hunter then appealed to the Supreme Court. Marshall expected the Court to hear argument in the case at the same time as it heard argument in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), in which he represented the Virginia debtors against the British creditors. *See supra* note 125 and accompanying text. He intended to argue that Article IV of the Treaty of Peace did not revive the debt against the local debtors but that Article VI did protect the Fairfax estate. After Hunter successfully postponed argument in the case, the legislative compromise of 1796 intervened, and, to Marshall's great disappointment, Hunter dismissed the appeal. *See Fairfax Lands, supra* note 374, at 145-46; *Fairfax v. Hunter*, Editorial Note, *supra* note 374, at 233.

384. *See Fairfax Lands, supra* note 374, at 145-48; *Fairfax v. Hunter*, Editorial Note, *supra* note 374, at 233.

385. Marshall had advised Fairfax to seek to have the British negotiators put a provision in the Jay Treaty which would have explicitly protected the Fairfax estate. However, his advice arrived after the treaty had already been concluded. *See Fairfax Lands, supra* note 374, at 144-45. The inclusion of Article 9 in the treaty nevertheless greatly strengthened his negotiating position. *See id.* at 149.

386. For a discussion of Marshall's views in another context, see *infra* note 484.

In any case, although the legislative compromise effectively ended the ongoing litigations over the Fairfax estate for a time,<sup>387</sup> some years later one of the cases was revived in the Virginia Court of Appeals. In *Hunter v. Fairfax's Devisee*,<sup>388</sup> a sharply divided Virginia Court of Appeals revisited the issues that had only recently been embroiled in fierce controversy, and the court rejected Fairfax's claim to a small portion of the lands that Marshall, for technical reasons, had claimed were not subject to the legislative compromise.<sup>389</sup> Of particular interest is Judge Spencer Roane's opinion rejecting Marshall's interpretation of Article VI.<sup>390</sup> Roane, famously, was a passionate defender of states' rights and leader of the Virginia Republicans, and he took the opportunity to press for a states' rights approach to the treaty power. The difficulties he faced in doing so, and his equivocations in expressing the states' rights view, however, dramatically underscore the weakness of that view even among those most prone to support it. His opinion also supplies the context without which it is impossible to appreciate the full significance of the Supreme Court's later opinion upholding Article 9 of the Jay Treaty.

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387. In fact, the respite was quite brief, and the intensity of the litigation soon resumed in full force. See *Marshall and the Fairfax Litigation*, *supra* note 374, at 110-13; Articles of Agreement (Sept. 11, 1801), in 6 THE PAPERS OF JOHN MARSHALL 93 (Charles F. Hobson ed., 1990) [hereinafter 6 MARSHALL PAPERS]; *Marshall v. Hunter and Pendleton*, Deposition (Aug. 28, 1802), in 6 MARSHALL PAPERS, *supra*, at 122; *Marshall v. Janney*, Amended Bill and Answer in Chancery (Nov. 29, 1803), in 6 MARSHALL PAPERS, *supra*, at 202; *Martin v. Weekly*, Bill and Answer in Chancery, U.S. Circuit Court, Virginia (Dec. 1806), in 6 MARSHALL PAPERS, *supra*, at 473; Letter from John Marshall to James M. Marshall (July 9, 1822), in 9 THE PAPERS OF JOHN MARSHALL 239 (Charles F. Hobson ed., 1998) [hereinafter 9 MARSHALL PAPERS].

388. 15 Va. (1 Munf.) 218 (1810).

389. See *Marshall and the Fairfax Litigation*, *supra* note 374, at 112-16 (explaining how the land at issue actually fell within the manor lands, even though earlier the Marshalls had mistakenly stipulated, when it was not a point of significance, that it was waste land). Hunter had left the appeal dormant in the Court of Appeals for over a decade. See *Hunter*, 15 Va. (1 Munf.) 218 (1810). Only two Judges participated in the case, Judges Roane and Fleming. See *Hunter*, 15 Va. (1 Munf.) at 223 (opinion of Roane, J.); *id.* at 232 (opinion of Fleming, J.). Although they agreed on the judgment, they disagreed sharply on the rationale. Judge St. George Tucker did not participate because his son had married Hunter's daughter. See *Marshall and the Fairfax Litigation*, *supra* note 374, at 113; *Fairfax v. Hunter*, Editorial Note, *supra* note 374, at 230-31; *Fairfax v. Hunter*, Case Agreed, Notes, *supra* note 375, at 248-49. Tucker had been the judge in the court below and had ruled in favor of Fairfax on the ground that the state had never in fact legally taken the estate. See *id.* at 402-09. For further discussion of the views of Judge Tucker, see *infra* notes 393, 432-439 and accompanying text. Marshall claimed that the property was really manor lands, and therefore belonged to Fairfax under the legislative compromise. It was on this point alone that Judge Fleming agreed that Fairfax should lose. See *Hunter*, 15 Va. (1 Munf.) at 237-38.

390. Judge Roane incorporated into his opinion an elaborate unpublished opinion he had written in a previous case, *Reed v. Reed*. See *Hunter*, 15 Va. (1 Munf.) at 226. The *Reed* opinion was published as an appendix to his *Hunter* opinion. See *id.* at 611-27; see also 3 AM. L.J. 22 (1810) (reprinting Roane's opinion in *Reed v. Reed*). Roane had written that opinion in part in anticipation of the Fairfax dispute. See *Hunter*, 15 Va. (1 Munf.) 226, app. at 616.

According to Judge Roane, Article VI protected British subjects only against legislative confiscations made on the ground that a landholder was an enemy alien but not against forfeitures and escheats made under the ordinary common law principle prohibiting even friendly aliens from holding real property.<sup>391</sup> Roane gave a number of interpretive reasons why he believed his was the better understanding of Article VI. The crux of his argument, however, was based on a states' rights understanding of the old Congress's powers under the Confederation. Implicitly invoking Article VI and the proviso to Article IX of the Confederation, he claimed that it was beyond Congress's powers to enter into treaty stipulations which "invade a right of the several states, entirely of an internal and municipal nature".<sup>392</sup>

[T]he right of escheat and forfeiture now in question could on no construction appertain to congress; it strictly "appertained to the internal polity of the several states," and was, emphatically, beyond the power of congress. Congress had . . . no power to invade the ordinary rights of the several states, and to invest with the privileges of citizens of *Virginia*, those whom the policy of her laws had thrown into the class of aliens.<sup>393</sup>

Having made this strong assertion of a states' rights limitation on the treaty power, however, Judge Roane faced a serious complication. As he was forced to acknowledge, the old Congress had on several occasions — most importantly in the French Treaty of 1778 — concluded treaties with provisions precisely of the kind which he now contended were "emphatically" beyond its authority.<sup>394</sup> To this, he had two ap-

391. See *Hunter*, 15 Va. (1 Munf.) 226, app. at 619-25.

392. *Id.* at 620.

393. *Id.* In support of this view, Roane relied almost entirely on the self-denying statements made by the American commissioners during the delicate negotiations in Paris leading to the Treaty of Peace. See *id.* at 619-20. (The internal quotation in the quotation above is taken from diplomatic documents prepared by the commissioners). For a full discussion of the negotiations and these statements, see *supra* notes 99-142 and accompanying text. Given the internal inconsistencies in the positions assumed by the commissioners — and their strategic character — it is not surprising that Roane's reliance on them led him to inconsistencies and confusions of his own. He simply ignored, or misconstrued, the subsequent events that demonstrated the unreliability of the quotations on which he relied. See *supra* notes 99-142, 148-156 and accompanying text. Despite his heavy reliance on Jefferson, see *Hunter*, 15 Va. (1 Munf.) 226, app. at 626-27, he also ignored the many statements by Jefferson during the Confederation taking the contrary view. See *supra* notes 96-98, 148-156 and accompanying text.

Roane also argued that the 1782 act had effectively taken the property even without an inquest of office and thus that even if Article VI would otherwise have protected the Fairfax estate, the estate was already in the state's hands by the time the treaty became effective. See *Hunter*, 15 Va. (1 Munf.) at 228-32. Judge Fleming disagreed on both points. Although a states' rights proponent himself, he accepted Marshall's argument that Article VI superseded the ordinary forfeiture and escheat laws applicable to aliens and showed no interest in Judge Roane's states' rights rhetoric. See *id.* at 235-36. Moreover, he believed that without an inquest of office, the state had never effectively taken the estate. See *id.* at 233-35. In these respects, he concurred in Judge Tucker's opinion in the court below. See *supra* note 389.

394. See *Hunter*, 15 Va. (1 Munf.) 226, app. at 620, 621, 625.

parently inconsistent responses. First, he claimed that notwithstanding the peremptory character of these provisions, they were in reality merely recommendations or requests to the several states to amend their laws in conformity with the treaty. This was the case, he claimed, "in several of our foreign treaties which expressly waive the disabilities of alienage, in favour of the subjects of certain friendly powers."<sup>395</sup> As we have seen, however, such a claim was utterly implausible in light of the history surrounding those treaties, and Judge Roane, perhaps for this reason, did not press the point.<sup>396</sup> Indeed, he even seemed to acknowledge that such a treaty, no matter how distasteful, would have to be obeyed: "Such a treaty would not be natural nor reasonable; but if such a one exists, it must probably have its effect. Whether there be any such treaty rights in the present instance, we shall presently inquire."<sup>397</sup>

His second argument was perhaps more plausible, but essentially conceded the states' rights view. Prefiguring contemporary clear statement rules, Roane argued that the previous treaties which had waived the disabilities of alienage used language that was express and unequivocal. Article VI of the Treaty of Peace, in contrast, was general and vague and thus ought not to be construed as invading the sphere otherwise reserved to the states:

If in several of our treaties of amity and commerce with friendly *European* powers, the several states are called on, by the most particular and express stipulations, to waive their laws of alienage, in favour of the subjects of such powers, does it readily follow that in a treaty of peace with an enemy nation, an expression entirely congenial with the character of such treaty, and which can be otherwise abundantly satisfied, shall have this most important effect? Nay, even, if in the treaty of amity and commerce, formed by us with the same power, (*Great Britain*,) in 1794 [the Jay Treaty], some partial privileges on this subject could only be obtained for *British* subjects, and those conferred by the most explicit and unequivocal terms; if even these privileges, notwithstanding the lapse of eleven years since the date of the treaty of peace, created a general ferment in our country, arising from the recollection of ancient injuries; shall we construe the general words of the treaty before us, to have an equal or more extensive effect?<sup>398</sup>

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395. *Id.* at 620.

396. See *supra* notes 77-98, 247-258, 265-288, 303-315 and accompanying text.

397. *Hunter*, 15 Va. (1 Munf.) at 616.

398. *Id.* at 621. In another passage, Judge Roane reasoned:

[I]n all those of our treaties in which it was intended to yield up the laws of alienage in favour of the subjects of highly friendly and favoured nations, nay, even in the instrument of confederation itself, in relation to the citizens of the other states of the union, (see art. 4) express, explicit, and appropriate terms are used to effect such surrender: whereas this is an attempt, under general and ambiguous expressions, (to admit the most,) to infer a surrender of those laws, and to create or enlarge interests in favour of the subjects of a nation, then certainly standing at the head of those the least favoured by *America*, and which has not been

Thus, in the final analysis, even Judge Roane was unwilling, or unable, to mount a defense of the states' rights view of the treaty power under the Confederation, retreating instead to a federalism-based rule of construction. In this light, his remarks on Article 9 of the Jay Treaty are all the more striking. Although he (incorrectly) viewed the Jay Treaty as inapplicable to the case (because the case was pending before the treaty was ratified),<sup>399</sup> he did at several points refer to it in support of his general position. Clearly, Judge Roane was not enamored of the Treaty; indeed, his Jeffersonian hostility is barely submerged beneath the surface of his judicial rhetoric. However, in an effort to show why Article 9 did not further undermine the states' rights rationale for narrowly construing Article VI of the Treaty of Peace, he distinguished between the scope of the treaty power under the Confederation and the scope of such power under the Constitution:

[W]hile that treaty has guarantied, in a remarkable manner, the property in lands then actually holden in either country[, this] proves nothing in relation to the treaty of 1783, both because the present general government of the *United States* has powers, perhaps, competent to that purpose, and because the treaty of 1794 has used strong words to effect it; in both which important respects, the treaty of 1783 is widely different.<sup>400</sup>

In other words, the treaty power under the Constitution (divested, presumably, of the constraints of Article VI and the proviso to Article IX of the Confederation) was stronger than the treaty power under the Confederation and thus permitted the inclusion of a provision which, on states' rights grounds, might not have been valid in the Treaty of Peace. Or, as Madison had put it in the *Federalist Papers*, the treaty power under the Constitution had been "disembarrassed by the plan of the convention, of an exception under which treaties might be substantially frustrated by regulations of the States."<sup>401</sup> Further-

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able to obtain from us up to this day, even by the famous treaty of 1794, the boon in question, in the extent now contended for!

*Id.* at 625.

399. *See id.* at 611.

400. *Id.* at 625.

401. THE FEDERALIST, *supra* note 176, NO. 42 (James Madison), at 264. Although the context strongly suggests otherwise, it is possible to interpret Judge Roane as claiming not that the treaty power was broader under the Constitution but that Congress's legislative powers included the power to accord aliens the right to own real property in the states. It seems particularly doubtful that this is what Judge Roane had in mind, however, because, among other things, making such a claim would have been far more unorthodox for a Jeffersonian strict constructionist than simply accepting the nationalist view of the treaty power — especially after the experience with the Alien Act of 1798. *See, e.g.*, JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 163-65, 189-93 (1951); JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 63-79 (1956). *See also* Madison's famous report justifying the Virginia Resolutions of 1799, The Report of 1800 (Jan. 7, 1800), in 17 THE PAPERS OF JAMES MADISON 307, 317-24 (David B. Mattern, J.C.A. Stagg, Susan Holbrook Perdue,



more, the states' rights constraint, even in Roane's view, could be overcome by a clear and unequivocal provision.

After thirty years of litigation, the stage was finally set for the Supreme Court to resolve the Fairfax estate dispute. By this time, of course, Marshall was Chief Justice; obviously, though, he did not sit in the case. In an opinion by Justice Story, the Court reversed. To Marshall's frustration, however, Story decided to place the decision not on the Treaty of Peace, as Marshall had always believed proper, but on Article 9 of the Jay Treaty.<sup>402</sup> Story noted that although the point "has been very elaborately argued at the bar," it was unnecessary to consider Article VI of the Treaty of Peace because the Fairfax estate was protected in any case by Article 9 of the Jay Treaty, "which being the supreme law of the land, confirmed the title to [Fairfax], his heirs and assigns, and protected him from any forfeiture by reason of alienage."<sup>403</sup>

Perhaps because even Judge Roane had conceded the validity of Article 9, perhaps because the lawyers were unwilling at this late stage to hazard their credibility by raising a states' rights challenge, perhaps because the Court considered the states' rights view wholly implausible and generally abandoned, most likely for all of these reasons — neither Justice Story nor Justice Johnson, the two Justices who authored opinions, felt compelled even to address the claim which had been so passionately asserted during the "general ferment" aroused by Article 9 of the Jay Treaty,<sup>404</sup> the traces of which could still be found in Judge Roane's opinion. Without making any reference to the states' rights arguments of Roane, both construed the treaty as overriding state laws on the disabilities of aliens, satisfied that a simple citation to the Supremacy Clause fully resolved the issue.<sup>405</sup> The only difference

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Jeanne K. Preuss eds., 1991). No doubt this explains why Roane's Republican allies and their antebellum strict constructionist successors routinely denied that Congress had any such power. See *supra* notes 249, 256, 265-266, 271-281 and accompanying text; *infra* notes 503-504, 527-529, 532-533, 538-540, 558-561, 563-564 and accompanying text.

402. Years later, Marshall wrote to his brother: "The case of Hunter & Fairfax is very absurdly put on the treaty of 94." Letter from John Marshall to James M. Marshall, *supra* note 387, at 240. By resting the decision on Article 9 rather than Article VI, the Court gave Marshall an immediate victory but left title uncertain in the many other pending litigations, to which the Jay Treaty might not be applied. Marshall had hoped to put the question of title under Article VI to rest. See Marshall and the Fairfax Litigation, *supra* note 374, at 116.

403. Fairfax Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 627 (1813). Story also agreed with Judge Fleming in the Virginia Court of Appeals that without an inquest of office the state had never taken the Fairfax estate. See *id.* at 622-27.

404. *Hunter*, 15 Va. (1 Munf.) 226 app. at 621.

405. For the relevant portion of Story's opinion, see *Fairfax Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) at 627; for the relevant portion of Johnson's dissenting opinion, see *id.* at 629. In this respect, they followed the example of Judge Fleming in the Virginia Court of Appeals, who had likewise ignored Judge Roane's states' rights rhetoric. See *Hunter*, 15 Va. (1 Munf.) at 235-36. Unlike Story, Johnson in his dissent did reach the Article VI issue and concurred in Roane's view that it did not apply to ordinary laws of forfeiture and escheat.

between Story's and Johnson's opinions was on the question of whether Virginia had in fact taken the property before the conclusion of the Jay Treaty, with Story answering in the negative and Johnson in the affirmative.<sup>406</sup>

The lack of any dissent on the states' rights question is all the more striking because Brockholst Livingston was now sitting on the Court. Recall that Livingston had authored the Decius series, which had been among the leading Republican essays against the Jay Treaty in the heated summer of 1795. Despite his confident charge in 1795 that Article 9 "infringes the rights of the different States,"<sup>407</sup> Livingston was now content to join quietly Story in upholding that provision without even a word devoted to defending, or explaining, his earlier point of view.

It is well known, of course, that Virginia did not take kindly to the Court's decision. In 1795, when an appeal was first taken in the Fairfax litigation to the Supreme Court, the legislature had nearly adopted a resolution "most unequivocally den[ying] the authority of the federal courts to decide cases affecting titles to lands under the grants of this commonwealth to the citizens thereof."<sup>408</sup> When the Virginia Court of Appeals received the Supreme Court's mandate in 1813, it followed the legislative precedent and denied that the Supreme Court could exercise appellate jurisdiction in the case.<sup>409</sup> Thus ensued the final chapter of the Fairfax litigation and the decision in the great case of *Martin v. Hunter's Lessee*.<sup>410</sup>

In the years following the decision in *Hunter v. Fairfax's Devisee*, the Court repeatedly made clear that states' rights subject matter limitations could not be asserted against the treaty power, upholding vir-

*See Fairfax Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) at 628-29. Even here, however, Johnson's opinion is revealing, because in reaching that result, he carefully avoided any reference to Roane's states' rights rhetoric and instead relied purely on ordinary interpretive considerations. *See id.* For Justice Johnson's strong affirmation of the nationalist view of the treaty power, see *infra* notes 451-489.

406. *See Fairfax Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) at 622-27 (Story, J.) (holding that the property was never taken); *id.* at 629-31 (Johnson, J., dissenting) (arguing that the state did take the property).

407. AMERICAN REMEMBRANCER, *supra* note 244 (reprinting the Decius essays); see *supra* notes 279-280 and accompanying text.

408. *Fairfax v. Hunter, Petition for Postponement*, *supra* note 380, at 253 n.1 (quoting resolution (internal quotation marks omitted)). It does not appear that the resolution was rejected because of any hesitancy on this subject.

409. *See Hunter v. Martin*, 18 Va. (4 Munf.) 1, 16 (1814). Of course, its reason was different. The Court of Appeals famously asserted that the Supreme Court could not exercise appellate jurisdiction over the decisions of the state courts, even in cases raising federal questions.

410. 14 U.S. (1 Wheat.) 304 (1816). After Fairfax died during the long pendency of the appeal, Martin, his heir, was substituted as the defendant, and consequently the case bears his name.

tually all of the provisions in earlier treaties granting aliens the right to hold real property. In 1817, in *Chirac v. Chirac*,<sup>411</sup> the Court in an opinion by Marshall unanimously upheld both Article XI of the French Treaty of 1778 and the corresponding provision in the Convention of 1800 with France which superseded the earlier agreement. As to the former, Marshall, like Story in *Hunter*, declined to decide the constitutionality of Article XI under the terms of the Confederation because the property at issue had been purchased after the adoption of the Constitution; whatever controversy there might have been about the scope of the treaty power under the Confederation, upon adoption of the Constitution “this treaty had become the supreme law of the land.”<sup>412</sup> As to the latter, he broadly construed the somewhat narrower provision in the Convention of 1800 to override Maryland’s law requiring French citizens holding real property to become citizens or sell their property to citizens within ten years of acquiring the property. The French Treaty, he held, permitted them to sell their property at any time during their lives.<sup>413</sup> During the following term, moreover, the Court, in *Craig v. Radford*,<sup>414</sup> reaffirmed the validity of Article 9 of the Jay Treaty.<sup>415</sup>

In 1819, with Marshall again not sitting, the Court completed the unfinished business left over from the *Hunter* decision. Writing for the Court in *Orr v. Hodgson*,<sup>416</sup> Justice Story this time explicitly upheld Marshall’s construction of Article VI of the Treaty of Peace as well as again affirming Article 9 of the Jay Treaty.<sup>417</sup> Rejecting Judge Roane’s view, Story found that

[w]hen the 6th article of the treaty declared, “that no future confiscation should be made,” it could not mean to confine the operation of the language to confiscations *jure belli*. . . . [I]t must have meant to protect [British subjects] from all future losses of property, which but for the war would have remained inviolable.<sup>418</sup>

He then referred to the *Hunter* case and noted that this “subject has been heretofore before us, and although no opinion was then pronounced, it was most deliberately considered.”<sup>419</sup> This ruling, moreo-

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411. 15 U.S. (2 Wheat.) 259 (1817).

412. *Chirac*, 15 U.S. (2 Wheat.) at 271.

413. *See id.* at 274-78.

414. 16 U.S. (3 Wheat.) 594 (1818).

415. *See Craig*, 16 U.S. (3 Wheat.) at 599-600.

416. 17 U.S. (4 Wheat.) 453 (1819).

417. *See Orr*, 17 U.S. (4 Wheat.) at 462-65.

418. *Id.* at 462-63 (quoting Article VI of the Treaty of Peace).

419. *Id.* at 463. Professing insufficient time because of “other imperious duties,” Story explained that the Court was unable at that time “to go at large into the reasoning upon which our present opinion is founded.” *Id.* Story did, however, provide persuasive arguments in favor of the Court’s construction. *See id.* at 962-63.

ver, also effectively resolved the question left open in *Chirac* — not only Article VI, but also all of the treaties concluded under the Confederation, which included provisions dealing with alien landholding, were constitutional, even under the more restrictive provisions of the Articles of Confederation.<sup>420</sup> As far as the Court was concerned, they were ipso facto constitutional under the broader terms of the Constitution.<sup>421</sup>

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420. Subsequently, in *Hughes v. Edwards*, 22 U.S. (9 Wheat.) 489, 496 (1824), the Court again upheld Article 9 of the Jay Treaty, and in *Carneal v. Banks*, 23 U.S. (10 Wheat.) 181, 189 (1825), it again upheld Article XI of the French Treaty of 1778.

Professor Bradley wishes to deflect the force of this whole line of decisions by pointing out that the treaties at issue “did not purport to regulate the relationship between states and their own citizens . . . . They regulated only the treatment of aliens.” Bradley, *supra* note 2, at 420. Thus, he concludes, these treaties were “quite naturally viewed as regulating this country’s inter-national relations.” *Id.* To be sure, these treaties were quite naturally viewed as important to our international relations — just as today human rights treaties are. Professor Bradley’s observation simply fails to explain why those decisions are not authoritative support for the nationalist view. Indeed, his point seems designed precisely to justify that view. Even under his construction, the Court was permitting treaties to override areas of exclusive state legislative authority when the treaty was important to our inter-national relations. That is precisely the nationalist view.

421. Proponents of the states’ rights view have often relied upon an opinion written by Attorney General Wirt in 1819. Professor Bradley is no exception. See Bradley, *supra* note 2, at 416. Within a week of having received an inquiry from the Secretary of State, Wirt concluded in a three-sentence opinion, first, that the treaty with Sweden of 1782 did not extend the right to inherit real property to Swedish subjects and, second, that it could not constitutionally have done so because that subject was within the exclusive competence of the states. See 1 Op. Att’y Gen. 275 (1819). One is certainly tempted to attribute Wirt’s view to a too hasty judgment without adequate consideration and research. Perhaps, as a Jeffersonian Virginian, he had Jefferson’s states’ rights dictum in mind. See *supra* note 350 and accompanying text. If so, however, he was not well informed. As we have already seen, during the Confederation, Jefferson had not only attempted to negotiate treaties extending privileges in real property to aliens, he had also explicitly endorsed their validity under the Articles and their binding status on the states notwithstanding their refusal to pass implementing legislation — indeed, in the face of conflicting state legislation. See *supra* notes 94-98, 148-154 and accompanying text. Presumably, moreover, Wirt was unaware of the circumstances that led to the conclusion of the treaty and of French legal usages which left no doubt that the treaty extended to real property. See *supra* notes 89-93, 285-288 and accompanying text. Even more important, Wirt simply failed to mention that the Supreme Court had unequivocally affirmed the constitutionality of this type of provision on several recent occasions — not only in *Fairfax’s Devisee v. Hunter’s Lessee*, but in *Chirac*, *Craig*, and *Orr*, the last of which was decided that same year. If he meant to reject the Court’s opinions wholesale, would he not have felt obliged at least to mention that fact? In any case, Wirt himself would shortly thereafter switch to the nationalist view. Following in Gallatin’s footsteps, he would defend the Louisiana Purchase to a skeptical John Quincy Adams, citing the treaty power as the source of constitutional authority for the acquisition of territory. See 5 JOHN QUINCY ADAMS, MEMOIRS 401 (Charles Francis Adams ed., 1874-77). Moreover, in a later Attorney General opinion in 1824, discussed *infra* note 490 and accompanying text, he again seemed to affirm the nationalist view — this time after far more consideration and on a subject of enormous controversy. Ironically, later courts rejected Wirt’s construction of the treaty and applied it to real property. See *Erickson v. Carlson*, 145 N.W. 352 (1914); *Adams v. Akerlund*, 168 Ill. 632 (1897). Over a century later, the Supreme Court explicitly disapproved both Wirt’s interpretation of the treaty and his constitutional claim. See *Todok v. Union State Bank*, 281 U.S. 449, 452-54 (1930) (noting that Wirt’s “view of the treaty-making power of the United States is not tenable”). Proponents of the states’ rights view seem to be ignorant of this history. For discussion, see *infra* note 664.

*e. The Views of Early Commentators.* In concluding this survey of the views of the first generation of Americans on the treaty power, it is worth considering briefly the views of the leading early commentators on the Constitution — Joseph Story, William Rawle, and St. George Tucker, among others. Although none of these writers addressed the question head on, they all expressed a clear and unmistakable understanding of the breadth and scope of the treaty power that leaves little doubt as to where they stood. This inference becomes all the more powerful, moreover, when it is recognized that all were fully familiar with — some, indeed, participated in — the great struggle over the Jay Treaty. They were thus fully aware of the implications of the views they expressed.

Story's position, of course, is already clear from his opinion in *Hunter* and the other Supreme Court cases upholding precisely those provisions of earlier treaties that were claimed to violate the rights of the states, under both the Confederation and the Constitution. His *Commentaries*<sup>422</sup> only serve further to confirm this understanding. Thus, he begins by attacking the states' rights subject matter limitations in Article IX of the Confederation: "These limitations were found very inconvenient in practice; and indeed, in conjunction with other defects, contributed to the prostration, and utter imbecility of the confederation."<sup>423</sup> In contrast, the power to make treaties

is by the constitution general; and of course it embraces all sorts of treaties, for peace or war; for commerce or territory; for alliance or succours; for indemnity for injuries or payment of debts; for the recognition and enforcement of principles of public law; and for any other purposes, which the policy or interests of independent sovereigns may dictate in their intercourse with each other.<sup>424</sup>

This breadth was necessary, moreover, because the treaty power "is indispensable to the due exercise of national sovereignty. . . . 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."<sup>425</sup>

Obviously, Story's ringing affirmation of the broad scope of the treaty power, accompanied by his denunciation of states' rights limita-

422. See STORY, *supra* note 19.

423. *Id.* § 1501, at 355. The states' rights limitations he was referring to were those imposed by the proviso to Article IX of the Confederation. For discussion, see *supra* notes 75-89, 147-153, 187-189 and accompanying text.

424. *Id.* § 1502, at 355.

425. *Id.* § 1503, at 356. Given this unavoidable necessity, it was crucial, Story affirmed, that the Constitution ensure that the power be delegated to those "best qualified for the purpose, and in the manner most conducive to the public good." *Id.* § 1503, at 357. For this reason, the Constitution wisely choose the President and Senate, in which, as to the latter, "all the states are equally represented." *Id.* § 1507, at 360.

tions under the Confederation, strongly confirms the nationalist view. This conclusion becomes even more powerful when the exceptions which he did recognize are taken into account. Thus, even “though the power is thus general and unrestricted,”<sup>426</sup> it is not, Story explained, entirely unlimited. No delegated power can be construed “to authorize a destruction of other powers given in the same instrument . . . and cannot supersede, or interfere with any other of its fundamental provisions.”<sup>427</sup> Therefore, a “treaty to change the organization of the government, or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers, would be void; because it would destroy, what it was designed merely to fulfil, the will of the people.”<sup>428</sup> It is hardly inconspicuous that states’ rights subject matter limitations did not appear among the exceptions he thus noted.<sup>429</sup> The conclusion would appear inescapable.<sup>430</sup>

If anything, Rawle’s affirmation of the broad scope of the treaty power is even stronger than Story’s:

The most general terms are used in the constitution. The powers of congress in respect to making laws we shall find are laid under several restrictions. There are none in respect to treaties. . . . [The President and Senate] are by the treaty making power, invested with the high and sole control over all those subjects which properly arise from intercourse with foreign nations. . . . To define them in the constitution would have been impossible, and therefore a general term could alone be made use of . . . [A treaty] is a compact entered into with a foreign power, and it extends to all those matters which are generally the subjects of compact between independent nations . . . . To make treaties is an essential of a nation. One which disabled itself from the power of making, and the capacity of observing and enforcing them when made, would exclude itself from the international equality which its own interests require it to preserve . . . . In modern times and among civilized nations, we have no instances of such absurdity. . . . Under the articles of confederation it was given with some restrictions, owing to the nature of that imperfect compact, to con-

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426. *Id.* § 1502, at 355.

427. *Id.* § 1502, at 355-56.

428. *Id.* § 1502, at 356.

429. Story noted that whether there may be other exceptions, “necessarily growing out of the structure of the government, will remain to be considered, whenever the exigency shall arise.” *Id.* § 1502, at 356. Obviously, as Story was exquisitely aware, the states’ rights issue had already arisen (and been dispatched with by himself) and thus could not possibly have been what he had in mind.

430. Professor Bradley argues that Story supported the states’ rights view, relying on Story’s reference to the “fundamental laws” and his general view that the Constitution is an instrument of limited and enumerated powers. See Bradley, *supra* note 2, at 416-17. In light of the above, this is a remarkable claim.

gress . . . . In our present constitution no limitations were held necessary. The only question was where to deposit it.<sup>431</sup>

Finally, St. George Tucker's views are perhaps the most revealing. Not only was he a leading jurist; a prominent Republican and states' rights proponent; and a judge in the Virginia District Court, the Virginia Court of Appeals, and the Federal Circuit Court; he was also an active opponent of the Jay Treaty and a lower court judge in the Fairfax estate litigation.<sup>432</sup> Indeed, it was his ruling in the lower court in favor of Fairfax's title in *Fairfax's Devisee v. Hunter's Lessee* that the Virginia Court of Appeals overturned and that was then reinstated by the Supreme Court.<sup>433</sup> He was thus peculiarly knowledgeable about the whole question as well as disposed to view the states' rights position sympathetically. It is especially significant, then, that he too rejected it in favor of a broad construction of the treaty power.

431. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 57-58 (1825). Rawle nevertheless affirmed that treaties are subject to the Constitution "from which alone the power proceeds." The only example of an unconstitutional treaty that he cited was "an engagement to cede a part of the territory of the United States." *Id.* at 66. He did spend a good deal of effort criticizing the position of the House during the Jay Treaty debate that it had discretion to refuse to carry treaty stipulations into effect. *See id.* at 60-67. "The representation held out by our constitution to foreign powers, was that the president with the advice and consent of the senate, could bind the nation in all legitimate compacts: but if pre-existent acts, contrary to the treaty, could only be removed by congress, this representation would be fallacious." *Id.* at 60-61. Professor Bradley cites Rawle for the proposition that the treaty power is limited. *See Bradley, supra* note 2, at 416.

William Duer's discussion of the treaty power in relevant part was largely taken from Rawle and, to a lesser extent, from Story. *See WILLIAM ALEXANDER DUER, COURSE OF LECTURES ON THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES* 227-35 (Boston, Little, Brown & Co. 2d ed. 1856). With nuances, he concurs in their views. Chancellor Kent, the great federalist jurist, was the least explicit on the scope of the treaty power, but he too is probably best read as affirming the nationalist view. *See* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW \*284-87. Citing the special procedural limitations on the treaty power in Holland arising from its federal structure, he observed that in the end they led to a breach of the Constitution: "The history of Holland shows the danger and folly of placing too much limitation on the exercise of the treaty-making power. . . . So feeble are mere limitations upon paper — mere parchment barriers, when standing in opposition to the strong force of public exigency." 1 *id.* at \*285. As to the scope of the treaty power under the Constitution, he merely cited Story. *See* 1 *id.* at \*287 n.a. Consistent with his active advocacy of the Jay Treaty, however, he had harsh words for the House's claim to discretion in implementing treaties. The House Jay Treaty resolution "cannot be mentioned at this day, without equal regret and astonishment . . ." 1 *id.* at \*286.

Professor Bradley appears to cite both Rawle and Duer in support of the states' rights view. *See Bradley, supra* note 2, at 416-17. What possible basis there might be for this construction of their writings escapes me.

432. Clyde N. Wilson, *Foreword* to ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES: WITH SELECTED WRITINGS (1999).

433. *See* *Hunter v. Fairfax*, Apr. 22, 1794, in St. George Tucker, Notes on Cases in the General Court, District Court, and Court of Appeals in Virginia, 1786-1811, Tucker-Coleman Papers, ViW, *rev'd* *Hunter v. Fairfax's Devisee*, 15 Va. (1 Munf.) 218 (1810), *rev'd* *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813). For discussion of Tucker's ruling in the lower court, see *supra* notes 389, 393 and accompanying text.

Tucker's extensive commentaries on the Constitution, published in 1803 when the treaty power controversies were still smoldering, leave no doubt about his view.<sup>434</sup> After referring to international law for the definition of treaties, he observed:

[T]he most usual [treaties] relate to, or in their operation may affect, the sovereignty of the state; the unity of its parts, it's territory, or other property; it's commerce with foreign nations, and *vice versa*; the mutual privileges and immunities of the citizens, or subjects of the contracting powers, or the mutual aid of the contracting nations, in case of any attack, or hostility, from any other quarter. . . . In our constitution, there is no restriction as to the subjects of treaties, unless perhaps the guarantee of a republican form of government, and of protection from invasion, contained in the fourth article, may be construed to impose such a restriction, in behalf of the several states, against the dismemberment of the federal republic.<sup>435</sup>

This affirmation is all the more striking, moreover, because Tucker was otherwise highly critical of the treaty power. Adopting the critiques that Republicans had articulated during the Jay Treaty debate, he argued at length in favor of amending the treaty power, and he likewise strongly supported the House's position during the Jay Treaty debate.<sup>436</sup> Even more significantly, he undertook an extended analysis of Article VI of the Treaty of Peace and Article 9 of the Jay Treaty. While broadly construing both, he at the same time explicitly upheld their constitutionality under the Supremacy Clause: "By the adoption of the constitution of the United States [the Treaty of Peace] became a part of the supreme law of the land, and as such paramount to the acts of the state legislature."<sup>437</sup> Nor did this constitutional view come without cost to his political preferences. In the initial storm after the Jay Treaty was published in 1795, he too had written a lengthy essay attacking the treaty.<sup>438</sup> While arguing that the treaty was unconstitu-

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434. See TUCKER, *supra* note 52. Tucker's version of Blackstone's *Commentaries* filled five volumes and included extensive appendices giving his own commentaries on the Constitution and laws of the United States and Virginia.

435. 1 TUCKER, *supra* note 52, at 332-33.

436. See *id.* at 334-38 (criticizing the interaction between the treaty and impeachment powers and declaring them "the most defective and unsound, of any part of the fabric"); *id.* at 338-39 (criticizing the "extraordinary" exclusion of the House from the treaty-making process); *id.* at 339-40 (arguing in favor of the House resolution asserting the House's discretion in implementing treaty stipulations on subjects within congressional powers).

437. 3 TUCKER, *supra* note 52, at 61; see also *id.* at 62-65 (construing Article VI of the Treaty of Peace and Article 9 of the Jay Treaty). Much of Judge Roane's lengthy opinion in *Hunter* is an effort to address the elaborate and learned arguments that Tucker made in his opinion in the lower court and in his commentaries. See *Hunter*, 15 Va. (1 Munf.) at 616. No doubt Roane was particularly frustrated by having to defend his views against a fellow Republican and noted jurist. See *id.*

438. See ST. GEORGE TUCKER, REMARKS ON THE TREATY OF AMITY, NAVIGATION, AND COMMERCE, CONCLUDED BETWEEN LORD GRENVILLE AND MR. JAY, ON THE PART



tional in a variety of respects, when he came to Article 9, he declined to endorse the constitutional claims of Cato, Decius, Dallas, and others, restricting himself instead to a lengthy and harsh critique of the Article on policy grounds.<sup>439</sup>

## 2. *Treaty Power, Slavery, and Antebellum States' Rights Dogmas*

As with many other momentous constitutional questions, the scope of the treaty power quickly became caught up in the great antebellum debates over strict versus broad constructionism, states' rights versus nationalism, slavery versus freedom. Indeed, after the Missouri Compromise in 1819, the entanglement of the treaty power with the slavery question became the first flashpoint in the brewing struggle between North and South, providing the opening act in the famous Nullification drama of the late 1820s and early 1830s. For Southern strict constructionists, it was nothing short of a sacred postulate that the whole question of slavery was beyond the delegated powers of Congress. Could a treaty nevertheless affect a slave state's regulations of its slave population? Was there a fatal loophole in the Constitution through which the whole economic, social, and political structure of Southern society could thus be brought to its knees? In the developing Southern states' rights jurisprudence, there was only one possible answer.

That affirming the states' rights view meant disregarding the precedents of the Marshall court, and even the many treaties that were necessarily premised on the nationalist view, was not too great a barrier. There was nothing special in this context about challenging the great existing nationalist precedents or even the practical construction given to the Constitution during the first generation. They were under attack whenever their possible, or even their imagined, implications

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OF GREAT BRITAIN AND THE UNITED STATES, RESPECTIVELY (1796) (written under the pseudonym "Columbus").

439. See *id.* at 13-14 (attacking the constitutionality of the appointment of commissioners to decide on violations of Article IV of the Treaty of Peace regarding impediments to the collection of debts as in violation of Article III and the requirement of a jury trial); *id.* at 15-17 (broadly construing and sharply attacking Article 9 as subverting "the wholesome maxims of the common law," as allowing a dangerous British influence, as lacking in reciprocity, and as threatening an ultimate return to British rule, but not mentioning any doubt as to its constitutionality); *id.* (arguing that the commercial stipulations in the treaty violate the rights of the House). In his concluding *riposte*, he again severely attacked Article 9 and then observed that the treaty

is subversive of the constitution of the United States; because it establishes a tribunal incompatible with the constitution, and assigns to it jurisdiction in cases expressly vested by the constitution in the judicial courts of the United States; and because the decisions of this tribunal are paramount to the judgments of the constitutional courts; and because it tends to wrest from the *whole body of congress* its constitutional powers, and to transfer the same to a part of that body only; or to subject the measures of *one of the component parts of congress* to the absolute controul of the other two.

*Id.*

could pose a threat to slavery. Thus, Charles Warren, with perhaps only slight exaggeration, could rightly observe about the great Commerce Clause controversies beginning with *Gibbons v. Ogden*: “the long-continued controversy as to whether Congress had exclusive or concurrent jurisdiction over commerce was not a conflict between theories of government, or between Nationalism and State-Rights, or between differing legal construction of the Constitution, but was simply the naked issue of State or Federal control of slavery.”<sup>440</sup> All the more so in the case of the treaty power.

The full significance of the potential constitutional problem became evident almost immediately. In the wake of the Denmark Vesey conspiracy in Charleston in 1822, South Carolina slave society found itself in a panic. The successful Haitian slave revolts of the turn of the century in “St. Domingo” were an ever-present source of worry, and Vesey was a free black man who had hailed from the West Indies. The problem, South Carolinians inferred, was that free blacks from the North and from abroad were stirring up the slave population with abolitionist ideas. It was essential to the safety of South Carolina — essential, that is, to preventing a repetition of the wholesale slaughter of slave owners and their families that had occurred in Haiti — that any further contact between free blacks and slaves be entirely cut off.<sup>441</sup>

In order to alleviate this “threat,” South Carolina promulgated draconian new laws against free blacks. Among these was the so-called Negro Seamen Act of December 1822.<sup>442</sup> It provided that when a ship employing free blacks called at a South Carolina port, whether coming from an American or a foreign port, the free blacks were to be arrested immediately and kept in jail until the ship was ready to depart. At that point, the captain of the ship was obligated to carry the jailed free blacks back to the ship and pay the expenses of their deten-

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440. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 627-28 (1935).

441. For accounts of the Vesey affair and the reaction in South Carolina, see, e.g., WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR, THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816-1836*, at 53-61, 108-12 (1965); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 128-32 (1977). Vesey, a free black, allegedly had planned an elaborate slave insurrection in Charleston, intending to slaughter slave owners and then escape to Haiti. The “plot” was foiled before the uprising began.

442. See Act of Dec. 21, 1822, ch. 3, § 3, 1822-23 S.C. Acts & Resolutions 11, 12. The Seamen Act was frequently amended, alternately tightening and loosening its provisions. Similar laws were passed in other Southern states. For citations, see Gerald L. Neuman, *The Lost Century of American Immigration (1776-1875)*, 93 COLUM. L. REV. 1833, 1874 nn.260-61. I refer to these laws collectively as the “Negro Seamen Acts” or “Seamen Acts.”

tion. If the captain failed to do so, the free black mariners were to be "taken as absolute slaves, and sold."<sup>443</sup>

It is hardly surprising that the measure was greeted with a storm of protest. The Northern states, whose black mariners were hauled off their ships and placed into Charleston jails, were vociferous in their condemnation of the statute on constitutional grounds.<sup>444</sup> In the decade following its adoption, however, the sharpest controversy was not with the North, but with the British, who claimed that the treatment thus accorded their free black mariners violated the Commercial Convention of 1815.<sup>445</sup> For Southern states' rights advocates, the issue was thus drawn: since the Negro Seamen Act was, broadly speaking, a regulation of slavery (or at least was, in their view, essential to preserving the slave system), it was ipso facto beyond congressional authority; it must, therefore, be beyond the treaty power of the President and Senate as well.

Given the delicate — or, rather, explosive — character of federal-state relations, no solution to this festering conflict was in the offing. As a result, the matter was left in a state of uneasy, and portentous, stalemate; relations with the British were seriously strained.<sup>446</sup> Not that the federal government was slow in asserting the supremacy of

443. See Negro Seamen Act § 3, 1822-23 S.C. Acts & Resolutions at 12. A captain failing to carry the free blacks back to ship and pay their upkeep was also guilty of a criminal offense. The best accounts of the Negro Seamen Act controversy are in FREEHLING, *supra* note 441, at 108-16; WIECEK, *supra* note 441, at 132-40; Philip M. Hamer, *British Consuls and the Negro Seamen Acts, 1850-1860*, 1 J. S. HIST. 138 (1935) [hereinafter Hamer, *British Consuls*]; and Philip M. Hamer, *Great Britain, the United States, and the Negro Seamen Acts, 1822-1848*, 1 J. S. HIST. 3 (1935) [hereinafter Hamer, *Negro Seamen Acts*]. There is an excellent Ph.D. dissertation on the subject. See Alan F. January, *The First Nullification: The Negro Seamen Acts Controversy in South Carolina, 1822-1860* (1976) (unpublished Ph.D. dissertation (on file with author)).

444. The Northern states claimed that the Act violated the Constitution in two respects. First, it interfered with Congress's power over commerce. Second, it violated the privileges and immunities of their free black citizens. See, e.g., HOUSE OF REPRESENTATIVES, FREE COLORED SEAMEN — MAJORITY AND MINORITY REPORTS, H.R. REP. NO. 27-80, at 2-7 (1843) (3d Sess.) [hereinafter H.R. REP. NO. 27-80] (arguing the unconstitutionality of the Seamen Act).

445. See Convention to Regulate Commerce, July 3, 1815, U.S.-Gr. Brit., in 2 TREATIES, *supra* note 74, at 595. The first article provided:

There shall be between the Territories of the United States of America and all the Territories of His Britannick Majesty in Europe a reciprocal liberty of Commerce. The Inhabitants of the two Countries shall have liberty freely and securely to come with their ships and cargoes to all such places Ports and Rivers in the Territories aforesaid to which other Foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said Territories respectively, also to hire and occupy Houses and warehouses for the purposes of their commerce, and generally the Merchants and Traders of each Nation respectively shall enjoy the most complete protection and security for their Commerce but subject always to the Laws and Statutes of the two countries respectively.

*Id.* at 595-96.

446. Hamer is particularly effective in bringing out the strains and consequences for United States-British relations. See Hamer, *British Consuls*, *supra* note 443, *passim*; Hamer, *Negro Seamen Acts*, *supra* note 443, *passim*.

federal authority and the treaty. Despite intense diplomatic protests, active federal efforts, and a highly publicized federal circuit court decision condemning the statute, South Carolina doggedly persisted in its policy, unflinchingly claiming justification in “the law of self-preservation.” Later, it was joined by other Southern states which enacted similar laws, and challenges were met by increasingly hysterical rhetoric and secessionist threats.<sup>447</sup> Flatly disregarding the mounting protests, South Carolina thus successfully “nullified” federal authority in this area even as it retreated in the face of threatened federal military intervention in the “Nullification” controversy over the federal tariff.<sup>448</sup> In the end, there proved no way to reach a definitive settlement of the conflict other than to await the outcome of the Civil War.

It is difficult to overestimate the impact of the Seamen Act controversy on the treaty power debate during the antebellum period and beyond. If single incidents sometimes profoundly shape the character of constitutional debates for decades to come, the Seamen Acts are an exemplary case in point. The positions staked out in the initial battles echoed in public debates throughout the pre-Civil War period, not only over the Acts themselves but over a myriad of treaty power questions. Though the constitutional issue remained sharply contested throughout, the position staked out by states’ rights activists ultimately found its way into dicta in the opinions of some of the most states’ rights-oriented Justices of the Taney Court. Indeed, the ambiguous figure of Roger Taney — with his strategy of appeasement and concession — assumed a pivotal position on the states’ rights side, both in his opinions as President Jackson’s Attorney General and later as Chief Justice. Of the relatively few authorities supporting the states’ rights view in American history, these dicta undoubtedly had the most lasting impact, surviving the immediate crisis which provoked them and necessitating a further effort after the end of the Civil War to return to the status quo ex ante of the first generation. Although the treaty power issue, of course, had wider significance than its implications for the slavery debate, just below the surface of the states’ rights

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447. See, e.g., FREEHLING, *supra* note 441, at 113-15; WIECEK, *supra* note 441, at 132-40; Hamer, *Negro Seamen Acts*, *supra* note 443, *passim*; January, *supra* note 443, at Ch. 4, 5, 6, 7.

448. See FREEHLING, *supra* note 441, at 115 (describing the close relationship between the Negro Seamen Act controversy and Nullification); Donald G. Morgan, *Justice William Johnson on the Treaty-Making Power*, 22 GEO. WASH. L. REV. 187, 200 (1953). According to Freehling,

In 1823 South Carolinians relied on the reserved rights of the states to nullify a federal treaty which they judged interfered with internal safety. In 1832 South Carolinians used the same reserved rights to nullify a federal law which they judged unconstitutional. The Negro Seamen Controversy, in short, served low country gentlemen as a powerful lesson on the necessity for adopting strict-construction principles if the federal government was to be prevented from touching the slavery issue.

FREEHLING, *supra* note 441, at 115.

arguments uniformly lay the Negro Seamen Acts and the unavoidable and overriding question of slavery.

South Carolina's passage of the Negro Seamen Act prompted immediate diplomatic protests from the British government. Initially, though, Secretary of State John Quincy Adams seemed to be successful in quelling the problem by convincing the South Carolinians to let the statute sleep.<sup>449</sup> Soon, however, leading members of the South Carolina slaveholding gentry formed the South Carolina Association for the express purpose of ensuring strict enforcement of the Black Codes. The Association was to become a permanent fixture of South Carolina society and an important source of radical pro-slavery, states' rights activism throughout the antebellum period.<sup>450</sup> One of its first and most important projects was to reverse the lax enforcement of the Seamen Act, and its first victim was Henry Elkison, a British seaman from Jamaica who was seized when his ship docked in Charleston.<sup>451</sup> This time, however, the British not only protested, but also sought a writ of habeas corpus on Elkison's behalf in the federal circuit court in Charleston. Fortuitously, Supreme Court Justice William Johnson, a Jefferson appointee and South Carolina native, was riding circuit and available to hear the case.<sup>452</sup>

It was immediately evident that the case would be hotly contested and have wide significance. Instead of defending itself, the state permitted two lawyers for the South Carolina Association, Benjamin Hunt and Isaac Holmes, to handle the matter.<sup>453</sup> Elkison argued that the statute was unconstitutional on two grounds: that it interfered with Congress's exclusive right to regulate foreign commerce, and that it was in violation of Article I of the 1815 Convention, which guaranteed a reciprocal liberty of commerce to citizens of each nation.<sup>454</sup> In response, Hunt and Holmes, in an argument bristling with secessionist undertones, sought to develop a states' rights jurisprudence capable of shielding slavery from federal challenge.<sup>455</sup> As they formulated it, the

449. See, e.g., *Elkison v. Deliesseline*, 8 F. Cas. 493, 494 (C.C.D.S.C. 1823) (No. 4,366); H.R. REP. NO. 27-80, *supra* note 444, at 10-11 (reprinting diplomatic notes between Secretary of State Adams and British Minister Canning); Hamer, *Negro Seamen Acts*, *supra* note 443, at 3-4.

450. See FREEHLING, *supra* note 441, at 113; WIECEK, *supra* note 441, at 133; January, *supra* note 443, at 153-58.

451. See FREEHLING, *supra* note 441, at 113; January, *supra* note 443, at 156-58.

452. See *Elkison*, 8 F. Cas. at 493-94.

453. See *id.* at 494; January, *supra* note 443, at 159.

454. See *Elkison*, 8 F. Cas. at 493-96; *supra* note 445.

455. For a description of the arguments of Hunt and Holmes, see, for example, Morgan, *supra* note 448, at 191-92 & n.11, 202; January, *supra* note 443, at 159-61; see also *Elkison*, 8 F. Cas. at 494. Hunt's argument was published as a pamphlet and widely circulated. See THE ARGUMENT OF BENJ. FANEUIL HUNT, IN THE CASE OF THE ARREST OF THE PERSON CLAIMING TO BE A BRITISH SEAMAN, UNDER THE 3D SECTION OF THE STATE ACT OF DEC.

question was not whether the federal commerce and treaty powers logically extended to the regulation of seamen aboard foreign ships trading in American ports. Rather, the starting point was the law of nations and the inherent and inalienable right of a sovereign state to protect its vital interests. South Carolina, they claimed, was at the time of the federal compact a sovereign state and, as such, necessarily retained a paramount right to enact laws to protect against the spread of moral contagion among its slave population. The Negro Seamen Act was simply a police regulation founded in the law of self-preservation and was therefore exclusively within the state's authority. Only the state could judge its necessity.<sup>456</sup> In any case, moreover, the law did not violate the Convention of 1815, but if it did, "it would not be obligatory upon the State, inasmuch as the treaty making power can make no stipulation which shall impair the rights, which by the constitution are reserved 'to the States respectively, or to the people.'" <sup>457</sup> Rather, the treaty power "is but a mode for exercising those powers, which are expressly delegated by the States, or which are necessary to the perfect exercise of those powers."<sup>458</sup>

Justice Johnson would have none of it. As far as he was concerned, the unconstitutionality of the Act was so clear that "it will not bear argument."<sup>459</sup> The Act "leads to a dissolution of the Union, and implies a direct attack upon the sovereignty of the United States."<sup>460</sup> The arguments of Hunt and Holmes, moreover, would render the Union, like the old Confederation, "a mere rope of sand," with federal laws subject to a discretionary authority in the states as to how far they would be observed.<sup>461</sup> Justice Johnson was particularly shocked by Holmes's concluding argument, in which he had declared "that, if a dissolution of the Union must be the alternative, he was ready to meet it."<sup>462</sup> On the other hand, Justice Johnson was entirely in agreement with Elkison's constitutional claims. Congress's power over foreign commerce was by its nature necessarily exclusive, and the Act accordingly unconstitutionally ventured beyond the area of state

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1822, IN RELATION TO NEGROES, &C. BEFORE THE HON. JUDGE JOHNSON, CIRCUIT JUDGE OF THE UNITED STATES, FOR 6TH CIRCUIT (1823) [hereinafter ARGUMENT].

456. See *Elkison*, 8 F. Cas. at 494; January, *supra* note 443, at 159-61.

457. Morgan, *supra* note 448, at 192 n.11 (quoting ARGUMENT, *supra* note 455 (quoting U.S. CONST. amend. X)).

458. Morgan, *supra* note 448, at 202 (quoting ARGUMENT, *supra* note 455, at 16).

459. *Elkison*, 8 F. Cas. at 494.

460. *Id.*

461. *Id.* at 496. Is this not, he asked, "asserting the right in each state to throw off the federal constitution at its will and pleasure? If it can be done as to any particular article it may be done as to all." *Id.*

462. *Id.* at 494.

authority into the realm assigned to Congress.<sup>463</sup> “But,” he then added, “the case does not rest here.” Because the Act violated the commercial convention with the British, “[i]n order to sustain this law, the state must also possess a power paramount to the treaty-making power of the United States, expressly declared to be a part of the supreme legislative power of the land.”<sup>464</sup> Thus invoking the nationalist conception of the treaty power, he held that the Act was unconstitutional for this reason as well.<sup>465</sup>

Johnson’s opinion, delivered to a packed courtroom, unleashed a raging torrent of attack. Press coverage was national, but the fevered pitch reached in South Carolina was unmatched anywhere else.<sup>466</sup> Immediately, a barrage of letters began to appear in the South Carolina newspapers harshly attacking both Justice Johnson and the opinion.<sup>467</sup> The most important — a series of thirteen essays — were co-authored by Isaac Holmes and Robert Turnbull under the signa-

463. *See id.* at 495. The question of whether the commerce power is exclusive or concurrent, of course, was one of the great constitutional issues of the day. If it was indeed exclusive, its exclusivity only heightened the importance of determining what fell within the powers of Congress and what was reserved to the states.

464. *Id.*

465. *See id.* To be sure, there was an ambiguity in Johnson’s opinion. He never explicitly stated that the treaty would be valid irrespective of whether the subject matter fell within Congress’s power over foreign commerce. In context, however, the treaty power argument appears as an independent and separate grounds for the invalidity of South Carolina’s law, not dependent on the scope of Congress’s commerce authority. Johnson’s later writings make this point undeniable. *See infra* notes 478-489 and accompanying text. For his role in the Fairfax estate litigation, *see supra* notes 405-406 and accompanying text.

Ironically, after declaring the law invalid on the merits, Johnson went on to hold that he had no authority to issue a writ of habeas corpus against state officials. *See Elkison v. Deliesseline*, 8 F. Cas. 493, 496-97 C.C.D.S.C. 1823 (No. 4,366). He did consider the possibility that he could enter another now archaic writ but expressed doubt on that score as well. *See id.* at 497. Hence, much like Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), he was subject to attack for having issued a lengthy opinion on the merits in a case in which he was ultimately forced to acknowledge he had no jurisdiction.

466. *See Morgan, supra* note 448, at 193; January, *supra* note 443, at 166-79. *Niles’ Register* and the *National Intelligencer* both published Justice Johnson’s opinion. *See Important Judicial Decision, National Intelligencer*, Sept. 10, 1823; *Judge Johnson on the S Carolina Law*, NILES’ WEEKLY REGISTER, Sept. 6, 1823, at 12. *Niles’* declared that “his decision was such as every one must have expected that it would be: to wit, that the law is unconstitutional,” *Free People of Color*, NILES’ WEEKLY REGISTER, Aug. 23, 1823, at 392, and that its unconstitutionality is “so clear . . . that it cannot be doubted for a moment by any impartial mind.” *Judge Johnson on the S Carolina Law, supra*. John Quincy Adams reported that at a dinner in Boston, when the subject of Johnson’s decision arose, Robert Hayne, the Senator from South Carolina, “discovered so much excitement and temper that it became painful, and necessary to change the topic.” 6 JOHN QUINCY ADAMS, MEMOIRS 176 (Charles Francis Adams ed., 1874-77) [hereinafter 6 MEMOIRS]; *see also* Letter from John Marshall to Joseph Story (Sept. 26, 1823), in 9 MARSHALL PAPERS, *supra* note 387, at 338 (describing the excitement generated by the opinion).

467. *See Morgan, supra* note 448, at 193-96; January, *supra* note 443, at 166-77. Three of the four Charleston newspapers printed a constant stream of letters attacking the opinion. There were more than a dozen letter writers. *See* January, *supra* note 443, at 176-77.

ture Caroliniensis.<sup>468</sup> Holmes had been one of the lawyers in the case; Turnbull was a budding lawyer and polemicist who would shortly play an incendiary role in inciting the Nullification movement. Both were officers in the South Carolina Association.<sup>469</sup> The purpose of their essays was to undermine Johnson's credibility, develop a jurisprudence suitable for the task of protecting slavery, and, contra Justice Johnson, establish the constitutionality of the South Carolina law. Central to their project was establishing the principle that treaties could not touch on subjects that were beyond Congress's delegated authorities.

The Caroliniensis essays are a fascinating study in early antebellum jurisprudence. Caroliniensis proved far more sophisticated in building a theory of state sovereignty than in making more traditional constitutional arguments about the scope of the treaty power. The authors seemed to think that it was sufficient, in order to establish the states' rights view, simply to point out that treaties are subject to the Constitution and that thus, for example, a commercial treaty that gave preference to the ports of one state over those of another in violation of Article I, Section 9 would be unconstitutional.<sup>470</sup> From this, Caroliniensis then claimed:

These are cases in which treaties would be void, as infringing *express* articles or provisions in the constitution. But there might be stipulations in treaties which would be void, as interfering with the numerous undefined powers reserved to the states, such as a stipulation that a foreigner should carry on his trade free from all state taxes, or that he should be exempt from military or patrol duty, or that the estate of an intestate should be distributed according to the laws of the nation to which he belonged, and different from the law of the state in which he died . . . . A treaty then at last, as to its validity, is no more than an act of congress. Its validity depends upon its *constitutionality*. It must *not* interfere . . . with the powers . . . *reserved* to the states respectively. If it does, such a

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468. See Morgan, *supra* note 448, at 193-94; January, *supra* note 443, at 167-68. The Caroliniensis essays were printed in the Charleston *Mercury*. These letters with three additional letters, under the signature "Philo-Caroliniensis," and a fourth by "A Southerner" were published in pamphlet form. Even before they appeared, Johnson had arranged for the publication of his opinion as a pamphlet.

469. Morgan, *supra* note 448, at 193-94; January, *supra* note 443, at 167. On Turnbull's career as a leader in the Nullification crisis and as the firebrand author of the pamphlet that sparked the movement, see FREEHLING, *supra* note 441, at 126-28 (noting that the "man most responsible for creating the new militancy was Robert J. Turnbull, a lowcountry planter and pamphleteer, whose series of essays, *The Crisis*, made him a hero of the nullification campaign").

470. See *Caroliniensis No. 7*, Charleston *Mercury*, Aug. 28, 1823. A treaty establishing a defensive alliance would also be void because "it would give the President and Senate a power to *place* the United States in a *state of war*, which power by the constitution is *expressly and exclusively* vested in Congress." *Id.* Likewise, a treaty giving foreign subjects after a period of residence all the immunities of citizens would be void because "*Congress alone* can naturalize foreigners." *Id.*



treaty . . . is *ipso facto* void, and the states are no more bound by it than they can be bound by an act of the British Parliament.<sup>471</sup>

Caroliniensis then shifted to higher ground: The President and Senate, in exercising the treaty power, are “to be regarded in no other light, than as delegates from the several states, to negotiate with Great Britain, a treaty of commerce, for their benefit . . . with *an obligation* on the part of the states, *to ratify* any convention, to be made in virtue of their powers.”<sup>472</sup> As with any other agent, however, the President and Senate had no power to deprive their principal “of an *essential* right.”<sup>473</sup> Indeed, since self-preservation is the first law of nature,

a State never can surrender a right, the exercise of which is indispensable to its safety. It is a right inherent in every sovereign state; and it matters not whether a State be in league or confederacy with others . . . . To deny this right to South Carolina . . . is to take from her that *first*, that *unalienable attribute*, which is the foundation of all sovereignty.<sup>474</sup>

Moreover, it was absurd to claim that South Carolina, when it agreed to join the Union, could possibly have intended to relinquish “a point of such magnitude . . . as the regulation of a black population found within her limits.”<sup>475</sup>

471. *Id.* Even more incomprehensible, in Caroliniensis’s view, imagine a treaty which obligated the state to allow the importation of slaves which it wished to exclude:

Are we to be told that the treaty is the supreme law of the land, and that the treaty making power, being rightfully exercised, in permitting an unlimited liberty of commerce must be paramount? The idea is preposterous, that the sovereign state of South Carolina . . . should be precluded from [prohibiting such importation] again at any time when she shall conceive that the further increase of a black population, ready so large, shall endanger her domestic quiet.

*Caroliniensis No. 8, Charleston Mercury, Aug. 29, 1823.*

Caroliniensis recognized that his interpretation of the treaty power might sometimes cause collision or even war with a foreign state. Too bad, he declared:

Let the General Government extricate itself from a dilemma occasioned by its own oversight or folly in the best way it can, and let the State whose acknowledged right has been improperly surrendered, and upon which its peace and existence depend, continue to exercise it, as if nothing had happened. Let her in every such case adhere to the rights reserved to her by the constitution of the United States. Let her cling to them as the Ark of her salvation.

*Id.*

472. *Caroliniensis No. 9, Charleston Mercury, Sept. 3, 1823.*

473. *Id.*

474. *Id.* Here, Caroliniensis was developing a theory of state sovereignty that would become a staple of Southern states’ rights jurisprudence.

475. *Caroliniensis No. 10, Charleston Mercury, Sept. 6, 1823.* Treating all questions relating to slavery as necessarily exclusively within the realm of state authority was also a basic premise of Southern antebellum jurisprudential thinking.

The other most important of Johnson’s critics, Zeno, wrote six essays in the *Charleston Courier*. These were slightly less acrid in tone but made essentially the same points, including on the treaty power. See Morgan, *supra* note 448, at 195, 207; January, *supra* note 443, at 173-74.

An outraged Justice Johnson, unwilling to let the storm pass, instead threw himself into the heart of the tempest. With indefatigable energy, he sought to take on the entire battery of his critics.<sup>476</sup> The most important of his essays, signed Philonimus, were the nine that responded to Caroliniensis, in which, sensing the vulnerability of his antagonist's argument, he focused most heavily on the treaty power question.<sup>477</sup> His first move was to observe that the undoubtedly correct premise that treaties are subject to the Constitution did not move Caroliniensis "one inch . . . towards proving" that treaties may extend no farther than the legislative powers of Congress. "Does he adduce," he asked, "an argument proper to sustain this doctrine?"<sup>478</sup> Treaties, Philonimus then observed, are different from laws. "The one is the act of its own will, the other may be the act of another: may be imposed on it by the bayonets of a victor. . . . A treaty is an affair of negotiation and compromise, of mutual concession and sacrifice."<sup>479</sup> Furthermore, the text and structure of the Constitution rendered the matter entirely clear:

The legislative power of Congress is expressly limited to a few prominent objects. The Treaty-making power, in its nature admitted of no such specific definition; for it was subject to contingencies which we could not hope to control. The legislative power of the States was wholly retained, with the exception of the few subjects which they gave up to the general government. The Treaty-making power of the States was wholly relinquished, and vested in the general government. It exists therefore in the latter in the same extent that it existed in the former, restricted only, by the limitations prescribed in, or incident to the provisions of the constitution.<sup>480</sup>

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476. See Morgan, *supra* note 448, at 195-96; January, *supra* note 443, at 176-77. Exasperated, Johnson eventually gave up the effort to answer all of his critics.

477. On attributing the Philonimus essays to Johnson, see Morgan, *supra* note 448, at 196-97 n.32. They were likewise published in the *Mercury*.

478. *Philonimus No. 6, Charleston Mercury*, Sept. 11, 1823.

479. *Id.*

480. *Id.* His comments in these respects closely echoed both Hamilton's and Calhoun's analyses. See *supra* notes 42, 49, 291-294 and accompanying text. As to the applicable constitutional limits, he then observed:

There are powers which the United States Government cannot exercise at all; from which they are precluded by express words; such is that which imposes uniformity in commercial regulations; there are those which they cannot exercise because expressly delegated to the States, such is that of officering their militia; there are powers which they cannot exercise because restrained by conflicting stipulations such is that which guarantees the States a republican form of government. And there are powers which the President and Senate in their Treaty-making capacity cannot exercise because exclusively delegated to co-ordinate branches of the government, such is that of declaring war.

The reasons for this latitude of power, moreover, were obvious:

[W]hat have the States lost by the cession of this power? It never could have been exercised free of foreign control, and the necessity of acting as one people in their controversies with foreign powers was the great end for which they united themselves together. Mutual concessions became unavoidable. . . . What an absurdity would there not be in entailing on ourselves interminable war, from a groundless or unreasonable fear of jeopardizing the State rights! When the ship is in danger some ones goods must go over board to save the rest. . . . What a folly to vest in the President and Senate the Treaty-making power, yet bind them hand and foot in the exercise of it!<sup>481</sup>

But Philonimus left the best for last. If the treaty power was limited to the subjects of congressional legislation, then

we have been strangely inattentive to our rights for half a century past. For upon a cursory examination of treaties, I find no less than thirty-six instances in which the rights of the States have been invaded. Thirty-six instances, in which treaties have acted upon subjects within the acknowledged reservation of the States.<sup>482</sup>

He then proceeded to offer a partial, though extensive, survey of the precedents, climaxing in Articles IV, V, and VI of the Treaty of Peace and Article 9 of the Jay Treaty:

Who is ignorant that both the provisional and definitive articles of peace, which terminated the revolutionary war, expressly stipulated [for the payment of the debts, the recognition of certain interests in land, and for the cessation of further confiscations and prosecutions?] And who is ignorant that all these stipulations have been pleaded in bar and sustained in all our courts? Yet, what are they but laws imposed upon the States under the treaty making power? Imposed upon the exercise of power over subjects unquestionably reserved? If more modern instances are required, who has not heard of the case of Hunter and Fairfax? And of the treaty stipulation on which it arose.<sup>483</sup>

Philonimus thus claimed to have established that the nationalist view "is sanctioned by contemporaneous exposition, immemorial usage,

481. *Id.* Limits on the scope of the treaties, he then remarked, must be found in a different manner. "Those limits are, as they ought to be, adapted to the exercise of *diplomatic functions.*" *Id.*

482. *Philonimus No. 7, Charleston Mercury*, Sep't 13, 1823.

483. *Id.* Philonimus also cited Article XI of the French Treaty of 1778, which permitted French subjects to own real property; a number of provisions in the French Consular Convention of 1788; Article 14 of the Jay Treaty, which was virtually identical to Article I of the Commercial Convention of 1815, the provision in dispute; articles from the Prussian Treaties of 1785 and 1799, concerning the rights of aliens to inherit real property and affording them exemption from taxation; two provisions from the treaty with Spain of 1795 concerning the same and giving Spanish subjects an unlimited right to sue in courts of the two nations; and, finally, a provision on freedom of commerce in a treaty with Tunis of 1799. *See id.*

and the unrepining acquiescence of the States from the earliest period of our Union.”<sup>484</sup>

The controversy over the Seamen Act had a profound impact on Johnson.<sup>485</sup> Only seven months after rendering his decision in *Elkison*, and with the Seamen Act controversy clearly foremost in his mind, Johnson penned his famous separate opinion in *Gibbons v. Ogden*.<sup>486</sup> Outdoing even Marshall, he argued that the commerce power was exclusive and thus that any regulations which foreign nations are “subjected to in the ports of the Union” belong to the federal government.<sup>487</sup> Although there was no treaty issue, he also took the opportunity subtly to let his views be known. Thus, he gratuitously

484. *Id.* As to Carolinensis’s argument that the President and Senate were merely agents of the states and that treaties required the ratification of the states, he had nothing but contempt. It was simply disguised “revolutionary” doctrine:

But suppose we meet him on his own ground and admit the necessity of this ratification; how is it to be obtained? What the evidence of it? Is there any mode provided by the Constitution to obtain it? Any legal evidence of its having been executed? I know of none. . . . What time is to furnish the inference “of ratification?” How many States are to concur? Is each one to set at nought all the rest by its refusal? Or at liberty to withdraw its assent at any unlimited period? I will not offend against decorum. I will borrow the very language of Carolinensis: “it is monstrous, it is preposterous.”

*Id.*

Marshall followed the controversy closely from Virginia, reading both Johnson’s *Elkison* opinion and the ensuing debates. See Letter from John Marshall to Joseph Story, *supra* note 466, at 338-39. Although aware that the “subject is one of much feeling in the south,” he “could scarcely have supposed that [the opinion] would have excited so much irritation as it seems to have produced.” *Id.* at 338. “The decision has been considered as another act of judicial usurpation; but the sentiment has been avowed that if this be the constitution, it is better to break that instrument than submit to the principle. Reference has been made to the Massacres of St. Domingo . . .” *Id.* For Marshall, the controversy was just another indication that “the *exaltés* are about to roast the judicial department.” *Id.* Johnson had “hung himself on a democratic snag in a hedge composed entirely of thorny state rights in South Carolina.” *Id.* Marshall himself, moreover, had only recently faced a case involving a similar Virginia statute “in which I might have considered its constitutionality had I chosen to do so.” *Id.* Less intrepid than Johnson — “as I am not fond of butting against a wall in sport” — “I escaped on the construction of the act.” *Id.*

The case to which Marshall referred, *Wilson v. United States*, 30 F. Cas. 239 (C.C.D. Va. 1820), also involved free blacks employed upon a ship calling at a port in Virginia. Marshall struggled hard to construe the pertinent federal and state forfeiture and penal laws narrowly to avoid their application to these free black mariners. Although he thereby avoided any delicate constitutional issues, he nevertheless tipped his hand by making frequent reference to potentially conflicting treaty obligations and to Congress’s paramount authority over navigation. See *id.* at 245-46.

485. Johnson quickly sent off letters to Secretary of State Adams and to Jefferson, enclosing copies of his opinion. See 6 MEMOIRS, *supra* note 466, at 175; William Johnson to Thomas Jefferson, Aug. 11, 1823, in *Letters from Judge William Johnson to Thomas Jefferson*, S.C. HIST. MAG. 1 (1900); H.R. REP. 27-80, *supra* note 444, at 14-15 (reprinting correspondence with Adams).

486. 22 U.S. (9 Wheat.) 1, 222 (1824) (Johnson, J., dissenting).

487. *Gibbons*, 22 U.S. (9 Wheat.) at 227-29. For discussion of the relationship between the Seamen Act controversy and *Gibbons*, particularly Justice Johnson’s opinion, see, for example, DONALD G. MORGAN, JUSTICE WILLIAM JOHNSON, THE FIRST DISSENTER 202-06 (1954); 1 WARREN, *supra* note 440, at 623-25; and WIECEK, *supra* note 441, at 135-36.

observed that if a treaty were involved, the matter would require a different analysis, because the treaty power was a separate grant of authority not subsidiary to the commerce power: "I speak not here of the treaty making power, for that is not exercised under the grant [i.e., the commerce power] now under consideration. I confine my observation to *laws* properly so called."<sup>488</sup> After analyzing the scope of Congress's legislative authority, he then added: "The treaty making power undoubtedly goes further."<sup>489</sup>

Rational discussion, however, was hardly the currency of the day in South Carolina on any subject relating to slavery, and the state was utterly unwilling to defer to Johnson's opinion or to the vigorous efforts of Secretary of State Adams to have the law repealed. Adams and Monroe concurred in Johnson's view that the law was unconstitutional and actively sought ways of solving the crisis in relations with the British. Eventually, they decided to obtain a definitive resolution of the issue in the Supreme Court. At Monroe's suggestion, moreover, Adams submitted the case to Attorney General William Wirt for an official opinion, with Wirt quickly concurring in Johnson's views.<sup>490</sup> When the planned test case unexpectedly became moot, Monroe and Adams settled upon a new strategy: Adams drafted a letter to Governor Wilson of South Carolina, enclosing copies of the latest British diplomatic protests and of Wirt's opinion and expressing the hope of the President "that the inconvenience complained of will be remedied by the legislature of the state of South Carolina itself."<sup>491</sup>

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488. *Gibbons*, 22 U.S. (9 Wheat.) at 228. In a veiled reference to the Seamen Act, he noted that "[w]hatever regulations foreign commerce should be subjected to in the ports of the Union, the general government would be held responsible for them; and all other regulations, but those which Congress had imposed, would be regarded by foreign nations as trespasses and violations of national faith and comity." *Id.* at 228-29.

489. *Id.* at 230.

490. See, e.g., WIECEK, *supra* note 441, at 136-37; 6 MEMOIRS, *supra* note 466, at 279, 295, 297, 307, 376; Hamer, *Negro Seamen Act*, *supra* note 443, at 8-10. For Attorney General Wirt's opinion, see 1 Op. Att'y Gen. 659 (1824). Wirt concurred on both points. As to the treaty power, he observed that by "the national constitution, the power of making treaties with foreign nations is given to the general government; and the same constitution declares that all the treaties so made shall constitute a part of the law of the land." *Id.* at 661. Wirt's opinion is ambiguous in the same respect as Johnson's opinion in *Elkison*. See *supra* note 465. For the same reasons — especially given the high publicity battle over the opinion in the newspapers — it seems safe to assume that his treaty power argument was meant to be separate and independent from his commerce power argument. For Wirt's shifting positions on the treaty power issue, compare *supra* note 421 (describing Wirt's views at various times).

491. Letter from John Quincy Adams to the Governor of South Carolina (July 6, 1824), reprinted in 27 NILES' WEEKLY REGISTER, Dec. 25, 1824, at 263; January, *supra* note 443, at 210; see also WIECEK, *supra* note 441, at 137; Hamer, *Negro Seamen Act*, *supra* note 443, at 10. Johnson gave Adams little grounds for optimism, writing to give him an update on legislative efforts to strengthen the Act and the practical difficulties of bringing a case to the Supreme Court. See H.R. REP. NO. 27-80, *supra* note 444, at 14 (reprinting letter from Judge Johnson to Adams). He complained bitterly that:

although obliged to look on and see the Constitution of the United States trampled on by a set of men who, I sincerely believe, are as much influenced by the pleasure of bringing its

Unfortunately, the President soon got his answer, and with it, the inauguration of a fateful transformation in the relationship between the federal government and South Carolina that would ultimately lead to war. In submitting the correspondence to the legislature, the Governor announced that

[t]he crisis seems to have arrived. . . . The president of the United States, and his law adviser, so far from resisting the efforts of a foreign ministry, appear to be disposed, by an argument drawn from the overwhelming powers of the general government, to make us the passive instruments of a policy, at war, not only with our interests, but destructive also of our national existence.<sup>492</sup>

He then concluded with a call to arms: if the federal government would not listen to reason, “there would be more glory in forming a rampart with our bodies on the confines of our territory, than to be the victims of a successful rebellion, or the slaves of a great consolidated government.”<sup>493</sup>

Release of Adams’s correspondence created still another uproar in South Carolina. After extensive debate on the constitutionality of the Act, the state senate adopted a resolution which officially declared the new states’ rights jurisprudence:

That it is as much the duty of the state to guard against insubordination or insurrection among our colored population, or to control and regulate any cause which might excite or produce it, as to guard against any other evil, political or physical, which might assail us. This duty is paramount to all *laws*, all *treaties*, all *constitutions*. It arises from the supreme and permanent law of nature, the law of self-preservation; and will never, by this state, be renounced, compromised, controlled or participated with any power whatever.<sup>494</sup>

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functionaries into contempt, by exposing their impotence, as by any other consideration whatever, I feel it my duty to call the attention of the President to the subject, as one which may not be unworthy of an official remonstrance to the Executive of the State.

*Id.*

492. Message of Governor John L. Wilson of South Carolina, in STATE DOCUMENTS ON FEDERAL RELATIONS 205 (Herman V. Ames ed., 1970) [hereinafter STATE DOCUMENTS].

493. *Id.* at 206. For discussion of the reaction of the Governor and the state legislature, see WIECEK, *supra* note 441, at 138; January, *supra* note 443, at 201, 209-16; and Hamer, *Negro Seamen Act*, *supra* note 443, at 11, 12.

494. *Resolutions of the Senate of South Carolina*, Dec. 1824, in STATE DOCUMENTS, *supra* note 492, at 206. The House adopted a somewhat milder resolution, see *Resolutions of House of Representatives of South Carolina*, Dec. 1824, in STATE DOCUMENTS, *supra* note 492, at 207. Because the two houses never agreed on a substitute, the resolution died, and South Carolina simply failed to respond to Adams’s letter. For discussion, see January, *supra* note 443, at 211-16, and WIECEK, *supra* note 441, at 138.

Unsurprisingly, national reaction to South Carolina's defiance was critical,<sup>495</sup> but there the matter stood, with little immediate hope of reconciliation.

The Seamen Act remained an irritation in relations with the British and even spread to other Southern states, but it was not until late 1830 that the next major controversy erupted. Andrew Jackson was in the White House, and Edward Livingston, the youthful firebrand of the Jay Treaty controversy, was now serving as Secretary of State. Although still protesting loudly, the British had substantially weakened their position by themselves throwing doubt upon whether they believed that the Seamen Acts actually violated the 1815 Convention.<sup>496</sup> Jackson turned to Attorney General John Berrien for a second opinion.

Berrien, a Georgian, was a passionate supporter of the Seamen Acts and was fully inculcated in the by-then well-established strict constructionist school. Unsurprisingly, he explicitly rejected Wirt's 1824 opinion and the premises on which the previous two administrations had acted in the matter.<sup>497</sup> According to Berrien, the Seamen

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495. See January, *supra* note 443, at 216-18. *Niles' Register* printed the whole controversy, see 27 NILES' WEEKLY REGISTER, Dec. 18, 1824, at 242; NILES' WEEKLY REGISTER, Dec. 25, 1824, at 261-64, 292-93, and took the occasion to affirm the nationalist view, see 27 NILES' WEEKLY REGISTER, Dec. 18, 1824, at 242. See also Letter from Robert Y. Hayne to Charles C. Pinckney (Dec. 21, 1824), quoted in THEODORE D. JERVEY, ROBERT Y. HAYNE AND HIS TIMES 181-82 (1909) (noting, as Senator from South Carolina, that the actions of the legislature "are certainly not very acceptable here [Washington, D.C.]"). After assuming the presidency, Adams was asked by a South Carolina Senator to make some conciliatory remarks to calm the disquiet over the slavery question in the South. Still smarting from his confrontation with the state, Adams replied that:

the Legislature of South Carolina itself had put it out of my power to say anything soothing to the South on that subject — by persisting in a law which a Judge of the Supreme Court of the United States, himself a native and inhabitant of South Carolina, had declared to be in direct violation of the Constitution of the United States; which the Attorney General of the United States had declared to infringe the rights of foreign nations, against which the British Government had repeatedly remonstrated, and upon which we had promised them that the cause of complaint should be removed — a proviso which the obstinate adherence of the Government of South Carolina to their law had disenabled us from fulfilling. . . . In this state of things, for me to say anything gratifying to the feelings of the South Carolinians on this subject would be to abandon the ground taken by the Administration of Mr. Monroe, and disable us from taking hereafter measures concerning the law, which we may be compelled to take.

7 JOHN QUINCY ADAMS, MEMOIRS 57 (Charles Francis Adams ed., 1874-77).

496. See Hamer, *Negro Seamen Act*, *supra* note 443, at 12-15. The British Foreign Office obtained a legal opinion that upheld the Act under the treaty on the ground that the reference to "the laws and statutes of the two countries" in Article I exempted the Act from attack. *Id.* at 13. This seriously embarrassed the British in pressing the question diplomatically, although they nevertheless persisted.

497. See 2 Op. Att'y Gen. 426 (1831). In the course of his opinion, Berrien openly embraced the Act:

Acts were perfectly consistent with the treaty and with the laws of the United States.<sup>498</sup> Even if they were not, however, it was not the state laws that would have to bend but the treaties and laws of the United States. Berrien hardly discussed the treaty issue, simply assuming, like Caroliniensis, that if Congress's commerce powers did not extend to the subject, that a treaty could not.<sup>499</sup> He was more explicit about why the Acts should not be condemned on Commerce Clause grounds. Rejecting the Supreme Court's decisions in both *Gibbons* and *McCulloch v. Maryland*,<sup>500</sup> he substituted in place of Marshall's doctrine the now-standard states' rights view worked out by Calhoun and others: in the event a conflict arose between federal and state law from the exercise of one of Congress's delegated powers and of the state's police powers, federal law was only supreme if it was indispensable to the exercise of a delegated authority.<sup>501</sup> Otherwise, it could not be considered "necessary and proper" and, hence, was an unconstitutional invasion of state prerogatives.<sup>502</sup>

Livingston apparently disagreed, at least on the treaty question. Berrien had rendered his opinion on March 25, 1831. In a complete turnabout from his Jay Treaty days,<sup>503</sup> and notwithstanding Berrien's contrary opinion, Livingston, on June 13, explicitly endorsed the nationalist conception of the treaty power. Directing the American Minister to Russia to negotiate yet another treaty granting subjects of each nation the right to own real property in the territory of the other, Livingston observed:

By the Federal Constitution the several States retained all the attributes of sovereignty which were not granted to the general government. The

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It would be . . . revolting to withhold from [the Southern States] the power of protecting themselves as they may, against the introduction among their colored people of that moral contagion, compared with which physical pestilence, in the utmost imaginable extent of its horrors, would be light and trifling.

*Id.* at 437.

498. *See id.* at 441-442. As to the treaty, he too relied upon the language saving the laws and statutes of the two countries. *See id.* at 439.

499. *See id.* at 436 (arguing that it makes no difference if "such regulations be made by law or by treaties"). Professor Bradley, unsurprisingly, relies on Berrien's opinion as authority for the states' rights view. *See Bradley, supra* note 2, at 416.

500. 17 U.S. (4 Wheat.) 316 (1819).

501. *See 2 Op. Att'y Gen.* at 435-36 (rejecting *Gibbons* explicitly and *McCulloch* implicitly but unmistakably).

502. *See id.* at 435-46. For a particularly clear exposition of this approach in a famous speech by Calhoun, see John C. Calhoun, Speech on the Bill to Prohibit Deputy-Postmasters, in 2 WORKS OF CALHOUN, *supra* note 19, at 509-33.

503. *See supra* notes 253, 268-277, 309 and accompanying text. Recall that Livingston helped his brother Robert write the Cato essays and took a leading role in the House debate. Note also the similarity between the provision which Livingston affirms in the quotation above with Article 9 of the Jay Treaty, which likewise dealt with alien ownership of real property.



right of regulating successions in relation to the subject in question is not among those conceded rights; consequently it was reserved to, and is still vested in, the several States. But by the same Constitution it is provided that treaties made under the authority of the general government shall be the supreme law of the land, anything in the constitution or laws of a State to the contrary notwithstanding.<sup>504</sup>

Notwithstanding Berrien's opinion, Livingston continued to assure the British that the federal government would seek the repeal of the offending statute.<sup>505</sup> When shortly thereafter Berrien resigned, Livingston, in August, decided to obtain yet another opinion from Berrien's successor, perhaps hoping for a more congenial result. The new Attorney General was none other than Roger Taney.

In response, Taney did indeed write an elaborate opinion in which he upheld the constitutionality of the Seamen Act, explicitly endorsing the states' rights view of the treaty power.<sup>506</sup> Because the opinion was

504. 5 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 738, at 177 (1906). Even after resigning as Secretary of State and undertaking diplomatic duties in Europe, Livingston continued to press for treaties affording aliens rights in regard to real property — indeed, under the direction of President Jackson and his then Secretary of State Louis McLane. See Ralston Hayden, *The States' Rights Doctrine and the Treaty-Making Power*, 22 AM. HIST. REV. 566, 571-572 (1917).

505. See Hamer, *Negro Seamen Act*, *supra* note 443, at 15.

506. See Letter from Roger Taney, Attorney-General, to Edward Livingston, Secretary of State (May 28, 1832), in Carl B. Swisher Papers, MSS (Library of Congress) [hereinafter Letter from Taney to Livingston]; see also Letter from Roger Taney, Attorney-General, to Edward Livingston, Secretary of State (June 9, 1832), Dept. of State, Misc. Doc. (supplementing the May 28, 1832 opinion).

I think this right is reserved to the states & cannot be abrogated by the U. States either by legislation or by treaty. . . . The constitution it is true has declared that a Treaty shall be the supreme law. But in order to make it so the stipulations must be within the Treaty making power. A Treaty would be void . . . if it came in conflict with rights reserved to the states.

Letter from Taney to Livingston, *supra*, at 4-5. Taney's version of the states' rights view may differ in certain respects from its modern successor. Although Taney is difficult to pin down, it is not entirely clear that, like contemporary states' rights proponents, he would strictly limit the treaty power to those subjects falling within Congress's legislative authority. At times, he seems instead to postulate the existence of a category of subjects — e.g., those relating to slavery — which are absolutely "reserved" to the states from any exercise of federal power, whether it be under Congress's legislative authorities or the treaty power. This approach is consistent with antebellum states' rights jurisprudential thinking, but it leaves open the possibility that some exercises of the treaty power might be permissible notwithstanding that they go beyond Congress's legislative authorities. See *infra* note 519 (discussing Taney's opinion in *Holmes v. Jennison*, which may be consistent with this interpretation of his views). See also *supra* note 36. Whether the treaty power could ever touch on a subject beyond Congress's authority would depend upon how the category of subjects absolutely reserved to the states was defined — a central difficulty with strict constructionist theory. At times, Taney seems to suggest that the law of self-preservation may provide the key. See *infra* notes 519-520 and accompanying text (discussing Taney's opinion in the *Passenger Cases*, 48 U.S. 283, 464 (1849) (Taney, C.J., dissenting), in which he relies on the law of self-preservation). I do not mean to offer any particular interpretation of Taney's views, only to signal the complexities.

Livingston requested Taney's opinion in August 1831, but Taney delayed responding for almost a year. Apparently, the delay was due in part to the Nat Turner uprising in Virginia, which made the whole subject even more politically sensitive than before. Further diplo-

never published — probably because Livingston, and perhaps Jackson, disagreed — it fell into obscurity. It was only discovered by Taney's biographer, Carl Swisher, in the early 1930s and, despite its considerable historical significance, thereafter largely fell back into obscurity.<sup>507</sup> In the opinion, Taney makes a variety of claims of historical note. Among them are an argument prefiguring the view on the citizenship of free blacks that he would later adopt in *Dred Scott* and a remarkable denigration of the precedential weight of Supreme Court opinions, sounding strikingly like Lincoln's later justification for disregarding *Dred Scott*.<sup>508</sup> For present purposes, however, it is Taney's discussion of the treaty power which is of the greatest significance.

That discussion has a bearing on the present discussion in three crucial respects. First, although Taney explicitly adopted the states' rights view, he believed that it was his "duty to apprise" Livingston that the Supreme Court was "likely" to disagree:

While I express my own decided opinion that the power to guard themselves on this point is reserved to the states and cannot therefore be contested by the Treaty making power, conferred on the General government, I am not insensible of the conflicting opinions entertained on the true construction of the constitution of the U. States, upon questions which arise on the relative powers of the states & of the Federal govern-

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matic protests, however, necessitated a response. In the meantime, while holding the Seamen Act question in abeyance, Taney did cleverly take the opportunity to hint at where he stood on the issue in an earlier opinion upholding the right of a state to free a slave brought into its port from abroad. See 2 Op. Att'y Gen. 475, 476 (1831) (noting that it is "unnecessary now to inquire whether the United States could, by treaty, control the several States in the exercise of this power. I think they could not").

507. This development is partially the fault of Swisher. Although Swisher clearly recognized the historic importance of the document, and described it in some detail in his 1935 biography of Taney, see CARL BRENT SWISHER, ROGER B. TANEY 152 n.35 (1935), his citation was mistaken. He indicated that the document was in the "Attorney-General MSS" at the Library of Congress. *Id.* In response to my inquiries, a librarian at the Library of Congress informed me that not only was there no such file at the Library, but no such file existed in 1935 according to the old indexes. Ironically, after concerted effort, the librarian was able to find a copy of the document in the Carl Brent Swisher Papers. Where the original is filed remains a mystery. The few citations to the document in historical works that I have found repeat Swisher's error, and I presume, therefore, that they were relying on his account rather than on the document itself.

508. See Letter from Taney to Livingston, *supra* note 506, at 6-9, 16-18. As to the latter, Taney said:

I am not prepared to admit that a construction given to the constitution by the Supreme Court in deciding in any one or more cases fixes of itself irrevocably & permanently its construction in that particular & binds the states & the Legislative & executive branches of the General government, forever afterwards to conform to it & adopt it in every other case as the true reading of the instrument . . . I advert to [this issue] because it being my duty to state what I suppose may possibly be the decision of the Supreme Court on the law of S. Carolina it became necessary to explain why I do not advise the Executive to adopt in advance the construction which I think may be given by the court.

*Id.* at 16-18. In other words, although it is likely that the Court would declare the Seamen Act unconstitutional, the executive ought to persist in upholding the law *at least* until the Court rules.

ment. And I am aware that the Supreme Court of the U. States have maintained doctrines on this subject to which I cannot yield my assent. And differing as I do most respectfully from that high tribunal . . . I am aware that the opinion I have expressed may not be sanctioned by that Court. — Indeed judging from the past I think it highly probable that the Court will declare the law of S. Carolina null & void if contrary to the stipulations in the Treaty whenever the question comes before it.<sup>509</sup>

Thus, Taney himself, the single most important source of the states' rights view, confirmed what should already be more than obvious: the Supreme Court had already clearly endorsed the nationalist view. It was the states' rights view, then, that required a revision of settled constitutional doctrine.<sup>510</sup>

Second, Taney's rationale for adopting the states' rights view is vintage antebellum strict constructionism and reveals clearly the underlying premises of his position. For Taney, the question was whether South Carolina had surrendered to the federal government "the right to prohibit the introduction of free people of colour within her limits."<sup>511</sup> To answer that question, there was no need to inquire into the text or structure of the Constitution or the history of its interpretation, no need to examine the nature of the treaty — or, for that matter, the commerce — power or consider the historical background of the Supremacy Clause in the experience of the Confederation. The sacred premise of Southern jurisprudence would suffice:

In what article can the slave holding states who assisted in forming the constitution — and who afterwards adopted it be supposed to have contemplated the relinquishment of this power? The words ought to be clear & express or the implication necessary & unavoidable which should lead us to such a conclusion. For we have every reason to believe that if the proposition had been distinctly made to them, they would as soon have surrendered their own lives as parted from a power absolutely necessary for their own safety. . . . It is impossible to imagine they could

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509. *Id.* at 15-16.

510. For the record, I note that, strictly speaking, it is possible that the disagreement with the Supreme Court which Taney had in mind was not over the nationalist versus the states' rights views of the treaty power but only over the scope of Congress's legislative authorities, *e.g.*, the commerce power. Under this reading, Taney was (implicitly) claiming that the Supreme Court would declare the treaty void not because the Court would affirm the nationalist view but because it would likely hold that the subject of the treaty fell within Congress's powers over foreign commerce. If this is what Taney had in mind, however, his language was exceedingly indirect and misleading. The passage explicitly addresses the scope of the treaty power and nowhere mentions the commerce power. Moreover, throughout the opinion Taney treats the treaty power as a separate power delegated to the federal government. *See, e.g., id.* at 4-5 (noting that for a treaty to be valid it "must be within the Treaty making power"); *id.* at 10 (denying that the states intended to limit their power over all persons of African descent "by the grant of the Treaty making power or any other general power to the Federal government"); *id.* at 24 (same). In my view, therefore, the far more persuasive reading is as stated in the text.

511. *Id.* at 5.

have so intended. . . . The slave holding states could not have surrendered this power, without bringing upon themselves inevitably the evils of insurrection & rebellion among their slaves. . . . How can the states be supposed to have intended to surrender or limit their right of Legislation over this description of people by the general Terms in which they have been granted the power to regulate commerce and to make Treaties?<sup>512</sup>

Now is not the time for an inquiry into constitutional methodology. It should be obvious, however, that Taney's interpretive method is inconsistent not only with the great precedents of the Marshall Court but also with long-settled modes of interpretation recognized today.

Finally, and perhaps most significantly, Taney's opinion demonstrates how his endorsement of the states' rights view, and his much-cited dicta as Chief Justice, arose directly and immediately out of the crisis over the Negro Seamen Act and, thus, how the development of the states' rights view during this period was intimately intertwined with the whole question of slavery. As Carl Swisher put it, "Taney was attempting to mold legal doctrines, quite as much as to follow them." In the face of the Southern states' intense sensitivity on the slavery question, Taney "selected and interpreted historical facts and constitutional doctrines" to uphold their claims. "He was acting as a realist, though he had to conceal his realism behind the verbiage of law."<sup>513</sup> Surely, the entanglement between Taney's views and the imperatives of the sectional conflict over slavery says something important about the constitutional question and the status that ought to be accorded dicta from this period.

The connection between the Seamen Act and Taney's states' rights position are equally, though more subtly, evident in his (dissenting) opinion in the *Passenger Cases*<sup>514</sup> — the opinion most often cited in favor of the states' rights view.<sup>515</sup> At issue was the right of Massachusetts and New York, notwithstanding the commerce power, to impose head taxes on passengers arriving from foreign ports. In the immediate background, however, was the Seamen Act controversy. If the federal government could deny states the power to impose head taxes for purposes of protecting their citizens against vagrants and paupers, could they not also deny them the power to arrest free black mariners arriving in their ports? Sensitive to such an implication, Taney framed the issue as

whether, under the Constitution of the United States, the federal government has the power to compel the several States to receive, and suffer

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512. *Id.* at 6-9.

513. SWISHER, *supra* note 507, at 157.

514. 48 U.S. 283, 464 (1849) (Taney, C.J., dissenting). The Court was sharply divided, and numerous opinions were written.

515. *See, e.g.*, Bradley, *supra* note 2, at 414 & n.167.

to remain in association with its citizens, every person or class of persons whom it may be the policy or pleasure of the United States to admit.<sup>516</sup>

For if it does not, "then any treaty or law of Congress invading this right . . . would be an usurpation of power which this court could neither recognize or enforce."<sup>517</sup> Taney's answer was unequivocal: citing the law of self-preservation,<sup>518</sup> he declared that the power was necessarily reserved exclusively to the states.

If however, the treaty or act of Congress above referred to had attempted to compel the State to receive them . . . the question would not be on any conflicting regulations of commerce, but upon one far more important to the States, that is, the power of deciding who should or should not be permitted to reside among its citizens. . . . I cannot, believe that it was ever intended to vest in Congress, by the general words in relation to the regulation of commerce, this overwhelming power over the States. For if the treaty stipulation before referred to can receive the construction given to it in the argument, and has that commanding power claimed for it over the States, then the emancipated slaves of the West Indies have at this hour the absolute right to reside, hire houses, and traffic and trade throughout the Southern States, in spite of any State law to the contrary; inevitably producing the most serious discontent, and ultimately leading to the most painful consequences.<sup>519</sup>

516. *The Passenger Cases*, 48 U.S. at 465.

517. *Id.* at 466.

518. *See id.* at 470.

519. *Id.* at 473-74; *see also id.* at 467 (referring implicitly to the Seamen Act). The Seamen Act controversy was hovering behind a number of earlier Taney Court decisions as well. *See, e.g., The License Cases*, 46 U.S. 504 (1847); *Holmes v. Jennison*, 39 U.S. 540, 568-69 (1840) (Taney, C.J.); *New York v. Miln*, 36 U.S. 102 (1837); *see also* WIECEK, *supra* note 441, at 136 (noting how slavery was in the background of many of the Taney Court's decisions); 1 WARREN, *supra* note 440, at 621-28 (same); *In re Ah Fong*, 1 F. Cas. 213, 216-217 (C.C.D. Cal. 1874) (Field, J.) (arguing that "we cannot shut our eyes to the fact that much of what was formerly said upon the power of the state in this respect, grew out of the necessity which the southern states, in which the institution of slavery existed, felt of excluding free negroes from their limits. . . . But at this day no such power would be asserted . . . [a]nd the most serious consequences affecting the relations of the nation with other countries might, and undoubtedly would, follow from any attempt at its exercise"). In *Holmes*, Taney expressed a surprisingly expansive conception of the treaty power — as "designed to include all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty." 39 U.S. at 569. He added coyly: "which are consistent with the nature of our institutions, and the distribution of power between the general and state governments." *Id.* (emphasis added); *see also id.* at 614, 615, 618-20 (Baldwin, J.) (seeming implicitly to assert the states' rights view). In the *License Cases*, it was Justice Daniels, the Court's most ardent states' rights jurist, who gratuitously brought up the treaty power:

Every power delegated to the federal government must be expounded in coincidence with a perfect right in the States to all that they have not delegated, in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded to the general government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the constitution. Treaties, to be valid, must be made within the scope of the same powers; for there can be no "authority of the United States," save what is derived mediately or immediately, and regularly and legitimately, from the constitution. A treaty, no

In the following years, the Seamen Act issue continued to simmer and, on frequent occasion, to boil over. With time, the focus of controversy shifted to the dispute over the treatment of Northern mariners, although diplomatic controversy continued as well. The issue was repeatedly debated in Congress, provoking heated rhetoric but no forward movement.<sup>520</sup> Typical were Senator Archer's inflammatory remarks: citing the law of self-preservation, he declared that "[i]f you had a hundred provisions in the constitution of the United States in express terms prohibitory of such legislation," the Southern states would not abide. "No matter what might be the provisions of the constitution. . . . [w]e will endeavor to avoid such a form of plague as vis-

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more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State.

46 U.S. at 613; see Bradley, *supra* note 2, at 420-21.

Professor Bradley relies heavily on an earlier decision, *Mayor, Alderman and Inhabitants of New Orleans v. United States*, 35 U.S. 662, 736-37 (1836). See Bradley, *supra* note 2, at 419. The case does contain some sweeping, though ambiguous, dicta. Professor Bradley, however, misinterprets it as addressed to the *Missouri v. Holland* issue. On the contrary, the relevant portion of the complicated opinion in *New Orleans* deals with the so-called "equal footing" doctrine, under which all states entering the Union are to be considered as on an equal footing with the original thirteen members. The Court held that once Louisiana was admitted as a state, the United States could no longer exercise legislative jurisdiction over property located in the state — in that case in the city of New Orleans. In dicta, it noted that a treaty purporting to expand the jurisdiction of the national government in this respect would likewise be unconstitutional. See *id.* It would be unconstitutional, however, not because of a reserved powers subject matter limitation on the treaty power but because the equal footing doctrine constituted an affirmative prohibition. That this was the contemporaneous understanding of the decision, moreover, is demonstrated by the failure of any of the Justices in later cases to cite the decision in support of their dicta on the scope of the treaty power. Professor Bradley, though not the first, is one of the few who have understood it as affirming the reserved powers argument.

Some have cited *Prevost v. Greneaux*, 60 U.S. 1, 7 (1856), as supporting the states' rights view. See Bradley, *supra* note 2, at 419. The relevant dicta in *Prevost*, however, only denied the power of a treaty to override vested property rights. Cf. *Frederickson v. Louisiana*, 64 U.S. 445, 448 (1859) (disposing of a case involving a tax on the personal property of an alien on the ground that the treaty did not apply, but noting that it was argued that the treaty power "is incompetent to regulate testamentary dispositions or laws of inheritance of foreigners, in reference to property within the States" and that the "question is one of great magnitude").

520. For continued diplomatic wrangling, see, e.g., Hamer, *Negro Seamen Act*, *supra* note 443, at 17-27. For congressional debates, see January, *supra* note 443, at 284-95. Perhaps the most significant event in Congress was the preparation in 1843 of an elaborate report by the House Committee on Commerce in response to memorials from Massachusetts citizens complaining about the treatment of their free black mariners under the Acts. See H.R. REP. NO. 27-80, *supra* note 444. The majority declared the Acts unconstitutional as infringing the privileges and immunities of free black citizens (thus raising the *Dred Scott* issue), the commerce power, and numerous treaties of the United States. See *id.* at 3, 6. The report reprinted much of the diplomatic correspondence with the British, Judge Johnson's opinion in *Elkison*, and Attorney General Wirt's opinion. See *id.* at 7-36. Representative Rayner of North Carolina dissented and reprinted Attorney General Berrien's opinion. See *id.* at 37-58. On the treaty question, he said that he agreed "with most" of Berrien's views. *Id.* at 48. Nothing came of the report but further stalemate.

ited St. Domingo."<sup>521</sup> Therefore, he urged, the Northern states should let the subject pass.<sup>522</sup>

The resistance of the South, if anything, only stiffened as time passed. In response to further British protests, Secretary of State Buchanan told the British Minister that dissolution of the Union would be the result of any effort to enforce federal authority. Later, Webster, as Secretary of State, advised the British Minister that he believed the law was unconstitutional and that the Supreme Court would so hold if presented with the question. So did the United States District Attorney in Charleston, but he also claimed that "[i]n the present temper of the people here, the unconstitutionality of the law would not stagger them at all. They would continue to enforce it, even after the Supreme Court had declared it void."<sup>523</sup> When Massachusetts sent an agent to South Carolina to bring a court action challenging the constitutionality of the law, he was chased out of the state by a mob even before the legislature adopted a resolution directing the Governor to expel him as a "seditious" person "dangerous to their peace."<sup>524</sup> Thereafter, the legislature adopted a law imposing stiff criminal penalties on any person who, either on his

521. CONG. GLOBE, 28th Cong., 2d Sess. 379-80 (1845).

522. See *id.* at 380; see also *id.* at 381 (remarks of Sen. Archer) (providing further explanation of his remarks). Ironically, Isaac Holmes, the lawyer for the South Carolina Association in *Elkison*, and John Quincy Adams were now both in the House, and John Berrien was a Senator from Georgia. All of them were active participants in the debates, and calling upon the knowledge they had obtained in their previous positions, they simply continued the rancorous arguments of the past. See, e.g., CONG. GLOBE, 27th Cong., 2d Sess. 201 (1842) (colloquy between Reps. Adams and Holmes); CONG. GLOBE, 28th Cong., 1st Sess. 65-66 (1843) (colloquy between Reps. Adams and Holmes); CONG. GLOBE, 28th Cong., 2d Sess. 378, 383 (1845) (remarks of Sen. Berrien); CONG. GLOBE, 30th Cong., 2d Sess. 418 (1849) (remarks of Rep. Holmes); CONG. GLOBE, 31st Cong., 1st Sess. 1627 (1850) (remarks of Sen. Berrien). When Adams requested that the House obtain from the President all papers relative to the diplomatic controversy as well as Justice Johnson's opinion, Holmes fired back:

the gentlemen from Massachusetts was throwing a firebrand into the House which was to cause a conflagration that might endanger the Republic and not only so, but he was calling upon this Union to come in conflict with the States, to trample upon those rights which the States deemed most essential, and which they would not yield even if the gentleman from Massachusetts [Mr. Adams] should, like Samson, throw his giant strength round the pillars of the Constitution, and crush the whole Republic.

CONG. GLOBE, 27th Cong., 2d Sess. 201 (1842).

523. Hamer, *British Consuls*, *supra* note 443, at 157 (quoting diplomatic note); see also *id.* at 155, 157; Hamer, *Negro Seamen Act*, *supra* note 443, at 25. The British accordingly abandoned the idea of appealing to the Supreme Court. See Hamer, *British Consuls*, *supra* note 443, at 159.

524. See Hamer, *Negro Seamen Act*, *supra* note 443, at 22-23. For Massachusetts's complaints about this incident, which then became part of the mounting grievances of North against South, see, e.g., CONG. GLOBE, 31st Cong., 1st Sess. 1625-26 (1850) (remarks of Sen. Davis) (recounting the incident). After failing to find a South Carolina attorney willing to bring a challenge, Massachusetts had sent a respected emissary, Samuel Hoar, to South Carolina to make the necessary arrangements for a suit. It also sent an agent to Louisiana for the same purpose. He too was chased out of town under threat of violence. See WIECEK, *supra* note 441, at 140; Hamer, *Negro Seamen Act*, *supra* note 443, at 23.

own or on behalf of a foreign power, should seek "to disturb, counteract, or hinder the operation" of the Seamen Act. It also suspended the writ of habeas corpus for any free black imprisoned under the Seamen Act.<sup>525</sup>

Notwithstanding all the controversy, however, treaty practice more generally during the pre-Civil War period continued to reflect the nationalist conception of the treaty power. Beginning with the second Monroe administration, the treaty power experienced a second flowering, and many of the treaties concluded contained provisions trenching upon areas widely viewed at the time as within the reserved powers of the states.<sup>526</sup> For the most part, these sailed through the Senate, although toward the latter part of the period, the Senate, sometimes with the administration's support, apparently got cold feet.<sup>527</sup> Just as sharp debates rankled in Congress over the Seamen

525. Hamer, *Negro Seamen Act*, *supra* note 443, at 23-24 (quoting the South Carolina legislation).

526. See, e.g., CORWIN, *supra* note 62, at 134-42; NICHOLAS PENDLETON MITCHELL, *STATE INTERESTS IN AMERICAN TREATIES* (1936) (providing a comprehensive analysis of U.S. treaty practice and its relationship to the interests of the states); Davis, *supra* note 95, at 1224-26. Corwin nicely summarized the practice:

During this entire period, as earlier, treaties continued to assure for consuls their regular immunities from local jurisdiction, their immunity, when not citizens of the United States, from taxation except upon real estate and personal investments, their exemption from the duty of rendering testimony in court in person, the inviolability of their archives from any sort of judicial process whatsoever; further their right to assume jurisdiction over disputes arising between masters and sailors of vessels of their respective countries when such disputes did not involve the peace of the port; again their right to apply to the local authorities for assistance in securing the arrest and detention of deserters; and finally, frequently their right to intervene in the case of death of citizens or subjects of their respective countries, to make inventory of the property of the deceased and to take other steps looking to the safe transmission thereof to the rightful heirs. Treaties of the same period also assured aliens rights of sojourn, travel, residence, and trade, subject to the *ordinary laws* and on an equality with citizens . . . guaranteed them freedom of religion and rights of burial, and covenanted freedom of access to the courts of justice on an exact equality with citizens. They also assured aliens the most unqualified rights of acquiring, passing, willing, inheriting, and disposing of personal property, on an equality with citizens, and in the case of their inheriting real estate, where the local laws made alienage a bar to their succeeding, a reasonable term to dispose of such real estate to whom they chose; and in four instances the earlier type of treaty provision was recurred to and aliens were guaranteed the right of succession to real estate as well as personal estate, on an equality with citizens. It was also a period when a great number of extradition treaties were negotiated, covering progressively an ever wider range of offenses. . . . The Treaty of 1837 with Greece made what was potentially at least a most serious inroad upon the State quarantines, stipulating that any vessel arriving at a port of the United States from Greece, which was provided with certain documents, should not be, save in certain exceptional cases, subjected to other quarantine than such as might be necessary for the visit of the health officer of the port. Again, [a treaty with Peru of 1851 provided]:

The said citizens (of the two contracting power respectively) shall not be liable to imprisonment without formal commitment under a warrant signed by a legal authority . . . and they shall in all cases be brought before a magistrate, or other legal authority, for examination, within twenty-four hours after arrest . . . .

CORWIN, *supra* note 62, at 134-36.

527. This history is rendered in Hayden, *supra* note 504, at 567-77, 580-82 (1917). Both President Fillmore and Secretary of State Marcy expressed the view that treaty provisions



Acts, the Senate would occasionally refuse to approve or would modify provisions permitting aliens to own or inherit real property in the states. Most likely, friction in Congress over the Seamen Act brought the whole problem to mind, and some Senators suddenly recognized the implications of approving treaties of this kind.<sup>528</sup> Far more often, however, the Senate would simply approve similar or even identical provisions and others which were equally vulnerable on states' rights grounds.<sup>529</sup> In areas less sensitive than slavery, the imperatives of foreign policy consciously or unconsciously overcame any concerns about interfering with state prerogatives.<sup>530</sup>

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dealing with alien ownership of real property were within the reserved power of the states and thus beyond the treaty power. *See id.* at 575 (describing Fillmore's view); *id.* at 577 (describing Marcy's views). Neither Fillmore nor Marcy mentioned the several Supreme Court decisions affirming the constitutionality of treaties with stipulations of this kind — nor the large number of contrary precedents in past practice. It is noteworthy that later that year, Marcy also asserted the radical Republican view during the Jay Treaty debate that the treaty power does not extend to subjects within congressional competence and therefore, that, notwithstanding the many earlier precedents including in the Jay Treaty, a treaty stipulation concerning piracy would be unconstitutional. *See* 5 MOORE, *supra* note 504, § 736, at 169. Moreover, Attorney General Cushing made a point of denying the validity of Marcy's constitutional claims. *See infra* notes 532-533 and accompanying text.

528. *See* Hayden, *supra* note 504, at 567-77, 580-82. Hayden describes the Senate's remarkably inconsistent practice with regard to stipulations permitting aliens to hold or inherit real property in the states. *See id.* In his view, the Senate's rejection or modification of provisions of this kind on a few occasions demonstrates its acceptance of the states' rights view. *See id.* at 569-71. He discounts the significance of its approval on far more occasions of similar and sometimes even stronger provisions. *See id.* Hayden is no doubt correct that states' rights feelings lay behind the Senate's actions in at least some of the cases he describes. He is certainly wrong in implying, to the extent that he does, that the Senate was of one mind on the question. On the contrary, the very practice he cites demonstrates the divisions on the question, and the frequent approval of such stipulations suggests the continuing dominance in practice of the nationalist conception. Hayden also misses entirely the relationship between the Seamen Act controversy and the Senate's action on these treaties. It is more than likely that it was the sectional feeling generated by the continuing and acrid congressional debates — and a fleeting sense of urgency about retaining consistency — that explain the Senate's actions in the few cases when it resisted stipulations of this kind. The Court's decision in *Mager v. Grima*, 49 U.S. 490, 493-94 (1850) (holding, what had long been assumed, that the question of whether an alien could take real property by descent or devise was within the exclusive power of the states), might conceivably have added some fuel to the fire. Professor Bradley, of course, cites the few controversies over treaties on alien property rights as evidence in support of the dominance of the states' rights view. *See* Bradley, *supra* note 2, at 421.

529. *See* Hayden, *supra* note 504, at 567-69 (describing the forty-four treaties with stipulations concerning alien land ownership entered into between 1778 and 1860). There were several different types of treaties. Some gave aliens the same rights as citizens. Others required them, in states prohibiting aliens from owning or inheriting real property, to sell the property within a specified period of time, or a reasonable time, or within the time period specified by local law. *See id.*

530. *See supra* note 526 and accompanying text. From time to time, strict constructionists seized the opportunity to memorialize the states' rights view. Thus, in a 1845 report recommending against the annexation of Texas, Senator Archer of Virginia argued:

the treaty-making power can never have capacity of exertion unless in the cases in which its aid is invoked by some one of the expressed powers, to carry out the purpose, which, being of exterior relation, the powers of domestic sphere of operation would be unable for that

Nor was Southern opinion on the issue monolithic. Perhaps most significant, notwithstanding his pivotal role in developing the strict constructionist jurisprudence and his undoubted sympathy for the Seamen Act, Calhoun seems to have accepted the nationalist view of the treaty power.<sup>531</sup> Also significant, in 1857, Attorney General Caleb Cushing of Massachusetts rendered an elaborate and well-reasoned opinion affirming the nationalist view. According to Cushing:

The power, which the Constitution bestows on the President, with advice and consent of the Senate, to make treaties, is not only general in terms and without any express limitation, but it is accompanied with absolute prohibition of exercise of treaty-power by the States. That is, in the matter of foreign negotiation, the States have conferred the whole of their power, in other words, all the treaty-powers of sovereignty, on the United States. Thus, in the present case, if the power of negotiation be not in the United States, then it exists nowhere, and one great field of international relations, of negotiation, and of ordinary public and private interest, is closed up, as well against the United States as each and every one of the States. That is not a supposition to be accepted, unless it be forced upon us by considerations of overpowering cogency. Nay, it involves political impossibility. For, if one of the proper functions of sovereignty be thus utterly lost to us, then the people of the United States are but incompletely sovereign, — not sovereign, — nor in coequality of right with other admitted sovereignties of Europe and America.<sup>532</sup>

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reason to reach, without the aid of this power of exterior operation. The treaty-making power, under this construction, can never by any other than subsidiary — is never a power independent in its *vocation*, however, it is so in its name and structure.

S. REP. NO. 79, 28th Cong., 2d Sess. at 5 (1845). Archer relied on Jefferson's letter to Nicholas in connection with the Louisiana Purchase for authority. *See id.; supra* note 358 and accompanying text. Compare Senator Archer's impassioned — and nearly secessionist — remarks that same year in connection with a debate over the Seamen Act, which are quoted in the text above. *See supra* notes 521-522 and accompanying text.

531. *See supra* notes 42-49 and accompanying text (discussing Calhoun's view as expressed in the Disquisition and in a famous speech in the House); *see also* 5 MOORE, *supra* note 504, § 735, at 164 (quoting Calhoun, then Secretary of State, asserting that “[t]he treaty-making power has, indeed, been regarded to be so comprehensive as to embrace, with few exceptions, all questions that can possible arise between us and other nations, and which can only be adjusted by their mutual consent, whether the subject-matter be comprised among the delegated or the reserved powers”); Hayden, *supra* note 504, at 574 (quoting Calhoun, in connection with a treaty stipulation permitting aliens to acquire and dispose of real property to which the Senate had refused its consent, as asserting that the “President would have had no hesitation in ratifying the Convention as it stood”). It is indeed striking that Calhoun continued to affirm this view even in the midst of the Seamen Act controversy. Indeed, it is so surprising that I cannot refrain from expressing a doubt as to whether he might have expressed a contrary view at some other point. Hugh S. Legaré was another South Carolinian Secretary of State who likely endorsed the nationalist view. *See* January, *supra* note 443, at 214-15 (discussing Legaré's unpublished speech during an 1824 debate in the South Carolina legislature over the constitutionality of the Seamen Act, entitled *Elkison's Case*, but leaving ambiguous exactly what constitutional grounds Legaré endorsed).

532. 8 Op. Att'y Gen. 411 (1858). Secretary of State Marcy had asked Cushing for yet another opinion on the constitutionality of stipulations permitting aliens to inherit real property. In support of his opinion, Cushing also cited, *inter alia*, early practice under the Confederation, Article 9 of the Jay Treaty, the French Convention of 1800 (“as the most ex-

Cushing's opinion is particularly noteworthy, not only for the persuasiveness of argument, but because later, when the states' rights dogmas of the antebellum period were being discarded, it would be widely cited, among others, by the Supreme Court.<sup>533</sup>

Finally, the conclusion of the Seamen Act story provides a cautionary tale about the direction in which the states' rights view of the treaty power inevitably leads. The British finally grew frustrated with the federal government's acknowledged impotence in the face of the Act and turned instead to negotiating with the Southern states directly.<sup>534</sup> When it became known that the British Consul in Charleston had delivered formal diplomatic notes to the Governor of South Carolina, just as the state teetered on the verge of secession, an immediate nationwide furor was unleashed.<sup>535</sup> But what were the British

pressive of all precedents, it having passed through the hands, and received the approbation, of John Adams, John Marshall, Oliver Ellsworth, Thomas Jefferson, and James Madison," *id.* at 414), Calhoun, and the Supreme Court's decisions in *Ware v. Hylton* and *Fairfax's Devisee v. Hunter's Lessee* (which was "the direct constitutional question in its fullest conditions"). *See id.* at 415.

533. *See infra* notes 559, 564 and accompanying text. I do not mean to suggest that support for the states' rights view was strictly limited to the Southern states. The states' rights dogmas of the day had wider influence, as did the dicta on this question in the opinions of Justice Taney and others. The conflicting views on the question were well expressed by a series of California Supreme Court decisions in the period immediately following the state's admission to the Union, when its loyalty to North or South was as yet undecided. In *People v. Naglee*, 1 Cal. 232, 246-48 (1850), the Court, citing Taney's dicta in the *Passenger Cases* and Daniel's dicta in the *Licence Cases*, added dicta of its own endorsing the states' rights view. Five years later, in *People v. Gerke*, 5 Cal. 381, 382-85 (1855), involving alien property ownership, the Court reversed direction and, in a reasonably able opinion, affirmed the nationalist conception. *See also id.* at 385-87 (Bryan, J., concurring). The next year, in *Siemssen v. Bofer*, 6 Cal. 250, 252-53 (1856), also in an alien property case, it again reaffirmed the states' rights view. Chief Justice Murray was concerned that otherwise by

a treaty with England, her free black citizens may be introduced into South Carolina and other slave States of the Union. . . . Nay, more; by a treaty of amity and friendship with the Emperor Soulouque, of Hayti, every slave in the Southern States may be emancipated, and turned loose upon their present masters.

*Id.* at 253. Perhaps revealing a concern closer to his own heart — and prophetic of future controversies — he also worried that the "Asiatic, and the convicts of the penal colonies of the South Pacific, may be introduced into California." *Id.* This decision, too, was not to last. A short time later, the Court once again reversed direction, overruling *Siemssen*. *See Forbes v. Scannell*, 13 Cal. 242, 283 (1859) (reviving *Gerke*). For an elaborate opinion affirming a broadly nationalist view of the treaty power, see *Cornet v. Winton's*, 10 Tenn. 143, 150, 161-66 (1826) (Haywood, J., concurring).

534. *See Hamer, British Consuls, supra* note 443 (describing the extended efforts of British diplomats to obtain repeal or modification of the Negro Seamen Acts in the various Southern states, after the long-repeated failures of the federal government to redress British claims).

535. *See id.* at 146-53. In his first note, the British Consul, on behalf of "Her Brittanic Majesty's Government," addressed "His Excellency, The Governor and Commander-in-Chief of South Carolina," and concluded by expressing the hope for a strengthening of "the existing bond of commerce, of friendship, and of mutual good faith [with] a kindred nation." *Id.* at 146. Although intended as a confidential exchange of notes, a journalist from the North obtained copies of the correspondence, and the *New York Evening Post* published it. *See The British Consul and South Carolina, Evening Post*, Jan. 24, 1851. Commentary out-

supposed to do? As the British Foreign Secretary had warned prophetically in response to an earlier profession of impotence in the face of state resistance:

With the particulars of the internal compact which may exist between the several States which compose the Union, Foreign Powers have nothing to do: the relations of Foreign Powers are with the aggregate Union: . . . of that Union the Federal Govt. is to them the only organ. Therefore, when a Foreign Power has redress to demand for a wrong done it by any State of the Union, it is to the Federal Government, and not to the separate State, that such Powers must look for redress for that wrong; and such Foreign Power cannot admit the Plea that the Separate State is an Independent Body over which the Federal Government has no control.

It is obvious that such a Doctrine, if admitted, would at once go to a dissolution of the Union, as far as its relations with Foreign Powers are concerned; and Foreign Powers in such case, instead of accrediting Diplomatic Agents to the Federal Government, would send such Agents not to that Government but to the Government of each Separate State; and would make their relations of Peace and War with each State depend upon the result of their separate intercourse with each other, without reference to the Relations which they might have with the rest.<sup>536</sup>

South Carolina was no doubt flattered by the British show of respect. But this was just a delusion. Its resistance to British demands was possible only under the protective wings of the federal government — the very reason why the treaty power was exclusively entrusted to the national government. As the *New York Commercial Advertiser* trenchantly observed, South Carolina “must feel a little awkward, too, when she reflects that the power to which she looked for commercial relations *when* she secedes, is the very first to deny her state-rights, and demand the abrogation of laws designed to protect her ‘peculiar institution.’”<sup>537</sup>

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side of South Carolina, even in the South, was uniformly hostile, and commentators quickly connected the incident with South Carolina’s threats to secede. See Hamer, *British Consuls*, *supra* note 443, at 150-51 (quoting from the *Evening Post*, the *Morning Courier* and *New York Enquirer*, the *New York Commercial Advertiser*, the *New Orleans Daily Picayune*, the *Richmond Whig*, and a paper in Savannah). It presented yet another occasion for the endorsement of the nationalist view of the treaty power in the press. See, e.g., *Great Britain and South Carolina*, *Evening Post*, Jan. 24, 1851; *A New Phase of an Old Subject*, *Commercial Advertiser*, Jan. 25, 1851.

536. Hamer, *British Consuls*, *supra* note 443, at 140 n.7 (quoting British Public Record Office, Foreign Office Papers, Ser. 5, Vol. 358).

537. *Governor Means and Consul Mathew Again*, *Commercial Advertiser*, Jan. 27, 1851. The *Richmond Whig* was even stronger:

This brings to our mind the sheltered position of [South Carolina], and all the States, so long as the present Union continues. . . . [W]ith what party would the war be waged? Not with Carolina alone, with her overwhelming negro population; but with the great and powerful Government of the Union. If an English fleet were dispatched to bombard Charleston, or an English army to invade her cotton fields, the Navy and the Army of the Union would be sent for her defense. . . . So important is that Union which she is prepared to overthrow, to the welfare of S. Carolina! . . . If [Carolina] were now in the position of independence in which

### 3. *The Nationalist View Reemerges as the Dominant Position in the Aftermath of the Civil War*

It should come as no surprise that the nationalist view, in the aftermath of the Civil War, would again gain quick recognition as the dominant construction of the treaty power. The states' rights view had been intimately linked to the slavery question and had found its doctrinal underpinnings in the states' rights jurisprudence flowing out of the great sectional struggle between North and South. Inevitably, the landmark precedents of the Marshall Court would be revived and, with them, the decisions beginning with *Ware v. Hylton* and *Fairfax's Devisee v. Hunter's Lessee*, both of which had resolved the treaty question in favor of the nationalist view. Perhaps even more irresistible was the consistent stream of practice going back to the Confederation which demonstrated both that the nationalist view had always prevailed in practice and that practical imperatives required that the treaty-making power not be restrained by rigid limitations.

Both the political branches and the Court were quick to reaffirm the old precedents. As a result, few sensitive interpreters of the Court's precedents doubted that the Court would sooner or later authoritatively resolve the conflict between the Marshall and Taney Courts' precedents in favor of the nationalist view. Still, the issue remained open, and, as has always been the case, there were some who persisted in maintaining the states' rights view. Sometimes, its adherents even obtained high executive office, adding to the confusion. Notwithstanding occasional — and sometimes embarrassing — inconsistencies, the executive branch repeatedly made clear that when a treaty was important to the national interests of the United States, the executive would not feel bound by any states' rights subject matter limitations on the scope of the treaty power.

The most important conflicts were over race — through the medium of treaties protecting the rights of aliens. It was the West Coast's unbridled hostility toward Chinese and Japanese residents that provoked controversy. Indeed, the critical confrontation — forming the immediate backdrop for *Missouri* — was over school desegregation. A half century before *Brown v. Board of Education*, the federal government received a preview of the reaction which would attend federal intervention — this time pursuant to a treaty — in a state's racial policies for local schools. Only by bearing in mind the controversy

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her statesmen desire to place her, what think you, reader, would be the tone and language of England now? A respectful *request* to repeal the obnoxious law? . . . Why, if South Carolina were at this moment free from her federal relations, *England would seize upon the Government, and as she has done in her West Indian colonies, emancipate the blacks, and raise them above their masters.*

*Morning Courier and New York Enquirer*, Feb. 7, 1851, reprinting *From the Richmond Whig*.

over San Francisco's creation of separate but equal schools for "oriental" residents can one fully understand *Missouri*.

The course of the debate over the treaty power question, of course, was not wholly divorced from other developments in constitutional law and politics. No doubt the continuing controversy reflected in part the wider struggles over the relationship between the federal and state governments during Reconstruction and Post-Reconstruction. The expanding consensus on the nationalist view in the first part of the Twentieth Century, moreover, was inevitably connected to the perceived imperatives of foreign policy as the United States emerged as a world power in the wake of the Spanish-American War. Nevertheless, the issue had a life and integrity of its own, and the same structural imperatives that had been present from the beginning — and reflected in a century and a half of actual experience — continued to underwrite the nationalist view.

*a. The Practices of the Executive Branch and the Senate Largely Conformed to the Nationalist View.* It took only a short time for the nationalist view to receive full confirmation in the executive branch and the Senate. In 1870, Baden — a Germanic mini-state — proposed a treaty regulating inheritances of real estate and marriages. This proposition immediately brought to mind the antebellum Senate's increasing resistance to treaties affording aliens rights in real property as well as the states' rights dicta of some of the Taney Court Justices.<sup>538</sup> The reaction of Secretary of State Hamilton Fish is instructive: noting the "doubts which had been raised 'by extreme constructionists touching the constitutional power of this government to conclude such a treaty, doubts in which I do not share,'" he decided in advance of undertaking further negotiations to obtain the opinion of the Senate Foreign Relations Committee.<sup>539</sup> In response, the Chairman of the Committee, Charles Sumner, informed the Secretary that he had been directed "to say that the Committee after consideration unite with you in opinion on the propriety of such treaties and recommend their negotiation."<sup>540</sup>

Subsequent executive branch statements continued strongly to confirm this view. Most importantly, in 1898, Attorney General John

538. See *supra* notes 527-529 and accompanying text (describing the Senate's resistance in the 1840s and 1850s to stipulations allowing aliens to hold real property); *supra* notes 516-519 and accompanying text (describing dicta in Taney Court opinions supporting the states' rights view).

539. 5 MOORE, *supra* note 504, § 738, at 178 (quoting Mr. Fish, Sec. of State, to Mr. Bancroft, Min. to Prussia, No. 193, April 22, 1870, MS. Dep't St. Inst. Prussia, XV. 121); see also Davis, *supra* note 95, at 1239 (noting that the State Department referred the matter to the Foreign Relations Committee "[i]n deference to the doubts suggested from the bench").

540. Letter from Charles Sumner, Chairman of the Senate Foreign Rel. Comm., to Hamilton Fish, Sec. of State (Apr. 21, 1870), MS. Dep't St. Misc. Letters; see also 5 MOORE, *supra* note 504, § 738, at 178 (describing Sumner's letter).

Griggs explicitly affirmed the nationalist view in an opinion upholding the power of the federal government to make a treaty with Great Britain regulating fisheries in the waters of the United States and Canada along the international boundary.<sup>541</sup> Similar treaties had been concluded in 1854 and 1871, and thus he argued, fisheries were "recognized as a proper subject for international agreement."<sup>542</sup> It was true that the "regulation of fisheries in navigable waters within the territorial limits of the several States, in the absence of a Federal treaty, is a subject of State rather than of Federal jurisdiction."<sup>543</sup> However, the "several States are by the Constitution forbidden to enter into any such treaty or regulation with any foreign power, and unless the United States may regulate the subject by treaty it is impossible of regulation by uniform and reciprocal rules."<sup>544</sup> Thus, the Attorney General advised "that the regulation of the fisheries in these boundary water is a proper subject of the treaty-making power."<sup>545</sup> Subsequently, as we shall see, in 1906-07, Secretary of State Elihu Root forcefully expressed the same view in an even more controversial context.<sup>546</sup>

This understanding of the scope of the treaty was put into practice in a wide range of cases. In light of past controversies, perhaps the most emblematic were treaties giving aliens unqualified rights to hold and inherit real property in the states. These were now generally treated as unproblematic.<sup>547</sup> There were, however, many others: consular conventions, conventions limiting searches and seizures of aliens and protecting their religious and burial rights, fisheries conventions, migratory bird conventions, trademark conventions, sanitary conventions, conventions for the suppression of opium and other drugs, and conventions prohibiting trade in white women for purposes of prostitution. All of these raised states' rights dilemmas but were nevertheless concluded.<sup>548</sup> As Nicholas Pendleton Mitchell observed:

541. See 22 Op. Att'y Gen. 214 (1898).

542. *Id.* at 216.

543. *Id.* at 215. Congress's authority extended only to navigation and did not include the power "to pass laws to regulate or protect fisheries within the territorial jurisdiction of the States." *Id.* at 216.

544. *Id.* at 216-17.

545. *Id.*

546. See *infra* notes 584-590 and accompanying text.

547. For discussion of these treaty provisions, see, e.g., CORWIN, *supra* note 62, at 208-11, and MITCHELL, *supra* note 526, at 84-86, 163-65 (1936) (including appendix setting forth a list of all treaties containing the relevant stipulations). For an expression of doubt about their constitutionality, see *infra* note 552.

548. See CORWIN, *supra* note 62, at 205-16; MITCHELL, *supra* note 526, at 81-88, 97-115, 120-26 (describing various conventions). Although they all raised states' rights questions, I do not mean to deny that in some cases they did fall within the scope of Congress's legislative powers, just that this point was in dispute at the time they were concluded. As late as

If it is possible, as it is, by treaty, to throw open the courts of the states to aliens, to exempt foreign consuls from the application of state laws, to set up an international body to decide what use shall be made of boundary waters which constitute the territorial waters of a state, to regulate the manner and method of taking fish in the same waters, to overrule state laws relating to the collection of private debts, to set up restrictions on intrastate trade in livestock, and to establish limitations regarding the killing of game within a state, then it seems equally possible, so far as the Constitution is concerned, to negotiate treaties invading any of the other fields of state power, so long as the point at issue is one of proved national interest and a proper subject for international discussions.<sup>549</sup>

Notwithstanding these precedents, on a number of occasions, executive branch officials did express the states' rights view.<sup>550</sup> In part, these statements must have reflected genuine doubts held by some about the question. Almost uniformly, however, the statements were made to foreign governments in explanation of why the United States

1944, the courts rested on treaties for the source of authority for congressional legislation prohibiting the cultivating of opium poppies. See *Stutz v. Bureau of Narcotics*, 56 F. Supp. 810, 812-13 (N.D. Cal. 1944). For later cases, see Charles A. Lofgren, *Missouri v. Holland in Historical Perspective*, 1975 SUP. CT. REV. 77, 117 n.212 (collecting citations).

549. MITCHELL, *supra* note 526, at 152. In fairness, some of the treaties that Mitchell mentions were made shortly after *Missouri*. Even in those cases, however, similar treaties were made before the decision.

550. For discussion, see, for example, HAROLD W. STOKE, *THE FOREIGN RELATIONS OF THE FEDERAL STATE 184-88* (1931) (discussing various cases); Kurt H. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 U. PA. L. REV. 323, 325-26, 330-31, 334 (1954) (same in relation to private international conventions); 5 MOORE, *supra* note 504, § 738, at 178-79. The treaties that typically prompted expressions of the states' rights view dealt with the rights of consuls to administer estates, private international law, and labor rights. The states' rights objections were often mingled with reservations about whether a matter was really a proper subject for international negotiation and agreement. In some cases, particularly in regard to private international law conventions, these concerns persisted even after *Missouri*. See Nadelmann, *supra*, at 335-43, 357-62. The hesitance of the United States to enter into private international law conventions, for example, became the subject of major controversy as it became increasingly clear that rigid states' rights limitations seriously jeopardized important U.S. national interests. As the so-called Wigmore Committee of the National Conference of Commissioners on Uniform State Laws put it in 1921, "[w]e here start with two assertions: *First*, a most important process of the next twenty-five years in the world's affairs will be a vast activity in world-legislation; *Secondly*, into this activity the United States of America will enter as a self-inflicted cripple." *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS, REPORT OF THE COMMITTEE ON INTER-STATE COMPACTS* 297, 321 (1921). The committee made the radical suggestion that the only solution was to allow the states to make compacts with foreign states on private law subjects, and it even developed an elaborate program of action along these lines. See *id.* at 326-56. However, given the traditional reluctance to permit the states any role in conducting diplomatic negotiations, nothing came of it. Their report is nevertheless a powerful reminder of the difficulties into which the states' rights view inevitably leads. Some years later, the still-continuing diffidence of the United States prompted a famous debate on the scope of the treaty power at a meeting of the American Society of International Law. See 1929 PROC. AM. SOC. INT'L L. 176-96; *infra* notes 670, 727-728 and accompanying text (discussing the views expressed by Charles Evans Hughes). Eventually, of course, these concerns were dropped, and the United States became party to private international law conventions. See HENKIN, *supra* note 16, at 471-72.



was unwilling to conclude treaties that our friends and allies were pressing upon us. The conventions were generally ones which the executive viewed as unfavorable to our interests and which, given the sensitivity of the Senate to the interests of the states, could not in any case be approved.<sup>551</sup> These self-denying — and self-interested — statements were thus highly suspect as genuine expressions of the executive's constitutional views. All the more so, then, because they were irreconcilable with past practice and the positions which the executive branch had taken on other occasions — as astute foreign diplomats were to point out on several occasions.<sup>552</sup>

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551. See, e.g., STOKE, *supra* note 550, at 185 (discussing, for example, a note to the Italian minister explaining why the United States would not enter into a treaty “giving the right of gratuitous defense in civil and criminal proceedings to Italian citizens in America as it was accorded to aliens in Italy”); Nadelmann, *supra* note 550, at 325-26, 330-31, 334 (discussing notes and statements at diplomatic conferences explaining why the United States would not join conventions on private international law). Private international law treaties provide a good example: the United States, like the British, long resisted joining because the conventions were based upon civil rather than common law premises. See *id.* at 326. Even without claiming constitutional incapacity, the United States regularly invoked federalism concerns as a basis for declining to participate in various conferences and conventions on these kinds of treaties. See, e.g., *id.* at 325-43; 5 MOORE, *supra* note 504, § 735, at 164-65 (discussing U.S. refusal to negotiate a treaty with the British to prevent the imposition of discriminatory taxes on foreign fire insurance companies because such an effort would “probably be futile on account of the indisposition of the people to permit any encroachment upon the exercise of powers of the local legislation”). The Senate actively policed the executive branch to ensure that state interests would be fully respected. See MITCHELL, *supra* note 526, at 155; STOKE, *supra* note 550, at 190-98.

552. Thus, for example, despite the Supreme Court decisions to the contrary, as late as 1886, Secretary of State Bayard dissented from the view that the treaty power extended to stipulations affording aliens the right to hold real property in the states: “A treaty is, it is true, the supreme law of the land, but it is nevertheless only a law imposed by the Federal government, and subject to all the limitations of other laws imposed by the same authority.” 5 MOORE, *supra* note 504, § 738, at 178-79. Nevertheless, a year later, he negotiated a treaty with Peru which contained precisely such a provision. See CORWIN, *supra* note 62, at 210-11 (describing Article 11 of the Treaty of 1887 with Peru). Even Secretary of State Fish, whose strong affirmation of the nationalist view in 1870 was quoted in the text above, see *supra* notes 538-540 and accompanying text, could not restrain himself from invoking states' rights when it suited his immediate diplomatic purposes. Thus, even though he reaffirmed the nationalist view in 1874, see 5 MOORE, *supra* note 504, § 738, at 178 (noting that estates are administered in accordance with state law “in the absence of any treaty regulations on the subject”), in 1876, in a note never published in the United States, he deflected Peru's request for U.S. participation in a conference on private international law, *inter alia*, by asserting that “the several states have reserved powers which it is not competent for this government to trench upon either by Act of Congress or by Treaty with a foreign power.” Nadelmann, *supra* note 550, at 326 (quoting NATIONAL ARCHIVES, RECORD GROUP 59: GENERAL RECORDS OF THE DEPARTMENT OF STATE (Communications to Foreign Sovereigns and States, vol. 4, 1865-77)). Fish thus set the pattern for how U.S. diplomats would handle the growing movement in Latin America and on the Continent for treaties harmonizing private law. See Nadelmann, *supra* note 550, at 326-43. For challenges to the U.S. claims of constitutional incapacity by skeptical foreign diplomats, see, for example, *id.* at 330 (discussing an Argentine diplomat's cogent challenge, observing that the states' rights view would place the “country under a *capitis deminutio*, with a constitutional capacity to treat inferior to that of all other countries of the world”) and *id.* at 336-37 (describing a Cuban diplomat's argument that “an investigation of the treaties entered into by the United States showed a number of these subjects dealt with in such treaties signed by the Executive and ratified by the Senate”).

*b. The Supreme Court's Early Reaffirmation of the Marshall Court Decisions.* Like the executive branch, the Supreme Court too was quick to signal its support for the nationalist view. In 1870, Congress had passed its first effort at regulating trademarks. In 1879, in the *Trade-mark Cases*,<sup>553</sup> the Court struck down the Act. The law could not be justified, the Court found, as a measure "to promote the Progress of Science and useful Arts",<sup>554</sup> nor was it limited to the use of marks in interstate or foreign commerce. Even if it were, moreover, the Court expressed skepticism about whether trademarks in principle fell under the power to regulate commerce.<sup>555</sup> Notably, there was no treaty question presented in the case. The federal government had, however, concluded a treaty with Belgium in 1868 containing a stipulation according subjects of each nation mutual trademark protection, and similar treaties had followed.<sup>556</sup> Without prompting, the Court was quick to dispel any implication that its ruling undermined the constitutional validity of the treaties: "In what we have here said we wish to be understood as leaving untouched the whole question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect."<sup>557</sup>

It seems likely that the Court already had *Hauenstein v. Lynham*<sup>558</sup> in mind in offering these qualifying remarks. A short time after rendering the *Trade-mark Cases*, it issued its decision in *Hauenstein*, thereby practically resolving the issue in favor of the nationalist view. Once again it was a treaty provision according aliens rights in real property that was at issue. Citing *Ware v. Hylton*, *Fairfax's Devisee v. Hunter's Lessee*, *Chirac v. Chirac*, the other Marshall Court cases

553. 100 U.S. 82 (1879).

554. U.S. CONST. art. I, § 8, cl. 8.

555. See *Trade-mark Cases*, 100 U.S. at 93-99.

556. See CORWIN, *supra* note 62, at 205-06.

557. *Trade-mark Cases*, 100 U.S. at 99. Even before the *Trade-mark Cases*, the Court in *United States v. Forty-Three Gallons of Whiskey, etc.*, 93 U.S. 188, 197-98 (1876), had affirmed a broad conception of the scope of the treaty power and the validity of treaties according aliens the right to inherit real property:

[The treaty power] is, beyond doubt, ample to cover all the usual subjects of diplomacy. One of them relates to the disability of the citizens or subjects of either contracting nation to take, by descent or devise, real property situate in the territory of the other. If a treaty to which the United States is a party removed such disability, and secured to them the right so to take and hold such property, as if they were natives of this country, it might contravene the statutes of a State; but, in that event, the courts would disregard them, and give to the alien the full protection conferred by its provisions. If this result can be thus obtained, surely the Federal government may, in the exercise of its acknowledged power to treat with Indians, make the provision in question, coming, as it fairly does, within the clause relating to the regulation of commerce.

*Id.* In other words, if the treaty power extends to subjects falling into areas of exclusive state legislative competence, like descents of real property, then it surely extends to subjects falling within the scope of congressional authority.

558. 100 U.S. 483 (1879).

arising in this line, the California Supreme Court's decision in *People v. Gerke*, Calhoun, and Attorney General Cushing's 1857 opinion,<sup>559</sup> the Court upheld the treaty as within the scope of the treaty power:

By the British treaty of 1794, "all impediment of alienage was absolutely levelled with the ground despite the laws of the States. It is the direct constitutional question in its fullest conditions. Yet the Supreme Court held that the stipulation was within the constitutional powers of the Union." Mr. Calhoun, after laying down certain exceptions and qualifications which do not affect this case, says: "Within these limits all questions which may arise between us and other powers, be the subject matter what it may, fall within the treaty-making power and may be adjusted by it."<sup>560</sup>

Furthermore, the Court reasoned, "[i]f the national government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to 'enter into any treaty, alliance, or confederation.'"<sup>561</sup>

*Hauenstein* thus affirmed all of the essential grounds for the nationalist view. The only question is why, forty years before *Missouri*, it was not understood as an authoritative post-Civil War reaffirmation of the Marshall Court precedents. The answer is that it surely would have been so understood were it not for a caveat the Court added at the end of its opinion. Noting that counsel had not argued that the treaty was beyond the scope of the treaty power, the Court decided to "forbear to pursue the topic further."

We have no doubt that this treaty is within the treaty-making power conferred by the Constitution. . . . There are doubtless limitations of this power as there are of all others arising under [the Constitution]; but this is not the proper occasion to consider the subject. It is not the habit of this court, in dealing with constitutional questions, to go beyond the limits of what is required by the exigencies of the case in hand.<sup>562</sup>

With the door thus barely left open, the Court thereafter repeatedly hinted that it endorsed the nationalist view, but never squarely decided the issue. The most important case was the 1889 decision in *Geofroy v. Riggs*, yet another case involving a treaty affording aliens rights in real property.<sup>563</sup> Justice Field famously attempted a comprehensive definition of the scope of the treaty power. With citations to

559. See *Hauenstein*, 100 U.S. at 488-90.

560. 100 U.S. at 489-90.

561. 100 U.S. at 490 (quoting U.S. CONST. art. I, § 10, cl. 1).

562. *Id.* Notwithstanding the Court's explicit reasoning, Professor Bradley reads *Hauenstein* as being limited to the proposition "evident from the constitutional text" that "treaties are supreme over state law," Bradley, *supra* note 2, at 418, and as establishing that "[t]here are doubtless limitations of this power," *id.* at 419 n.161 (quoting *Hauenstein*, 100 U.S. at 490).

563. 133 U.S. 258, 266-68 (1889).

*Ware, Chirac, Hauenstein, People v. Gerke*, and Attorney General Cushing's 1857 opinion, he once again reaffirmed the broad scope of the treaty power:

That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that [the rights of the subjects of one nation to own and devise real property in the territory of the other] are fitting subjects for such negotiation . . . . The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent [citation omitted]. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.<sup>564</sup>

Some years later, in *Keller v. United States*,<sup>565</sup> the Court struck down a congressional statute which made it a federal crime to harbor an alien in a house of prostitution within three years after the alien's entrance into the country. The Court held that the subject was beyond Congress's legislative authority and hence within the powers reserved to the states by the Tenth Amendment. In the course of its opinion, however, it noted:

The question is, therefore, whether there is any authority conferred upon Congress by which this particular portion of the statute can be sustained. By § 2 of Art. II of the Constitution, power is given to the President, by and with the advice and consent of the Senate, to make treaties, but

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564. *Geofroy*, 133 U.S. at 266-67. Field was drawing in part from Calhoun and some of the other early authorities discussed previously. See *supra* notes 26, 28, 39, 41-42, 131-134, 291-292, 424-431, 435, 480-481, 557, 560 and accompanying text; *infra* notes 624, 720-721, 724-739, 747-748 and accompanying text. Despite the breadth of his language, states' rights advocates have sometimes attempted to find support in his reference to restraints "arising from the nature of the government itself and of that of the States" See, e.g., Bradley, *supra* note 2, at 419 n.167. In light of Field's approving citations to authorities upholding the nationalist view and of the passage as a whole, however, it should be clear enough that this amounts to wishful thinking rather than an effort to give a faithful interpretation to his remarks. It is noteworthy that Field's claim that the territory of a state cannot be ceded without the consent of a state masks a longstanding controversy over the question, beginning with the efforts under the Confederation to cede navigation of the Mississippi. For a discussion, see, for example, HENKIN, *supra* note 16, at 193, 465-66, and *supra* notes 26, 159-166, 196-207, 210-211, 216, 431, 435 and accompanying text. In *In re Ross*, 140 U.S. 453 (1891), Justice Field, again writing for the Court, said: "The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments." *Id.* at 463.

565. 213 U.S. 138 (1909).

there is no suggestion in the record or in the briefs of a treaty with the King of Hungary under which this legislation can be supported.<sup>566</sup>

In light of these decisions, the opinion in *Missouri* could hardly have come as a surprise to anyone carefully following the precedents. These previous decisions also provide at least part of the explanation for why Justice Holmes was able to garner seven votes while provoking no written dissent.

c. *The First Great Controversy: Anti-Chinese Legislation in the West Coast.* As we have seen, the Treaty of Peace and the Jay Treaty were the focal points for controversy in the first generation, and the Negro Seamen Acts were the same for the antebellum period. For the post-Civil War period, it was the virulent racism against Asian immigrants on the West Coast that gave rise to a national controversy over the scope of the treaty power. The first wave came during the 1870s and 1880s when California and Oregon adopted discriminatory laws designed to drive Chinese immigrants out of the country. The obstacle was the so-called Burlingame Treaty of 1868 with China.<sup>567</sup> Under this treaty, Chinese subjects had the right of permanent residence in the United States. Article 6 provided that "Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions, in respect to travel or residence, as may

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566. *Keller*, 213 U.S. at 147. Even before *Keller*, the Court in *Wildenhuis's Case*, 120 U.S. 1 (1886), which involved a treaty granting consular jurisdiction over certain offenses committed in the United States, had no trouble affirming the extent of the treaty power:

The treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the consul of Belgium exclusive jurisdiction over the offense which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty . . .

*Id.* at 17; see also *Ward v. Race Horse*, 163 U.S. 504, 514-16 (1896) (assuming, without deciding, that even in the absence of congressional power over wild game on lands owned by the federal government in a state, the treaty power could reach the subject); *id.* at 516, 519 (Brown, J., dissenting) (same); *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 562 (1916) (implicitly raising the treaty power as a possible source of power where the subject at issue was beyond Congress's legislative authorities). For discussion of *Becker*, see Lofgren, *supra* note 548, at 89 & n.70.

There were some cases from which states' rights proponents could draw, if not comfort, at least some consolation. On a couple of occasions, the Court construed treaties narrowly so as to avoid overriding state law on matters generally regulated by the states. See, e.g., *Rocca v. Thompson*, 223 U.S. 317, 329-34 (1912) (narrowly construing treaty providing for right of consul to intervene in probate proceedings, but "assuming . . . that it is within the power of the National Government to provide by treaty for the administration of property of foreigners dying within the jurisdiction of the States, and to commit such administration to the consular officers of the Nations to which the deceased owed allegiance"); *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Bd. of Health*, 186 U.S. 380, 393-95 (1902) (narrowly construing treaty with Greece concerning quarantines of ships).

567. See 6 CHARLES I. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF THE UNITED STATES OF AMERICA 1776-1949, at 680 (1971).

there be enjoyed by the citizens or subjects of the most favored nation."<sup>568</sup>

Given the agitated state of public feeling, California and Oregon were not impressed. California tried a number of expedients for nullifying the treaty, including attempts to exclude Chinese immigrants from entering the state under the pretext that they were "lewd or abandoned women."<sup>569</sup> It also included, *inter alia*, a constitutional provision making it a criminal offense for any corporation organized under California law to employ any Chinese resident in any capacity whatsoever, an ordinance requiring jailors to cut the hair of all prisoners to a uniform length and thus to clip the traditional Chinese "queue" notwithstanding its religious significance, and an ordinance making it impossible as a practical matter for the Chinese to operate laundries. Oregon followed suit, adopting a law prohibiting the Chinese from working on any public works project.

All of these laws and ordinances quickly came before the lower federal courts. In each instance, the challenge was based on the treaty, and in each instance, despite the fact that the laws and ordinances dealt with matters of a peculiarly local character, the lower courts steadfastly struck them down as in conflict with the treaty. In the first case, *In re Ah Fong*, Justice Field, on circuit, nullified California's effort to exclude "lewd" Chinese women.<sup>570</sup> Justice Field, himself a strong supporter of states' rights, struggled with Chief Justice Taney's dissenting opinion in the *Passenger Cases*: "[W]e cannot shut our eyes to the fact that much which was formerly said upon the power of the state in this respect, grew out of the necessity which the southern states, in which the institution of slavery existed, felt of excluding free negroes from their limits."<sup>571</sup> On a combination of dormant commerce power and treaty grounds, he struck down the California statute.<sup>572</sup>

By 1880, with Taney's approach to the commerce power relegated to history's dustbin,<sup>573</sup> and with *Hauenstein* on the books, the courts

568. *Id.* at 683. The treaty was later modified to permit the exclusion of Chinese laborers in some cases. See *In re Ah Fong*, 1 F. Cas. 213, 217 n.3 (C.C.D. Cal. 1874). Ultimately, Congress decided to defy the treaty altogether and prohibit the immigration of Chinese laborers. See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889). The Court upheld the congressional action. See *id.* For discussion of the political context and the court decisions, see CORWIN, *supra* note 62, at 174-82.

569. *In re Ah Fong*, 1 F. Cas. at 215 (quoting § 2952 of the California Political Code).

570. See *id.*

571. *Id.* at 216. He included an appendix in which he considered the *Passenger Cases* at greater length. See *id.* at 218-20.

572. See *id.* at 216-18. Justice Field also ruled that the statute violated the Equal Protection Clause. See *id.* at 218.

573. In *Chy Lung v. Freeman*, 92 U.S. 275 (1875), the Supreme Court struck down on dormant commerce clause grounds the same provision of California law which Field had struck down in *In re Ah Fong*.

were more secure in their doctrine. In *In re Tiburcio Parrott*,<sup>574</sup> the two judges assigned to the case each undertook elaborate analyses of the treaty issue. *In re Tiburcio Parrott* involved California's prohibition on the employment of Chinese residents by California corporations. Judge Hoffman declared that "even if the reserved power of the state over corporations were as extensive as is claimed, its exercise in the manner attempted in this case would be invalid, because in conflict with the treaty."<sup>575</sup> He then continued:

Would it be believed possible, if the fact did not so sternly confront us, that such legislation as this could be directed against a race whose right freely to emigrate to this country, and reside here with all "the privileges, immunities, and exemptions of the most favored nation," has been recognized and guaranteed by a solemn treaty of the United States, which not only engages the honor of the national government, but is by the very terms of the constitution the supreme law of the land? . . . The declaration that "the Chinese must go, peaceably or forcibly," is an insolent contempt of national obligations and an audacious defiance of national authority . . . no matter whether it assumes the guise of an exercise of the police power, or of the power to regulate corporations, or of any other power reserved by the state.<sup>576</sup>

Judge Sawyer was even more emphatic. Quoting extensively from *Ware v. Hylton* and *Hauenstein*,<sup>577</sup> he reasoned:

Among all civilized nations, in modern times at least, the treaty-making power has been accustomed to determine the terms and conditions upon which the subjects of the parties to the treaty shall reside in the respective countries, and the treaty-making power is conferred by the constitution in unlimited terms. . . . If the treaty-making power is authorized to determine what foreigners shall be permitted to come into and reside within the country, and who shall be excluded, it must have the power generally to determine and prescribe upon what terms and conditions such as are admitted shall be permitted to remain. If it has authority to stipulate that aliens residing in a state may acquire and hold property . . . against the provisions of the laws of the state, otherwise valid — and so the authorities already cited hold — then it certainly must be competent for the treaty-making power to stipulate that aliens residing in a state in

574. 1 F. 481 (C.C.D. Cal. 1880).

575. *In re Tiburcio Parrott*, 1 F. at 494.

576. *Id.* at 495-96, 499. Judge Hoffman noted that the California law "is in open and seemingly contemptuous violation of the provisions of the treaty . . . . It is in fact but one, and the latest, of a series of enactments designed to accomplish the same end." *Id.* at 497.

577. *See id.* at 499, 501-03 (Sawyer, J., concurring). He also cited the prohibition on state treaties, the various Marshall Court decisions in the *Chirac v. Chirac* line, *People v. Gerke*, and *Calhoun*. *See id.* at 503.

pursuance of the treaty may labor in order that they may live and acquire property that may be so held . . . .<sup>578</sup>

Equally emphatic was Judge Deady's opinion in *Baker v. Portland*.<sup>579</sup> Striking down Oregon's law prohibiting the employment of Chinese people on *public works projects*, a subject which could hardly trench more deeply on state prerogatives, he reasoned:

This treaty, until it is abrogated or modified by the political department of the government, is the supreme law of the land . . . . [S]o far as this court and the case before it is concerned, the treaty furnishes the law, and with that treaty no state or municipal corporation thereof can interfere. Admit the wedge of state interference ever so little, and there is nothing to prevent its being driven home and destroying the treaty and overriding the treaty-making power altogether.<sup>580</sup>

*d. San Francisco's Separate but Equal Schools for Japanese Resident Schoolchildren Collide with the Treaty Power.* Anti-Chinese legislation was only the prelude to yet another and, for present purposes, even more consequential treaty power controversy. In the early 1900s, anti-Japanese sentiment had been steadily rising in California. In October 1906, the San Francisco School Board responded to the pressure by exercising its *Plessy*-condoned right to establish "separate but equal" schools for "Oriental" schoolchildren, including the children of Japanese residents.<sup>581</sup> The reaction was explosive. The Japanese government immediately complained that the action violated the guarantees of the Treaty of Commerce and Navigation of 1894,<sup>582</sup> and, in a deeply offended Japan, bitter denunciations were widespread. Harsh words in turn provoked rumors of impending war, and hostile feelings

578. *Id.* at 507-08; see also *In re Quong Woo*, 13 F. 229 (C.C.D. Cal. 1882) (striking down licensing ordinance for Chinese laundries); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879) (striking down the so-called "Queue" ordinance).

579. 2 F. Cas. 472 (C.C.D. Or. 1879).

580. *Baker*, 2 F. Cas. at 473-74. In one federal court decision from (not surprisingly) South Carolina — entirely unrelated to the Chinese issue — the court conclusorily affirmed the states' rights view in dicta. See *Cantini v. Tillman*, 54 F. 969, 976 (C.C.D. S.C. 1893). After finding the relied-upon treaty inapplicable, the district judge added that the exercise of the reserved police powers of the states "cannot be affected by any treaty stipulations." *Id.*

581. The most complete treatment of the controversy is THOMAS A. BAILEY, THEODORE ROOSEVELT AND THE JAPANESE-AMERICAN CRISIS 28-192 (1934). For other discussions, see, for example, CORWIN, *supra* note 62, at 216-33; DEVLIN, *supra* note 62, §§ 145-61, at 142-90; and TUCKER, *supra* note 62, at 380-419. The School Board resolution is quoted in BAILEY, *supra*, at 29.

582. See 9 BEVANS, *supra* note 567, at 387. Article I provided that the

citizens or subjects of each of the two High Contracting Parties shall have full liberty to enter, travel, or reside in any part of the territories of the other Contracting Party. . . . In whatever relates to rights of residence and travel . . . the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties, and rights . . . [as] native citizens or subjects, or citizens or subjects of the most favored nation.

*Id.* at 387-88. For the Japanese diplomatic protest, claiming violation of Article I, see BAILEY, *supra* note 581, at 63-64 (quoting from diplomatic note dated October 25, 1906).



on both sides threatened to harden positions and sour relations. Although the rumors were exaggerated, the incident was undoubtedly one of the earliest links in the chain of events leading to Pearl Harbor.<sup>583</sup>

The Roosevelt administration struggled mightily to preserve good relations with the Japanese, which Roosevelt had spent years fostering.<sup>584</sup> Accepting the Japanese interpretation of the treaty, the administration made intensive efforts to convince the San Franciscans to repeal the resolution and readmit the schoolchildren to the white schools.<sup>585</sup> When those efforts failed, it instituted litigation in federal court seeking a judicial ruling affirming the Japanese construction of the treaty and ordering San Francisco to comply.<sup>586</sup> From the outset, it was clear that the controversy raised the treaty power question in a particularly stark form: did the treaty power extend so far that a treaty could override local educational policy — indeed, override a local decision to segregate primary education on the basis of race? Roosevelt and Secretary of State Root left no one in doubt about their

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583. See BAILEY, *supra* note 581, at 46-84.

584. Roosevelt had been careful to protect Japanese interests when he had intervened in the Russo-Japanese War, and was an ardent admirer of Japanese culture. See *id.* at 89-92. He was deeply troubled by the Board's action and in general by the racial hostility being directed at Japanese residents in California. See *id.* at 80-83 (quoting, *inter alia*, Roosevelt's letter to his son: "I am being horribly bothered about the Japanese business. The infernal fools in California, and especially in San Francisco, insult the Japanese recklessly and in the event of war it will be the Nation as a whole which will pay the consequences."). Fearing that a military conflict in the Far East could not be ruled out, he began making preparations for fortifying the navy. See *id.* at 81-82, 119-20. His vigorous efforts to rescind the School Board resolution and to protect Japanese residents did win him the confidence of the Japanese and smooth over the difficulties. See *id.* at 85-96.

585. From the outset, the administration made clear that it would support the Japanese interpretation of the treaty, see *id.* at 59-60, and it maintained that position throughout. The administration was less sure that the courts would uphold the Japanese view. The treaty language was far from clear. Secretary of State Elihu Root was convinced that the rights of residence protected by the treaty included the right to attend public school, but less certain that provision of a separate (if equal) school violated the treaty. In his view, though, it certainly violated the spirit, if not the letter, of the treaty. See *id.* at 189-90. Other members of the administration were more pessimistic on the treaty interpretation questions. See *id.* at 189. Among other efforts, Roosevelt sent his Secretary of Commerce Victor Metcalf to San Francisco to conduct a full investigation of the dispute. See *id.* at 60-61, 85-89, 114-17. His report was printed as a Senate Document. See S. DOC. NO. 147, 59th Cong., 2d Sess. (1907). Metcalf quickly determined that it was hopeless to reason with the San Francisco authorities. See BAILEY, *supra* note 581, at 88-89.

586. See BAILEY, *supra* note 581, at 123; Elihu Root, *The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution*, 1 AM. J. INT'L L. 273, 276 (1907). A state court action was also brought by the parent of one of the Japanese children affected by the Board's resolution. See DEVLIN, *supra* note 62, § 159, at 189. Devlin was the United States Attorney in San Francisco responsible, under the direct supervision of the Attorney General, for conducting the federal suit against the School Board. See BAILEY, *supra* note 581, at 126-27.

views.<sup>587</sup> Indeed, Roosevelt threatened to uphold the treaty forcibly if necessary.<sup>588</sup>

Fortunately from the diplomatic point of view, the Court never answered the question. In an extraordinary political move, Roosevelt and Root invited the entire School Board along with the Mayor to Washington for consultations about the impact of San Francisco's action on relations with Japan — and, most important from San Francisco's perspective, on Roosevelt's ability to obtain an agreement from Japan to limit the emigration of Japanese laborers to California. In the end, the San Francisco authorities backed down and rescinded their resolution, obviating the need for a judicial showdown.<sup>589</sup> The resolution, however, did not arrive soon enough to avoid another heated national debate over the treaty power.

Secretary Root himself took the lead in defending the nationalist view. Shortly after the crisis passed, he delivered a much-noted speech before the American Society of International Law in which he laid out the argument for the nationalist position:

It has been widely asserted or assumed that this treaty provision and its enforcement involved some question of state's rights. There was and is no question of state's rights involved, unless it be the question which was settled by the adoption of the constitution. . . . Legislative power is distributed: upon some subjects the national legislature has authority; upon other subjects the state legislature has authority. Judicial power is distributed: in some cases the federal courts have jurisdiction, in other cases the state courts have jurisdiction. Executive power is distributed: in some fields the national executive is to act; in other fields the state executive is to act. The treaty-making power is not distributed; it is all vested in the national government; no part of it is vested in or reserved to the states. In international affairs there are no states; there is but one nation . . . .<sup>590</sup>

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587. For Root's public statement of the executive position, see Root, *supra* note 586, at 277-83.

588. See BAILEY, *supra* note 581, at 89-90, 100-01, 140. Roosevelt made the threat highly public by including it in a message to Congress that harshly attacked the San Francisco authorities. See *id.* at 89-90. Under pressure, he retreated somewhat, saying that he would not use troops to return the Japanese schoolchildren to the public schools, only to protect their safety. See *id.* at 101. The damage, however, had already been done. Senator Rayner, a leading critic of Roosevelt's handling of the crisis, ridiculed this threat on the floor of the Senate: "[I]t is quite a serious matter . . . for the President to contemplate the bombarding of the city at this time, and to declare war against the boards of county school trustees of California." 41 CONG. REC. 281 (1906) (remarks of Sen. Rayner).

589. See BAILEY, *supra* note 581, at 127-49, 168-86.

590. Root, *supra* note 586, at 273-86. Root was also President of the American Society of International Law. In the course of his address, he discussed many of the precedents which have previously been discussed. See *id.* Devlin's 864-page volume, published in 1908, was largely dedicated to establishing the basis for the nationalist view. See DEVLIN, *supra* note 62.

California found its advocates as well.<sup>591</sup> The Southern states, the traditional seat of states' rights sentiment, were highly sympathetic, immediately perceiving the danger which Roosevelt and Root's doctrine posed to their own institutions.<sup>592</sup> As Senator Rayner of Maryland explained:

If [the President] can take possession of the public schools of California and compel the State to admit to them Japanese students contrary to the laws of California, he could with equal propriety send us an amendment to the Santo Domingo treaty and demand the admission of the negro children of Santo Domingo into the white schools of South Carolina or of any other State . . . .<sup>593</sup>

In the midst of the controversy, Rayner introduced a resolution declaring that the federal government "has no right to enter into any treaty with any foreign government relating in any manner to any of the public school systems of any of the States of the Union" and further declaring that "it is the duty of the President . . . to notify the Government of Japan and notify any foreign government with whom the question may arise that the public educational institutions of the States are not within the jurisdiction of the United States."<sup>594</sup> He then defended the states' rights position in a lengthy speech on the Senate floor.<sup>595</sup>

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591. San Francisco officials adopted the states' rights position, arguing that the treaty could not trench on local school policy, which was a right reserved to the states. See BAILEY, *supra* note 581, at 76, 143-44 (noting the assertion by San Francisco's mayor that "if any part of the treaty conflicted with the local school law that part of the treaty was null and void"). Intriguingly, Metcalf reported that he had met with the justices of the California Supreme Court and that they had assured him that if the treaty did protect Japanese rights, they would rule unanimously that the Board's action was invalid. See BAILEY, *supra* note 581, at 188. Such a ruling would have been consistent with the California Supreme Court's earlier, though mixed, decisions on the treaty power issue. For discussion of those decisions, see *supra* note 533.

592. As Bailey describes it,

After Secretary Root came forward with the contention that a city could not segregate children of a foreign power if such action conflicted with established treaty rights, the Southerners recognized dangerous implications in this doctrine. Particularly vigorous were the objections of Southern congressmen in discussing this matter, some of whom professed to see in the position of Root and Roosevelt a movement to break down the whole system of separate schools for Negroes in the South. If the federal government could win the day in this case, it might, after negotiating the proper treaty with Great Britain or France, force the black subjects of these powers into the white public schools of the South.

BAILEY, *supra* note 581, at 71-72; see, e.g., 41 CONG. REC. 297 (remarks of Sen. Rayner, Maryland); *id.* at 1235, 3223 (remarks of Rep. Garrett, Tennessee); *id.* at 3218, 3222-23 (remarks of Rep. Williams, Mississippi) (declaring that "I stand with the State of California . . . in opposition to mixed schools. I stand with Californians in favor of the proposition that we want a homogeneous and assimilable population of white people in this Republic"); *id.* at 3217 (remarks of Rep. Burnett, Alabama).

593. 41 CONG. REC. 297.

594. *Id.*

595. See 41 CONG. REC. 298-304. His speech was widely seen as the most elaborate defense of the states' rights view yet attempted. From a contemporary perspective, it seems to

Senator Rayner's resolution ultimately went nowhere, and the controversy in Congress quickly died after implementation of the amicable settlement. Having caught the attention of the nation, however, the episode proved to be of wider significance. Over the next decade, it provoked the writing of four major scholarly books and countless articles, all dedicated to the constitutional issue.<sup>596</sup> These works were important in two respects. First, by collecting relevant historical materials and developing the arguments on both sides, they ensured that when the Supreme Court undertook a final resolution of the question, it would have the most complete possible basis for rendering its judgment. Among the authors were many of the leading scholars of the day. With considerable care, they had considered the question, marshaled historical support, and astutely articulated the opposing arguments. Second, the outburst of scholarly attention plainly revealed that the great weight of informed opinion endorsed the nationalist view. Leading authorities like Edward Corwin, Westel Willoughby, John Bassett Moore, Quincy Wright, Charles Henry Butler, Edwin Borchard, and George Sutherland all unequivocally affirmed the na-

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be a rather poorly conceived argument. See CORWIN, *supra* note 62, at 222-25 (analyzing the speech and observing that the "plain fact of the matter is that Senator Rayner's argument is not a well considered performance"). Tellingly, a few years after the School Board controversy, the Czar applied the same discriminatory policy to American Jews seeking to trade in Russia that he applied to Russian Jews. In response, the United States complained that this treatment constituted a violation of our treaty with Russia under a provision which, though weaker, was similar to the provision upon which the Japanese had relied. When Russia would not relent, Senator Rayner was among the staunchest advocates for abrogating the treaty as obsolete. See *id.* at 231.

596. The best book by far was Corwin's *National Supremacy*, which was entirely dedicated to the issue. CORWIN, *supra* note 62. Devlin published his treatise in 1908. See DEVLIN, *supra* note 62. A book by Charles Burr, also largely dedicated to the issue, won the prestigious Henry M. Phillips Prize of the American Philosophical Society. See CHARLES H. BURR, *THE TREATY-MAKING POWER OF THE UNITED STATES AND THE METHODS OF ITS ENFORCEMENT AS AFFECTING THE POLICE POWERS OF THE STATES* (1912). On the states' rights side, Henry St. George Tucker published a lengthy treatise. See TUCKER, *supra* note 62. Even before the School Board controversy, Charles Henry Butler had published his great two-volume treatise on the treaty power, which was also largely dedicated to establishing the nationalist view. See BUTLER, *supra* note 62. Butler was inspired by his work in 1898 at the State Department on whether the treaty power extended to fisheries within the exclusive jurisdiction of the states and by Attorney General Griggs's 1898 opinion upholding that power and endorsing the nationalist view. See 1 BUTLER, *supra* note 62, at i-ii; 1929 PROC. AM. SOC. INT'L L. 180. For discussion of Griggs's opinion, see *supra* notes 541-546 and accompanying text. For a sampling of articles published in the wake of the School Board controversy, see, for example, Chandler P. Anderson, *The Extent and Limitations of the Treaty-Making Power Under the Constitution*, 1 AM. JUR. INT'L L. 636 (1907) (upholding the nationalist view); Charles C. Hyde, *The Segregation of Japanese Students by the School Authorities of San Francisco*, 19 THE GREEN BAG 38 (1907) (same); Arthur K. Kuhn, *The Treaty-Making Power and the Reserved Sovereignty of the States*, 7 COLUM. L. REV. 172 (1907) (same); and William D. Lewis, *Can the United States by Treaty Confer on Japanese Residents in California the Right to Attend the Public Schools?*, 15 AM. L. REG. 73 (1907) (same). The best article endorsing the states' rights view was William E. Mikell, *The Extent of the Treaty-Making Power of the President and Senate of the United States* (pt. 2), 57 U. PA. L. REV. 528 (1909). See also Shackelford Miller, *The Treaty Making Power*, 41 AM. L. REV. 427 (1907).

tionalist view, while only Henry St. George Tucker and other scholars of little note supported the states' rights view.<sup>597</sup>

With all of the political commotion and academic speculation, there seemed little doubt that the Supreme Court would soon finally resolve the question. The probable quickly became the actual. Indeed, it was Elihu Root, now Senator from New York and fresh from his battles with San Francisco, who prompted the decisive events.

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597. Professor Bradley characterizes the authorities as evenly matched, *see* Bradley, *supra* note 2, at 421, but, to put it mildly, that is highly misleading. For Corwin's view, *see* CORWIN, *supra* note 62. For Butler's view, *see* 1 BUTLER, *supra* note 62. Willoughby emphatically endorsed the nationalist view, *see* 1 WILLOUGHBY, *supra* note 21, §§ 212-15, at 495-503. He specifically considered the Taney Court-era dicta supporting the states' rights view and contrasted them with the many precedents upholding the nationalist view. Finding them irreconcilable, he presciently declared:

The author is convinced that the *obiter* doctrine that the reserved rights of the States may never be infringed upon by the treaty-making power will sooner or later be frankly repudiated by the Supreme Court. In its place will be definitely stated the doctrine that in all that properly relates to matters of international rights and obligations, whether these rights and obligations rest upon the general principles of international law or have been conventionally created by specific treaties, the United States possesses all the powers of a constitutionally centralized sovereign State; and, therefore, that when the necessity from the international standpoint arises the treaty power may be exercised, even though thereby the rights ordinarily reserved to the States are invaded.

*Id.* § 215, at 503. Professor Bradley claims John Bassett Moore for the states' rights view, helping to balance the ledger sheet. *See* Bradley, *supra* note 2, at 421 (citing 5 MOORE, *supra* note 504, § 736, at 166). That is an error. He relies on Moore's brief description of the Supreme Court's decision in *Prevost v. Greneaux*, 60 U.S. 1 (1856), discussed *supra* note 519. Moore's discussion is somewhat misleading (as a description of *Prevost*). Moore, however, is an equal opportunity employer in his description of authorities and does not purport to be giving his own views. Indeed, he also quotes from a large number of authorities in favor of the nationalist view. *See* 5 MOORE, *supra* note 504, §§ 734-36, 738, at 158-59, 161-62, 164, 166, 175-79. In any case, Moore was a State Department official under Secretary of State Root at the time he wrote the famous treatise on which Professor Bradley relies. Moreover, Moore later wrote a review of the books by Corwin, Burr, and St. George Tucker, in which he strongly criticized Tucker's book and endorsed the nationalist view. *See* J.B. Moore, *Reviews*, 32 POL. SCI. Q. 320, 320-24 (1917) (noting, as to advocates of the states' rights view, that "in proportion as they would curtail, thwart, and hamper the operation of the ample clause of the Constitution in this country, in the same measure must citizens of the United States be put at a disadvantage in foreign countries, reciprocity being essential to successful negotiation"). For Quincy Wright's views, *see* WRIGHT, *supra* note 21, § 50, at 88-93, and Quincy Wright, *The Constitutionality of Treaties*, 13 AM. J. INT'L L. 242, 252-60 (1919). For the views of Edwin Borchard, the great constitutional conservative, *see* Edwin Borchard, Comment, *Treaty-Making Power as Support for Federal Legislation*, 29 YALE L.J. 445, 447-49 (1919). For Sutherland's views, *see* GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 155-57 (1919). We have already discussed Root's view. *See supra* notes 586-593 and accompanying text. Samuel Crandall, the author of another leading text on the treaty power, also endorsed the nationalist view. *See* CRANDALL, *supra* note 64, at 106-11. For other authorities, *see supra* note 596. In the two decades preceding *Missouri*, the only prominent scholar of whom I am aware that endorsed the states' rights view was St. George Tucker. *See* TUCKER, *supra* note 52. Among post-Civil War commentators in the nineteenth century, Pomeroy strongly supported the nationalist view, *see* JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES §§ 674-79, at 556-70 (1880), while Cooley endorsed the states' rights view, *see* THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 103 (1880).

*e. Of Migratory Bird Statutes and Migratory Bird Treaties.* Congressional efforts to regulate migratory birds date to as early as 1904. The birds were of significant economic value in their own right, and they also played a critical role in protecting agriculture by reducing the insect population. Tragedy of the commons imperatives, however, had made it impossible for states to place adequate restrictions on hunting. As a result, the birds were in danger of becoming extinct.<sup>598</sup> The difficulty lay in the Court's decisions that had made it fairly plain that wild game was beyond the regulatory powers of Congress and hence was "reserved" to the states.<sup>599</sup> Constitutional objections thus repeatedly stymied efforts to pass a bill.<sup>600</sup> Indeed, proponents were themselves so unsure of the constitutionality of the proposed legislation that they introduced a constitutional amendment to validate it.<sup>601</sup> However, in spite of their doubts — and the certainty of the opponents — Congress proceeded to adopt the Migratory Bird Act of 1913.<sup>602</sup>

Despite the legislative victory, proponents correctly anticipated legal problems ahead. Their solution was striking: following the vote in the Senate, they immediately offered a resolution calling for negotiation of a migratory bird treaty with Canada.<sup>603</sup> The idea was apparently Root's, who offered the resolution and reportedly remarked: "I think, sir, that that may furnish a pathway along which we can proceed to some practical relief in regard to the very urgent and pressing evil . . ." <sup>604</sup> The treaty power, he claimed, might create "a situation . . . in which the Government of the United States will have constitutional authority to deal with this subject."<sup>605</sup> One need hardly guess why the idea sprang to his mind. In the next session, the Senate

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598. There are two excellent accounts of the background to the migratory bird legislation insofar as it is pertinent to *Missouri*. See Julian P. Boyd, *The Expanding Treaty Power*, 11 N.C. L. REV. 428, 442 (1926); Lofgren, *supra* note 548, at 78.

599. The leading case was *Geer v. Connecticut*, 161 U.S. 519, 528 (1896), in which the Court had decided that wild game within the territory of a state was held by the state in trust for its citizens. The Court had elaborated this doctrine in a line of cases. For discussion, see Lofgren, *supra* note 548, at 79, 83-91 (elaborating on the legal issues).

600. See Boyd, *supra* note 598, at 442; Lofgren, *supra* note 548, at 78-80.

601. See 47 CONG. REC. 2564 (1911).

602. See Boyd, *supra* note 598, at 442; Lofgren, *supra* note 548, at 80. One supporter candidly acknowledged that "I do not know whether [the bill] is constitutional but I do know that it is eternally right and in the end right will prevail." 49 CONG. REC. 4332 (1913) (remarks of Rep. Moss); see also H.R. REP. NO. 680, at 2, 4-5 (1912) (making similar acknowledgment).

603. See 49 CONG. REC. 1494 (1913); see also Boyd, *supra* note 598, at 442; Lofgren, *supra* note 548, at 81.

604. Root's remark was omitted from the permanent edition of the *Congressional Record* but was reported by Senator Robinson in a later debate. See 51 CONG. REC. 8349 (1914) (quoting Root); see also Boyd, *supra* note 598, at 442-43; Lofgren, *supra* note 548, at 81.

605. 51 CONG. REC. 8349 (1913).

went along, adopting a similar resolution, and the Wilson administration readily obliged, concluding a migratory bird treaty with Canada in 1916.<sup>606</sup>

Naturally enough, Root's strategy did provoke some hostile comment in Congress, as well it might.<sup>607</sup> If ever the federal government could be charged with bad faith in making a treaty, this had to be the case. Nevertheless, the Senate approved the treaty after a thirty-minute debate, and thereafter Congress adopted implementing legislation.<sup>608</sup> The legislation passed by a voice vote in the Senate and, after some constitutional sparring, by a vote of 236 to 49 in the House.<sup>609</sup> The constitutional question was thus sharply drawn.

As it turned out, proponents had been wise in planning an alternative constitutional basis for the legislation. Relying on well-established Supreme Court precedents, two lower federal courts quickly struck down the 1913 Act as a violation of the Tenth Amendment.<sup>610</sup> Although the government appealed to the Supreme Court, it was evidently highly dubious about its prospects for success. Hence, it delayed the argument, and ultimately dismissed the appeal once the treaty and implementing legislation of 1918 were in place.<sup>611</sup> Its strategy paid off quickly. In contrast to their reception to the 1913 Act, the four lower federal courts to hear challenges to the 1918 legislation were unanimous in upholding it as a valid exercise of the treaty power.<sup>612</sup> Indeed, the same district judge who had found the 1913 Act clearly unconstitutional under the Tenth Amendment now affirmed the 1918 legislation as unproblematic.<sup>613</sup> Citing the precedents we

606. For the adoption of the resolution, see 50 CONG. REC. 2339-40 (1913). The treaty was actually negotiated with Great Britain, which was still responsible for Canada's external affairs. See Convention with Great Britain for the Protection of Migratory Birds, 39 Stat. 1702 (1916); see also Boyd, *supra* note 598, at 443; Lofgren, *supra* note 548, at 81.

607. See, e.g., Boyd, *supra* note 598, at 443-44 (providing citations to the debate); Lofgren, *supra* note 548, at 81-82 (same). Root, among others, was a defender. The leading Senate isolationists, Borah and Reed, were among those who attacked the constitutionality of the treaty and its implementing legislation.

608. See Boyd, *supra* note 598, at 443-44; Lofgren, *supra* note 548, at 81-82. The legislation was dubbed the Migratory Bird Treaty Act of July 3, 1918. See 40 Stat. 755 (1918).

609. See 55 CONG. REC. 5548 (1918) (passing bill in the Senate); *id.* at 7461-62 (same, in the House); see also Lofgren, *supra* note 548, at 82.

610. See *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915); *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914) (per J. Treiber). Two state courts also struck down the statute. See *State v. Sawyer*, 113 Me. 458 (1915); *State v. McCullagh*, 96 Kan. 786 (1915). For extended analysis of the decision by Judge Treiber in *Shauver*, see Lofgren, *supra* note 548, at 82-85.

611. See Lofgren, *supra* note 548, at 85-91.

612. See *United States v. Thompson*, 258 F. 257 (1919); *United States v. Samples*, 258 F. 479 (1919), *aff'd sub nom.*, *Missouri v. Holland*, 252 U.S. 416 (1920); *United States v. Selkirk*, 258 F. 775 (1919); *United States v. Rockefeller*, 260 F. 346 (1919).

have discussed, all four of the district judges expressly upheld the nationalist view.

### III. THE MEANING OF *MISSOURI*

#### A. *Unraveling the Mysteries of Justice Holmes's Opinion*

Putting aside the controversy over the merits, Justice Holmes's opinion in *Missouri* has given rise to much interpretive debate. In part, the fault lies with Holmes. He famously sacrificed clarity for compression, explication for rhetorical flourish. As a result, even careful readers of the opinion have seriously misunderstood his argument.<sup>614</sup> The onus, however, is not entirely on Holmes. These mistakes have stemmed in part from a failure to understand the issue in historical context. As a result, many interpreters have failed to discern that Holmes was elegantly, albeit cryptically, restating the arguments which had already been worked out by others.

The opinion itself reveals that Holmes did in fact have a deep appreciation of the historical roots of the controversy, and the little evidence we have about the writing of the opinion confirms this conclusion. As he wrote to Harold Laski shortly after completing the opinion, "I have a case that interested me very much and on which I worked fiercely."<sup>615</sup> Holmes almost certainly consulted the recently published works of Edward Corwin and St. George Tucker, to say nothing of the other books and commentaries of leading authorities that the San Francisco School Board affair had inspired.<sup>616</sup> Indeed, although unacknowledged, the most important source of Holmes's opinion was quite likely Corwin's brilliant 1913 book *National Supremacy*. Because the structure of Holmes's argument so closely

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613. Compare *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1974) (per J. Trieber (striking down the 1913 Act on Tenth Amendment grounds), with *United States v. Thompson*, 258 F. 257 (1919) (affirming the 1918 legislation as a valid exercise of the treaty power and endorsing the nationalist view). Judge Trieber's opinion was the most elaborately researched and reasoned, and showed the impact of the previous decade's scholarly efforts.

614. For discussion of Holmes's sometimes cryptic style, and engaging commentary on the subject by Frankfurter and Brandeis, see Lofgren, *supra* note 548, at 113-14 (noting, *inter alia*, Brandeis's comment that "Holmes did not 'sufficiently consider the need of others to understand'").

615. 1 HOLMES-LASKI LETTERS, THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, at 254 (Mark DeWolfe Howe ed., 1953). For identification of *Missouri* as the case to which Holmes referred, see, e.g., *id.* at 254 n.2, and 9 ALEXANDER M. BICKEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-21, at 480 n.180 (1984).

616. Although the Court was doubtless aware of the issue, the briefs specifically brought the Japanese schoolchildren controversy to its attention. See Brief for Appellant, *Missouri v. Holland*, 252 U.S. 417 (1920), at 59.



tracks Corwin's distinctive analysis, familiarity with Corwin's book goes a long distance toward unraveling the mysteries of the opinion.

Notwithstanding the confusion, there are several points which have not provoked interpretive controversy. First, Holmes clearly held that if a treaty is valid, then there can be no doubt about Congress's power to pass legislation to implement the treaty under the Necessary and Proper Clause. Thus, the only question presented was the scope of the treaty power.<sup>617</sup> Second, Holmes accepted the traditional requirement that a treaty must deal with a subject proper for negotiation and agreement or, as Holmes put it, that the treaty power extends to subjects in which there is a "national interest."<sup>618</sup> Third, like his forebears, he agreed that treaties, like all other governmental acts, are subject to the prohibitions contained in the Constitution.<sup>619</sup> Finally, he clearly upheld the nationalist view, rejecting the claim that treaties are limited to those subjects which would otherwise fall within the scope of Congress's legislative authority. The only question in dispute is what Holmes said in order to justify this last, and most crucial, conclusion. To undo the widespread misconceptions, we will need to reexamine the text with care.

As Holmes begins by noting, the State of Missouri premised its argument against the treaty on the Tenth Amendment.<sup>620</sup> Many of the interpretive difficulties surrounding *Missouri* have stemmed from a simple failure to appreciate that this is the sole claim which Holmes sets out to answer. Holmes's first point is straightforward: the literal terms of the Tenth Amendment provide no support for Missouri's claim because the treaty power is expressly delegated to the national government and thus not "reserved" to the states.<sup>621</sup> Missouri's real claim, therefore, was "that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty can-

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617. See *Holland*, 252 U.S. at 432 (noting that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government").

618. See *id.* at 433-35. At several points Holmes referred to the treaty as serving an important national purpose. Indeed, at one point he claimed that "a national interest of very nearly the first magnitude is involved." *Id.* at 435.

619. See *id.* at 433 (noting that the treaty "does not contravene any prohibitory words to be found in the Constitution"). This point is of importance because Holmes was later, particularly during the Bricker Amendment controversy, misconstrued as having ruled that treaties are not subject to constitutional restraints of any kind. See *infra* notes 676, 688 and accompanying text.

620. See *Holland*, 252 U.S. at 431 (noting that the "ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment").

621. See *id.* at 432 (noting that "[t]o answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly").

not do.”<sup>622</sup> The lower courts had held that the 1913 Act was beyond Congress’s powers. It therefore followed, in Missouri’s view, that the treaty and implementing legislation were equally unconstitutional.<sup>623</sup> The unadorned question, in other words, was the validity of the states’ rights view of the treaty power.<sup>624</sup>

Holmes immediately gives his answer: the scope of the legislative powers granted to Congress “cannot,” he says, “be accepted as a test of the treaty power.”<sup>625</sup> Holmes thus explicitly endorses the nationalist view, and he dedicates the rest of the opinion to justifying this conclusion. The first argument he gives is familiar and rests on the text. Pointing to the provisions pertaining to treaties, he notes that the “language of the Constitution as to the supremacy of treaties [is] general.”<sup>626</sup> Under the Supremacy Clause, “Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States.” It “is open to question,” he then opines, “whether the authority of the United States means more than

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622. *Id.*

623. *See id.*

624. Some have supposed that Holmes was attempting to provide a general account of the limits applicable to treaties. *See, e.g.,* White, *supra* note 3, at 69-72 (interpreting Holmes as promising to define qualifications on the treaty power but failing to live up to the promise — and drawing possible implications from Holmes’s failure in this regard). Holmes is explicit throughout, however, that he is only “considering the validity of the test proposed” by Missouri. *Holland*, 252 U.S. at 433. The whole opinion is devoted to that question. To the extent Holmes addresses other limitations, it is not to break new ground, but only to explain why there is no question about whether the treaty in issue passes the traditional tests. Thus, the treaty furthers “a national interest of very nearly the first magnitude . . . [that] can be protected only by national action in concert with that of another power.” *Id.* at 435. There is no question, then, that it is a proper subject for negotiation, meeting the traditional requirement. Furthermore, it “does not contravene any prohibitory words to be found in the Constitution.” *Id.* at 433. In light of these conclusions, there was no need to consider further clarification of the applicable limits. The Tenth Amendment limit raised by Missouri was the only question to be addressed.

Professor White claims that Holmes’s conclusion that migratory birds were a subject of national concern “seems particularly counterintuitive” and virtually strips the requirement of any substance. “The risks to migratory birds,” he suggests,

were a function of their tendency to fly into a particular area in great numbers and the predictable reactions of citizens in that area . . . . Protection of migratory birds was simply a function of the existence or nonexistence of laws forbidding their killing. The United States could have achieved that protection without any help from Canada.

White, *supra* note 3, at 71 n.246. This claim seems fundamentally to misunderstand the purpose of treaties — indeed, even of legislation. The point is that because of tragedy of the commons imperatives, both countries had strong reasons to enter into mutually binding stipulations to restrain themselves. That way each could be sure that the other would not take advantage of the first’s restrictive legislation. That much seems beyond debate. Holmes quite rightly treats the question of whether there was a national interest in the treaty as a non-issue requiring no more than conclusory mention.

625. 252 U.S. at 433.

626. *Id.* at 432.

the formal acts prescribed to make the convention."<sup>627</sup> Taken out of context, this language might be read to suggest that there are no constitutional limits on treaties, but that was not Holmes's point. The next sentence dispels any doubts: "We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way."<sup>628</sup>

Admittedly, Holmes's language in this passage is elliptical, but his point can be reconstructed without too much difficulty. The Supremacy Clause, he is arguing, ties the validity of acts of Congress, but not the validity of treaties, back to the legislative powers of Congress. Acts of Congress must be made "in pursuance" of the Constitution, meaning within the scope of the powers delegated in Article I. Those powers were carefully defined and limited to avoid conflicts over the boundaries between federal and state power. In contrast, treaties have a much wider scope: the Constitution only specifies that they be made under the authority of the United States. This does not mean they are entirely unrestricted in subject matter. The "different way" their limits were to be "ascertained" entails only that the scope of Congress's authority is not the touchstone; rather, as he then made clear, the question was whether the treaty dealt with a matter of national interest. If it did, then the fact that it went beyond the scope of Congress's powers was irrelevant: "It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could."<sup>629</sup> Thus, it was not the scope of Congress's powers that determined the extent of the treaty power — the "test" proposed by Missouri — but the natural scope of the treaty power considered as an independent power in its own right.<sup>630</sup>

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627. *Id.* at 433.

628. *Id.* Then, a bit later, he notes that the treaty "does not contravene any prohibitory words to be found in the Constitution." *Id.* Nevertheless, Holmes's remark gave rise to much debate, during the Bricker Amendment controversy, about whether treaties are subject to constitutional restraints. See Lofgren, *supra* note 548, at 119 (discussing and collecting citations); *supra* note 619 and accompanying text; *infra* notes 676, 688. In my view, those who expressed concern were primarily politically motivated.

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

630. It seems evident that Holmes was short-handing the long-familiar argument made most famously by Calhoun. See *supra* note 42 and accompanying text. Calhoun emphasized the contrast between unqualified grant of the treaty power and the carefully defined and limited nature of Congress's legislative powers, which were specifically enumerated by subject matter to mark out their limits and thereby to preserve the powers to the states. See *supra* note 42 and accompanying text. Calhoun's argument had been cited routinely in authorities affirming the nationalist view. For examples, see, e.g., *supra* notes 532, 559, 564 and accompanying text. It was quoted in the lower court decisions upholding the treaty as well. See, e.g., *United States v. Thompson*, 258 F. 257, 260 (1919). In this respect, Holmes did not achieve his apparent aim: to state Calhoun's argument not only more economically but more effectively as well.

Holmes's next reason for rejecting the states' rights view is equally familiar. He simply invokes the standard point that the treaty power must be interpreted in light of the fact that the Constitution prohibits the states from making treaties. "[I]t is not lightly to be assumed," Holmes observes,

that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found [citing *Andrews v. Andrews*]. What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act.<sup>631</sup>

Although some have read the passage otherwise, Holmes was not endorsing the idea of inherent federal foreign affairs powers free from constitutional limitations;<sup>632</sup> nor was he licensing bad faith recourse to treaties in order to achieve domestic ends.<sup>633</sup> On the contrary, Holmes

631. *Holland*, 252 U.S. at 433 (citing *Andrews v. Andrews*, 188 U.S. 14, 33 (1903)). In *Andrews*, the question was whether under the Full Faith and Credit Clause a state could refuse to give effect to a divorce rendered in another state to citizens of the first on grounds that the first did not itself recognize. The Court pointed out that no state could effectively regulate marriage if its citizens could temporarily leave the state and obtain a divorce that would have been illegal in their home state. The regulation of marriage, however, was a power that must belong to every civilized government. Since it was beyond the powers delegated to Congress, it could only exist in the states. Hence, the Full Faith and Credit Clause should not be construed in a manner that would undermine the power over marriage admittedly belonging to the states. See *Andrews*, 188 U.S. at 33. This reasoning was just the inverse of Holmes's. The treaty power had been prohibited to the states. It belonged to the national government, and it ought therefore to be interpreted to avoid leaving the nation as a whole and as individual parts without the power to make treaties on all subjects appropriate for negotiation and agreement. The power to make treaties on all appropriate subjects was a power belonging to every civilized government.

632. Professor White claims that Holmes was at least toying with the notion of inherent foreign affairs powers and that he abandoned the traditional enumerated/reserved powers framework that had been accepted until then. Under this view, Holmes's argument was that the treaty power, being inherent in sovereignty, can override the sphere of reserved powers traditionally off limits to Congress. See White, *supra* note 3, at 63-72. White acknowledges that the opinion is ambiguous and that Holmes purported to be acting within the traditional enumerated/reserved powers framework. He seems to doubt that Holmes lived up to this promise and to believe that the idea of inherent powers free from constitutional limits forms the real basis for the decision. See *id.* at 72. I note that Professor White speaks with some authority about Holmes. See G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF (1993). Even many of *Missouri's* friends have understood Holmes this way. See Flaherty, *supra* note 3, at 1302-05; Neuman, *The Nationalization of Civil Liberties*, *supra* note 3, at 1645-46.

633. Under this view, Holmes intended to give the federal government a green light to regulate domestic affairs by finding cooperative foreign partners willing to sign off on *faux* treaties and thereby to avoid the restrictions of the Tenth Amendment. See White, *supra* note 3, at 71 (noting that what Holmes was saying was "that when the national government wanted to achieve some goal, and believed that the states would resist it, the national government could achieve that goal if it could induce a foreign power to agree to a joint articulation of that goal in a treaty"); Lofgren, *supra* note 548, at 98 (suggesting as a possible reading that because certain powers "had to exist somewhere in American government, a treaty followed by a statute could serve to clothe the national government with needed plenary power that the Constitution otherwise failed to grant"). According to Professor Lofgren, the opinion affirms the propriety of using the treaty power not for international purposes but to fill in gaps in Congress's limited domestic powers when necessary to achieve

was simply making one of the core arguments in favor of the nationalist view which, as we have seen, its advocates had uniformly advanced from the beginning. Because the states are expressly prohibited from making treaties — and are thus “incompetent to act” — imposing states’ rights subject matter limitations on the scope of the power would leave the nation — both the national government and the states — without any power to make treaties on a range of important subjects otherwise appropriate for negotiation and agreement. The power to make such treaties is the power which “‘must belong to and somewhere reside in every civilized government.’” The Court therefore ought not to impose implied limitations on the treaty power which would undermine this sound maxim.<sup>634</sup>

Holmes’s next argument is far more complex and elusive — and thus even more likely to be misunderstood. Still considering only “the validity of the test proposed,” Holmes, in the opinion’s most famous passage, observed:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hun-

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important domestic purposes. *See id.* In his view, Holmes is saying that if the states cannot escape from the race-to-the-bottom logic, then the federal government can have recourse to pseudo-treaties to make up for its lack of domestic powers. I do not deny that the Migratory Bird Treaty could plausibly have been seen in this light. *See supra* notes 603-609 and accompanying text. In my view, however, nothing in the opinion suggests that such bad faith practices are permissible under the treaty power. In this respect, *Missouri* just reflects the traditional — and continuing — judicial reluctance to second-guess the motives of the political branches, particularly in the field of foreign affairs. The Court was unwilling even to consider the possibility that the treaty was entered into in bad faith.

634. Indeed, the Court itself had made this very point in *Hauenstein*, *see supra* note 561 and accompanying text, as had the lower courts in upholding the Migratory Bird Treaty, *see, e.g., United States v. Thompson*, 258 F. 257, 259, 263, 268 (1919) (observing that the states “are expressly prohibited from entering into treaties, alliances, or confederations with other nations. If, therefore, the national government is also prohibited from exercising the treaty power, affecting matters which for internal purposes belong exclusively to the states, how can a citizen be protected in matters of that nature when they arise in foreign countries?”). The point had also been made on countless occasions in the past. For examples, *see supra* notes 532, 543-545, 590 and accompanying text. The government, moreover, had emphatically pressed the point in its argument. *See Missouri v. Holland*, 1920 Lexis 1520, at 16, 17, 19, 22 (observing that it “is inconceivable that, since the States were to be denied the treaty-making power, the framers of the Constitution intended that the treaty-making power conferred upon the new Government should be less than that possessed by any other independent government and less than that possessed by the State conferring it. The very general language used in conferring the power negatives such an intention”). As already explained, moreover, Holmes’s citation to *Andrews v. Andrews*, 188 U.S. 14, 33 (1903) strongly confirms this reading. *See supra* note 631. For further discussion of this point, *see supra* notes 51-53 and accompanying text; *infra* notes 709-711, 804-806 and accompanying text.

dred years ago. . . . The only question is whether [the treaty] is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.<sup>635</sup>

What prompted Holmes, thrice-wounded Civil War veteran, thus to invoke the bloodletting of the Civil War and “our whole experience?” Many have read this passage as a paean to an evolving conception of the Constitution, justifying an expansion of federal powers beyond those originally intended by the Founders. This construction, however, misses Holmes’s point. The passage neither addresses the question of expanding federal powers nor the capacity of the Constitution to evolve, at least in the sense we use that concept today. Indeed, as we shall see momentarily, Holmes himself explicitly places the decision on originalist grounds.<sup>636</sup> The passage, therefore, de-

635. *Holland*, 252 U.S. at 433-34.

636. Professors White and Lofgren both read Holmes as endorsing an evolving conception of the Constitution and, in particular, the notion that the national interest is not static. Just because migratory birds might not have been considered a matter of national importance in 1789 does not mean that, in light of our whole experience, they cannot be so considered today. See Lofgren, *supra* note 548, at 99; White, *supra* note 3, at 68-69. Indeed, White ridicules the passage by claiming that it

reduce[s] itself to the argument that even though the framers might not have explicitly said that the protection of migratory birds was a matter requiring national action, the “whole experience” of the United States since the founding of the Constitution, including “much sweat and blood” to prove that the United States was now “a nation” rather than merely “an organism,” demonstrated a national interest in the protection of migratory birds.

*Id.* at 69. He then adds that “[i]f that reading seems to parody Holmes’s argument, it illustrates the dangers in making literary inspiration a source of judicial language.” *Id.* at 69. Perhaps. A safer maxim might be to assume that an interpretation that renders a celebrated passage in an important text ridiculous must itself be mistaken.

In any case, the passage is surely rich enough to bear interpretation as an endorsement of the idea of an evolving Constitution. There is perhaps, there is no more eloquent expression of that view. Nevertheless, for reasons that will appear, I strongly doubt that that is what Holmes had principally in mind. Given its powerfully suggestive quality, it is not surprising that the passage has been used for many purposes, bearing little relation to the meaning intended in its original context. For discussion of some of its subsequent uses in important cases, see Lofgren, *supra* note 548, at 115-18.

It is no doubt true that Holmes rejected a static conception of the national interest that would have limited the treaty power to subjects deemed appropriate for negotiation at the time of the Founders. See *supra* notes 624, 629-630 and accompanying text. That latter position, however, was hardly controversial. Indeed, it was endorsed by the Founders themselves, see *supra* notes 208-210 and accompanying text; *infra* note 730 and accompanying text, and Holmes assumes it throughout without ever addressing the point. The difficulty with the White/Lofgren reading is that the quoted passage has nothing to do with the question of how to interpret the scope of the national interest. Rather, as Holmes explicitly stated, he was still addressing the meaning of the Tenth Amendment and Missouri’s argument — “test” — that it should be read to limit the treaty power to those subjects falling within the scope of Congress’s legislative powers. According to the position Missouri was asserting, the scope of the national interest was wholly irrelevant; no matter how important the subject — no matter how appropriate for negotiation and agreement and no matter how broadly the notion of the national interest may expand — if it was beyond Congress’s legislative powers, as the lower courts had held, the treaty power was precluded from dealing with the matter. Thus, it was not the scope of the national interest, but rather

mands a more careful reading. It is in the unraveling of the mysteries in the profoundly resonant phrases of the passage that the key to the opinion lies.

Part of the difficulty may arise from the fact that Holmes in this passage is (probably self-consciously) adopting *sub silentio* the central thesis that Corwin had developed in *National Supremacy*, and it is difficult to appreciate Holmes's meaning without a familiarity with Corwin's analysis. As Holmes pointed out at the outset, the literal terms of the Tenth Amendment could not support the states' rights view — because it only “reserves” to the states those powers not delegated to the United States. Rather, the states' rights view rested upon something entirely different and more radical: the idea that implicit in the Tenth Amendment — Holmes's “invisible radiation” from its general terms — were affirmative subject matter restraints that existed prior to and as absolute limitations on the scope of the delegated federal powers. As Corwin had argued, this idea was one of the fundamental points of contention between the strict and broad constructionists during the antebellum struggle. Strict constructionism had roots in Jeffersonian constitutionalism and the Virginia and Kentucky resolutions, rested at its core on an idea of the Union as a compact among sovereign states rather than a national polity, and, in the end, provided the constitutional justification for secession. In practice, it meant that slavery — and anything that could affect it — was “reserved” and therefore that no federal power could be exercised in a manner that would invade this affirmatively guaranteed sphere of state autonomy. As we have seen, the treaty power was no exception.<sup>637</sup> The Taney Court dicta supporting the states' rights view was thus just the inevitable working out of the whole strict constructionist jurisprudential project in relation to the treaty power.<sup>638</sup>

Understood in this light, Holmes was situating Missouri's Tenth Amendment claim within the framework of the struggle between the strict and broad constructionists over the fundamental question of national supremacy. However doubtful strict constructionism was as an

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the validity of Missouri's Tenth Amendment claim that was at issue. Equally decisive, Holmes makes clear just a few sentences later that he is not resting his ruling on “the later developments of constitutional law.” *Holland*, 252 U.S. at 434. It is fully supported by decisions going back to the eighteenth century. *See id.* at 434-35. An evolving Constitution thus does not enter into the case. Holmes's references to history have a different, but no less important, purpose.

637. For discussion of the antebellum strict constructionist perspective and its application to the treaty power, see *supra* notes 455-458, 470-475, 494, 506, 511-512, 514-519 and accompanying text.

638. *See* CORWIN, *supra* note 62, at 23-58, 99-165. Corwin's book is a *tour de force* in its sweeping overview of the broad movements of American constitutional thought. Written when he was still a relatively young scholar, it left no doubt that he would be recognized as among the most important constitutional scholars of the twentieth century.

interpretation of original understandings,<sup>639</sup> it was not the sort of movement that could be defeated simply by reference to the Founders' intent or to John Marshall's decisions — by what was said “a hundred years ago.” The jurisprudential conflict between the two contending schools was the expression in constitutional law of profound underlying sectional cleavages over the character of national identity, cleavages that could not be resolved through constitutional exegesis.<sup>640</sup> Even the “most gifted” of the Constitution's “begetters” could not have foreseen completely — nor, Holmes might have added, have controlled — whether the organism they called into being would develop into a nation. Only the unfolding of history could provide an answer, and for us, tragically, the forging of a national identity could be accomplished only on the field of battle — the “much sweat and blood” that it “cost their successors . . . to prove that [the Founders] created a nation.” Strict constructionism was, and as things developed could only have been, defeated by the clash of arms. Missouri's conception of the Tenth Amendment, having descended directly from the strict constructionist school, had to be viewed “in the light of our whole experience.” What that amendment “has reserved” depended upon “what this country has become.”

When this remarkable passage is correctly understood, the meaning of the next two paragraphs immediately becomes clear. They simply aim to demonstrate how Missouri's Tenth Amendment claim is inconsistent with the fundamental principle of national supremacy announced in *McCulloch v. Maryland*: the principle that notwithstanding any state constitutions or laws to the contrary, all exercises of federal authority within the scope of the delegated powers are supreme, that there are no subjects which are, a priori, affirmatively reserved to the states by the Tenth Amendment. Thus, Holmes notes that Missouri “founds its claim of exclusive authority upon an assertion of title to migratory birds.”<sup>641</sup> Because the treaty power is delegated, however, “it does not follow that [the state's] authority is exclusive of paramount powers.”<sup>642</sup> The state's claim is simply that the treaty deals with creatures that are “within the state borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the State would be free to regulate this subject itself.”<sup>643</sup> These facts, however, do not distinguish the case from any other valid exercise of federal authority: “As most of

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639. Corwin spent considerable effort to demonstrate that the strict constructionist viewpoint was clearly inconsistent with the original understandings. *See id.* at 23-58, 99-121.

640. For illuminating discussion, see PAUL W. KAHN, *LEGITIMACY AND HISTORY* 38-45 (1992).

641. *Holland*, 252 U.S. at 434.

642. *Id.*

643. *Id.*



the laws of the United States are carried out within the States and as many of them deal with matters which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim."<sup>644</sup> The states' rights view, in other words, was based on erroneous, strict constructionist conceptions of the Tenth Amendment and the principle of national supremacy: "No doubt the great body of private relations usually fall within the control of the State, but a treaty," like all other exercises of federal authority within the scope of a delegated power, "may override its power."<sup>645</sup>

It was unnecessary, moreover, "to invoke the later developments of constitutional law for this proposition."<sup>646</sup> Indeed, specifically in regard to the treaty power,

it was recognized as early as *Hopkirk v. Bell*, 3 Cranch, 454, with regard to statutes of limitation, and even earlier, as to confiscation, in *Ware v. Hylton*, 3 Dall. 199. It was assumed by Chief Justice Marshall with regard to the escheat of land to the State in *Chirac v. Chirac*, 2 Wheat 259, 275. *Hauenstein v. Lynham*, 100 U.S. 483. *Geofroy v. Riggs*, 133 U.S. 258. *Blythe v. Hinckley*, 180 U.S. 333, 340. So as to a limited jurisdiction of foreign consuls within a State. *Wildenhus's Case*, 120 U.S. 1. See *Ross v. McIntyre*, 140 U.S. 453. Further illustration seems unnecessary.<sup>647</sup>

Original understandings, then, were more than adequate to support the nationalist view, once the detritus of the strict constructionist conception of the Tenth Amendment had been washed away.

It is evident, then, that Holmes did indeed work "fiercely" on the case. True, his brief opinion showed scant concern for citing authorities or precedents and working out the details of the arguments. Those precedents and arguments could be found in *Hauenstein*, in the decisions of the courts below, and in the countless authoritative discussions of the issue in the past. Nor was the question particularly problematic, given the very widespread endorsement of the nationalist view among leading authorities. Befitting his genius, Holmes instead went to the root of the matter and offered a penetrating vision of how the question fit into the framework of our constitutional structure and history. It is for this reason that *Missouri* ought rightly to be celebrated as among the greatest of the Court's decisions.

### B. *The Court and Human Rights Treaties*

A final note to dispel any doubts about whether the Court was aware of the full implications of its decision. Professor Bradley has

644. *Id.*

645. *Id.*

646. *Id.*

647. *Id.* at 434-35.

emphasized that the development of human rights treaties arose subsequent to *Missouri*; hence, the Court could not have contemplated that treaties affecting the ways in which nations treat their own citizens, as opposed to aliens, might be made the subject of treaties.<sup>648</sup> This suggestion is, among other things, historically untenable.

Perhaps the most discussed “human rights” treaties at the time of *Missouri* dealt with labor rights. The first labor treaties were concluded among European nations right after the turn of the century.<sup>649</sup> Most important, however, was Part XIII of the Treaty of Versailles, which established the International Labor Organization (“ILO”) and charged it with drafting conventions dealing comprehensively with the rights of workers and working conditions.<sup>650</sup> *Missouri* itself was decided at the same time the Treaty of Versailles was being debated in the Senate and across the country. Indeed, even before the Senate had acted upon the Treaty, President Wilson had improvidently invited the ILO to hold its opening session in Washington, D.C., in 1919.<sup>651</sup> Under the eyes of the capitol, the first ILO conference adopted draft conventions on the eight-hour work day, maternity protection, night work for women and children, unemployment, and child labor.<sup>652</sup> Nor had the implications of the nationalist view of the treaty power gone unappreciated even before *Missouri*. There was already much speculation over the question of whether the treaty power would permit the United States to conclude labor conventions.<sup>653</sup> In

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648. See, e.g., Bradley, *supra* note 2, at 460 (noting that since *Missouri* “we have seen the rise of international human rights law, which regulates the relations between nations and their citizens”). Ironically, in making this claim, Professor Bradley seems not to have noticed that *Missouri* itself dealt with a treaty placing limitations on a state’s treatment of its own citizens, not aliens. Indeed, that is a distinctive feature of most, if not all, environmental treaties, of which the Migratory Bird Treaty appears to have been the first. It is also a distinctive feature of arms control treaties, conventions for the suppression of narcotics, treaties dealing with atomic energy, and many others. Human rights treaties may be politically sensitive, but they are not unique in the respect which Professor Bradley emphasizes.

649. For discussion, see, e.g., Boyd, *supra* note 598, at 440-50.

650. Treaty of Versailles, June 28, 1919, pt. 13, § 1. Among other things, the ILO was to propose conventions dealing with the length of the working day, the prevention of unemployment, the provision of adequate wages, the protection of workers against sickness and injury, the protection of women and children, the provision for old age and disability, and the protection of workers exercising the right to organize unions. See *id.*

651. President Wilson submitted the Treaty of Versailles in 1919. It famously provoked a major national debate. For discussion, see generally DEENA FRANK FLEMING, *THE UNITED STATES AND THE LEAGUE OF NATIONS, 1918-1920* (1932), and David Golove, *From Versailles to San Francisco: The Revolutionary Transformation of the War Powers*, 70 W. COLO. L. REV. 1491, 1493-94 (1999). For discussion of the ILO invitation incident, see Ackerman & Golove, *supra* note 19, at 841-42. The agenda for the first meeting in Washington was included as an annex to Chapter 4 of Part XIII of the Treaty of Versailles. See Treaty of Versailles, *supra* note 650, pt. 13, § 1, ch. 4, annex.

652. See, e.g., Boyd, *supra* note 598, at 451-52 & n.114; *ILO History* (last modified Jan. 11, 2000) <<http://www.ilo.org/public/english/about/history.htm>>.

653. As early as 1907, a scholar raised the issue in the debate over the San Francisco School Board ordinance excluding Japanese schoolchildren from the public schools. See

1919, the American Association for Labor Legislation declared that "these international evils know no frontiers" and resolved that "in international agreements there be incorporated minimum protective labor guarantees."<sup>654</sup> Even the briefs in *Missouri*, citing the Treaty of Versailles, cautioned the Court that a ruling in favor of the treaty would permit the federal government to take over areas of traditional state authority, including the regulation of child labor. Citing Article 23 of the Treaty of Versailles, which explicitly pledged states to secure labor rights, the State of Kansas warned:

If the United States becomes a party to this treaty, it is thereby invested with constitutional authority to control the employment of labor in local industries, within each of the sovereign states, to determine the conditions of labor, to prescribe a minimum wage, to regulate hours of labor, to prohibit child labor, and to determine the innumerable questions of a similar character which have always been supposed to be a matter of state regulation.<sup>655</sup>

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Anderson, *supra* note 596, at 664. For discussions of the issue during the period immediately preceding *Missouri*, see, e.g., J.P. Chamberlain, *The Power of the United States Under the Constitution to Enter into Labor Treaties*, 9 AM. LAB. LEG. REV. 330 (1919); Thomas I. Parkinson, *Constitutionality of Treaty Provisions Affecting Labor*, 9 AM. LAB. LEGIS. REV. 21 (1919); and *The League of Nations Covenant*, 8 PROC. ACAD. POL. SCI. 359-512 (1919). In 1919, Edwin Borchard, a constitutional conservative, see Ackerman & Golove, *supra* note 19, at 806 & n.17, 872-73, wrote in the *Yale Law Journal*:

It is within the power of the federal government by treaty to remove from state control any matter which may become the subject of negotiation with a foreign government. With the continued drawing together of the world by increased facilities for travel and communication, the subjects of common interest which require international regulation will continue to grow in extent and variety. Uniformity of legislation by withdrawal from state legislative control of such subjects as marriage and divorce, labor legislation, the ownership and inheritance of property, and all matters affecting aliens would be possible by the exertion of the necessary federal treaty power.

Borchard, *supra* note 597, at 449 (emphasis added). Borchard spoke with special authority. He had been Librarian of the Supreme Court at the time of the migratory bird litigation immediately preceding *Missouri*, and Chief Justice White had commissioned him to make an exhaustive study of the law in order to find a constitutional basis for the legislation. He had been privy as well to discussions with the Chief Justice about the use of a treaty as a means of avoiding the problem of Congress's limited domestic authority. The extraordinary story is recounted in Edwin Borchard, *Treaties and Executive Agreements — A Reply*, 54 YALE L.J. 616, 632-33 (1945). See also 9 BICKEL, *supra* note 615, at 477-78.

654. Boyd, *supra* note 598, at 453 (quoting 9 AM. LAB. LEG. REV. 329 (1919)).

655. Brief for the State of Kansas, *Amicus Curiae*, at 43, 28-29, *Missouri v. Holland*, 252 U.S. 417 (1920). Kansas was particularly farsighted in imagining the future expansion of treaties, making clear that, if accepted, the government's position would permit treaties on "marriage and divorce," "the organization of corporations and their affairs," and a range of other matters of local import. *Id.* at 28-29. By treaty, moreover, "[c]hild labor laws could thus be made uniform throughout the states and uniform rules laid down covering the conditions of labor, including wages in stores, factories and mines." *Id.* Article 23 of the Treaty of Versailles, which Kansas quoted, provided that the members of the League of Nations "will endeavor to secure and maintain fair and humane conditions of labor for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend." *Id.* at 42-43 (quoting Treaty of Versailles).

In the wake of the decision, speculation became widespread.<sup>656</sup>

There can thus be no doubt that the Court was fully aware that *Missouri* would remove the most potent constitutional obstacle blocking the path to human rights treaties.<sup>657</sup> The near unanimity with which it accepted this possibility is all the more impressive in light of its controversial five-to-four decision less than two years before in *Hammer v. Dagenhart*.<sup>658</sup> In *Hammer*, the Court had reached out aggressively to strike down a congressional statute forbidding the sale in interstate commerce of products manufactured with the use of child labor. The uproar that greeted that decision is well known. What is perhaps less well known is the Court's evident willingness to offer the federal government a means to achieve the same end through international negotiation and agreement. Surely, when the Court permitted the federal government to use a treaty to avoid the effect of lower court decisions striking down migratory bird legislation as beyond the scope of congressional authority, it was aware that the same logic applied fully to *Hammer*.<sup>659</sup>

#### IV. FROM *MISSOURI* TO THE PRESENT

Although *Missouri* finally settled the ancient controversy over the nationalist and states' rights views as a matter of constitutional law, it could not resolve the political tensions underlying the controversy. Indeed, by bringing the subject more clearly into public view, the decision may well have inflamed, rather than soothed, conflict. As a consequence, a striking conjunction of developments ensued. On the one hand, the Court repeatedly reaffirmed *Missouri* in the following decades, giving no hint that it intended to retreat from the full implications of its decision. On the other hand, the presence of a vigilant Senate prevented the executive from attempting to exploit the

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656. See, e.g., Boyd, *supra* note 598, at 449-55; Jay Lloyd Jackson, *The Tenth Amendment Versus the Treaty-Making Power Under the Constitution of the United States* (pt. 2), 14 VA. L. REV. 441, 446-56 (1928); Lofgren, *supra* note 548, at 117 n.216 (collecting citations); Thomas Reed Powell, *The Supreme Court and the Constitution 1919-1920*, 35 POL. SCI. Q. 411, 417 (1920).

657. I do not mean to suggest that the Court foresaw the explosion in human rights treaties that followed World War II. Rather, my point is only that the Court was perfectly aware that treaties might extend protections to the rights of U.S. citizens and might do so even in areas beyond Congress's legislative powers.

658. 247 U.S. 251 (1918).

659. Notwithstanding the scholarly discussion and obvious implications of *Missouri*, U.S. diplomats continued to assert constitutional uncertainty about whether the United States could conclude labor conventions. See, e.g., STOKE, *supra* note 550, at 61-62. As in other instances, behind the diplomatic position lay less a concern about what the Supreme Court would rule than a near certainty about the light in which the Senate would view such a treaty. For other examples, see *supra* notes 547-552 and accompanying text. For discussion of a similar position asserted about treaties limiting armaments manufacturing, see HENKIN, *supra* note 16, at 191-92.

*Missouri* doctrine to the fullest. As a result, it was cautious in striking out into new areas which might provoke controversy. Indeed, even after *Missouri*, it continued on occasion to parry international pressure by claiming constitutional incompetence. With time, however, such claims sounded more obviously disingenuous, as the meaning of *Missouri* became more widely understood and the executive's inconsistencies more blatant. Ultimately, constitutional excuses were abandoned in favor of more forthrightly political explanations for the unwillingness of the executive and Senate to impose particular treaties upon the states. In the meantime, however, race once again provoked full-blown political controversy over the *Missouri* question. This time, with *Missouri* on the books, states' rights advocates attempted a direct assault through constitutional amendment. Their failure only served to consolidate *Missouri's* holding even further.

#### A. *The Supreme Court Reaffirms Missouri*

The Court's two most notable opinions in the decade following *Missouri* were *Asakura v. City of Seattle*<sup>660</sup> and *Santovincenzo v. Egan*.<sup>661</sup> At issue in *Asakura* was a Seattle municipal ordinance regulating pawnbrokers, which restricted applicants to citizens of the United States. It would be hard to imagine a subject more local in character, and the city urged the Court to revisit *Missouri*; the city argued that *Missouri* was inconsistent with the Tenth Amendment and rendered the treaty power "a convenient substitute for legislation in fields over which Congress has no jurisdiction. As this Court knows, a treaty is usually drafted secretly by the State Department or commissioners . . . in conference with some foreign representative."<sup>662</sup> The Court refused the bait. Instead, Justice Butler, speaking for a unanimous Court, made clear that *Missouri* would be taken for all it was worth:

The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend "so far as to authorize what the Constitution forbids," it does extend to all proper subjects of negotiation between our government and other nations. . . . The treaty was made to strengthen friendly relations between the two nations. . . . Treaties for the protection of citizens of one country residing in the territory of another are numerous, and make for good understanding between nations. The treaty is binding within the State of Washington. . . . It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates

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660. 265 U.S. 332 (1924).

661. 284 U.S. 30 (1931).

662. *Asakura*, 265 U.S. at 338 (Charles T. Donworth, Counsel for Defendant).

of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.<sup>663</sup>

In other words, the only question was whether the treaty was of a common type and whether it strengthened “friendly relations” and promoted “good understanding.” If so, then no matter how local the subjects with which it dealt, it fell within the scope of the treaty power and superseded inconsistent state laws.<sup>664</sup>

*Santovincenzo* presented a similar case. The treaty at issue had a novel provision concerning intestate distribution of the estates of decedents of Italian nationality. Under New York law, in the absence of known heirs, the estate escheated to the state. Under the treaty, however, the Italian Consul was entitled to receive the assets for distribution in accordance with Italian law. Thus, rather than just removing the disability of alienage, the treaty substituted the law of a foreign nation regarding inheritance for the law of a state.<sup>665</sup> The Court was once again unanimous in upholding the treaty, with Chief Justice Hughes delivering the opinion. Reminding his audience that treaties of this kind have reciprocal benefits, Hughes observed:

There can be no question as to the power of the Government of the United States to make the Treaty . . . . The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations, and agreement with respect to the rights and privileges of citizens of the United States in foreign countries, and of the nationals of such countries within the United States, and the disposition of property of ali-

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663. *Id.* at 341 (citations and footnote omitted).

664. Even before *Asakura*, the Court had assumed the validity of the same treaty at issue in that case in *Terrace v. Thompson*, 263 U.S. 197, 222-23 (1923). In *Terrace*, Justice Butler, writing for the Court, held that Washington’s Alien Land Law, which prohibited Japanese residents from leasing agricultural land, was not in violation of the treaty — or, for that matter, of the Equal Protection Clause. *See id.* at 221-22. The Court expressed no doubts, however, about whether the treaty would override the local law if the latter were in conflict with the treaty. *See id.* After *Asakura*, the Court decided two other cases in which *Missouri* was reaffirmed. In *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929), the Court unanimously upheld a treaty provision overriding a discriminatory state inheritance tax on aliens to avoid violation of a treaty with Denmark. The Court did not pause even to consider the validity of the treaty. *See id.* (noting that because “the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments”). Finally, in *Todok v. Union State Bank*, 281 U.S. 449, 453-54 (1930), the Court went out of its way to affirm that the treaty of 1783 with Sweden, *see supra* notes 93-95 and accompanying text, gave aliens the right to hold and inherit real estate, and to disapprove of Attorney General Wirt’s 1819 states’ rights opinion giving the contrary view of the treaty and stating his dictum that the treaty power did not extend to the rights of aliens to inherit real property in the states. For discussion of Wirt’s view, *see supra* note 421 and accompanying text.

665. The Italian Consular Treaty contained a most favored nation clause. The Italian Consul relied on an article in an 1856 treaty with Persia. *See Santovincenzo*, 284 U.S. at 35-36.

ens dying within the territory of the respective parties, is within the scope of that power, and any conflicting law of the State must yield.<sup>666</sup>

### B. *The Executive and the Senate*

As dramatic as *Missouri's* holding was as a matter of constitutional law, it had relatively little immediate impact on the conduct of the executive branch. In retrospect, this should not be surprising. The Framers had created a system designed to ensure rigorous scrutiny of treaties that threatened to undermine state interests, and the system had been, and continued to be, highly effective in achieving this aim. In conducting negotiations, the President always had to bear in mind the watchful eye of the Senate. As a result, the same practical limitations that had constrained the executive before 1920 continued to constrain it thereafter.

The executive's treaty practice during this period was thus of a dual character. The President and Senate continued to make a variety of treaties that interfered with traditional areas of exclusive state legislative competence and even expanded into important new areas.<sup>667</sup> At the same time, especially in the decade following *Missouri*, U.S. diplomats occasionally invoked constitutional incapacities when explaining to other nations their reasons for declining to join in certain treaty regimes — most importantly, conventions concerning private international law, labor rights, and armaments production.<sup>668</sup> Such statements were no doubt made with the political realities of the Senate closely in mind, and the statements were so often inconsistent with and contradicted by subsequent practice that they came to be widely viewed with suspicion — “as merely an excuse for not doing something which the United States does not wish, as a matter of policy, to do.”<sup>669</sup> As *Missouri* came to be more widely understood, the

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666. *Id.* at 40. For subsequent cases, see discussion *infra* notes 692-695 and accompanying text.

667. For examples, see HENKIN, *supra* note 16, at 191-92, 463-64, 474-75 (describing various conventions); MITCHELL, *supra* note 526, at 68-95, 97-115, 121-28 (same); and Zechariah Chafee, Jr., *Amending the Constitution to Cripple Treaties*, 12 LA. L. REV. 345, 364-68 (1952) (same). The Senate, however, often imposed restrictive reservations to protect state interests. See, e.g., HENKIN, *supra* note 16, at 192, 464-65.

668. See HENKIN, *supra* note 16, at 191-92, 463-64 (describing examples); Pitman B. Potter, *Inhibitions Upon the Treaty-Making Power of the United States*, 28 AM. J. INT'L L. 456, 456-61 (1934) (same); *supra* note 659.

669. Potter, *supra* note 668, at 461-62. Professor Potter, who taught in Geneva, wished to assume that the statements were in good faith, but could offer no reason for so concluding. For inconsistencies, see HENKIN, *supra* note 16, at 464 (describing how in early 1930s the United States dropped the federalism reservations it had asserted in the late 1920s to armaments conventions), and Nadelmann, *supra* note 550, at 341 (describing 1942 Senate approval of a private international law convention on powers of attorney, despite earlier pleas of constitutional incapacity). Potter discusses the inconsistent statements of United States diplomats concerning federal authority over conventions dealing with the rights of

statements themselves became more equivocal, seemingly asserting political rather than constitutional imperatives.<sup>670</sup>

The same tendency was marked in the occasional efforts of the United States to include "federal-state" clauses in treaties and of the Senate to impose federalism-based reservations. Federal-state clauses permit federal states to limit their binding obligations under a treaty to carrying out those portions of the treaty which deal with matters within the usual legislative competence of the federal government. As to matters ordinarily within the jurisdiction of local governments, the federal government is only obliged to bring the relevant treaty provisions to their attention with a recommendation that the provisions be carried out. Senate federalism reservations attempt to achieve the same result when the President has been unsuccessful in the difficult task of convincing other nations to accept a federal-state clause.<sup>671</sup> At times, the executive or the Senate claimed to be acting under constitutional necessity, but in time they adopted equivocal language which implicitly acknowledged the political character of the federalism restraints.<sup>672</sup>

### C. *The Bricker Amendment*

The relatively high degree of quietude that *Missouri* had achieved shattered in the early 1950s. Once again, race was the principle

aliens. See Potter, *supra* note 668, at 458-61. Indeed, it is nothing short of incredible that U.S. diplomats would claim constitutional incapacity to make treaties of that nature in light not only of *Missouri* but of the large number of treaties of that kind that had been made in the past. For a remarkable effort by one diplomat to harmonize the contradictory, see Potter, *supra* note 668, at 460-610 (quoting League of Nations Document C.10M.8.1934.IV, at 6).

670. The U.S. delegation's explanation for why it could not vote on a code of private international law in 1928 was a typical use of weasel words:

The Delegation of the United States of America regrets very much that it is unable at the present time to approve the Code of Dr. Bustamante, as in view of the Constitution of the United States of America, the relations among the States [sic] members of the Union and the powers and functions of the Federal Government, it finds it very difficult to do so.

Nadelmann, *supra* note 550, at 337 & n.68 (quoting THE INTERNATIONAL CONFERENCES OF AMERICAN STATES 1889-1928 371 (Scott ed. 1931)). For other examples, see *id.* at 336, 342-43. It was a dispute over this statement that led to debate in 1928 and 1929 at the meeting of the American Society of International Law, at the latter of which Charles Evans Hughes made a famous statement about the requirement that treaties deal with matters of "international concern." See 1928 PROC. AM. SOC. INT'L L. 60-62; 1929 PROC. AM. SOC. INT'L L. 176, 194-96. For further discussion, see *supra* notes 550-552 and accompanying text; *infra* notes 727-728 and accompanying text.

671. As to federal-state clauses and the increasing resistance to their inclusion in multi-lateral treaties, see RESTATEMENT (THIRD), *supra* note 19, § 302 reporter's note 4; HENKIN, *supra* note 16, at 192 & 464 n.68. As to federalism reservations, see *id.* at 181 & 453 n.31.

672. See HENKIN, *supra* note 16, at 192 & n.\*, 464 n.68 (describing the shift from reservations limiting U.S. obligations, to those matters "within the jurisdiction" of the federal government, to those matters over which they "exercise" jurisdiction or which are "appropriate" for federal action).



provocation. After adoption of the United Nations Charter, courts tentatively began to toy with the possibility that the Charter's broad expressions in favor of human rights might constitute self-executing treaty obligations mandating higher levels of protection to civil liberties than the Supreme Court had required under the Fourteenth Amendment. One lower state court had even struck down California's anti-Japanese alien land laws as inconsistent with the Charter.<sup>673</sup> The implications struck terror into the hearts of conservative Republicans and racist Southern Democrats, who immediately perceived the danger posed to racial segregation. When the Truman administration pushed through the aspirational Universal Declaration of Human Rights and then began negotiations for a binding international human rights covenant, the threat became too much to bear. A constitutional amendment was necessary to prevent the United States from concluding such a treaty.<sup>674</sup> It was *Missouri*, moreover, that stood at the center of the problem: if the United States ratified the proposed covenant, then under *Missouri* Congress would have the power to implement it by adopting a national anti-lynching law or even a law prohibiting racial segregation altogether.<sup>675</sup>

Thus began Senator John Bricker's (shameful) seven-year effort to limit the treaty power through constitutional amendment.<sup>676</sup> Once

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673. In *Oyama v. California*, 332 U.S. 633, 647, 650 (1948) (Black, joined by Douglas, JJ., and Murphy joined by Rutledge, JJ., concurring), four Justices said that California's anti-Japanese alien land law violated the Charter. In *Sei Fujii v. State*, 217 P.2d 481 (1950), an intermediate California Court of Appeal held that the human rights provisions of the Charter are self-executing and overrode another section of California's alien land law. The California Supreme Court reversed that ruling, finding that the Charter provisions were not self-executing. See *Fujii v. State of California*, 242 P.2d 617 (Cal. 1952).

674. The whole embarrassing episode is recounted admirably in DUANE TANNANBAUM, *THE BRICKER AMENDMENT CONTROVERSY, A TEST OF EISENHOWER'S POLITICAL LEADERSHIP* 1-48 (1988). See also Lofgren, *supra* note 548, at 118-20. There were of course other considerations that helped prompt the Bricker Amendment movement. Among other things, the movement reflected an isolationist backlash against the United Nations, pent-up resentment against Franklin Roosevelt, antipathy for the "executive agreements" reached in Yalta and Potsdam, and an intense hostility to any foreign influence over domestic practices and institutions. See TANNANBAUM, *supra*, at 1-48. Proponents, moreover, claimed that the human rights covenants threatened the constitutional liberties of American citizens. This was a convoluted claim, which at root meant the liberty to discriminate. See *id.*

675. See TANNANBAUM, *supra* note 674, at 12-15. At the time, it was thought that Congress would not have that authority in the absence of a treaty. That later proved incorrect. See HENKIN, *supra* note 16, at 192-93. *Missouri* would only come into play, of course, if the international human rights covenant was not self-executing. That too was a point which the amendment proposals sought to accomplish.

676. There were a number of different versions of the so-called "Bricker Amendment," some proposed by Bricker, others by the American Bar Association, and still others by different Senators. They are conveniently reproduced in TANNANBAUM, *supra* note 674, at 221-27. One common feature of all of the amendment proposals was to clarify that treaties are subject to the Constitution. See *id.* Of course, that point was never in doubt, but Bricker proponents made a great deal of the claim that Justice Holmes, in *Missouri*, had raised the possibility that treaties would not even be subject to the Bill of Rights. See TANNANBAUM, *supra* note 674, at 36-41; George A. Finch, *The Need to Restrain the Treaty-Making Power of*

again, the *Missouri* question was propelled into national prominence and became the subject of widespread national debate in Congress, the press, and law journals.<sup>677</sup> At one point in 1954, the proposed amendment came within one vote of passage in the Senate,<sup>678</sup> and the whole experience left a deep imprint on the nation — particularly with respect to human rights treaties.<sup>679</sup> However, rather than undermining *Missouri*, as Professor Bradley seems to imply, the Bricker Amendment controversy actually revealed far greater consensus on the nationalist view than may at first have appeared, and the controversy ultimately enhanced its constitutional grounding.

Surprisingly, Bricker himself initially opposed overruling *Missouri* because his experience in the Senate led him to believe that the treaty power would necessarily sometimes have to touch on matters otherwise within state legislative competence.<sup>680</sup> In early versions of his amendment, he therefore refused to include the famous “which” clause that was designed to overturn *Missouri*. It was only under intense pressure from virtual fanatics in the American Bar Association that he ultimately agreed to its inclusion.<sup>681</sup> It was that provision,

*the United States Within Constitutional Limits*, 48 AM. J. INT’L L. 57, 66-67 (1954). Opposition on this point was limited to pointing out that it was entirely unnecessary. See Finch, *supra*, at 67; John B. Whitton & J. Edward Fowler, *Bricker Amendment — Fallacies and Dangers*, 48 AM. J. INT’LL. 23, 31-33 (1954).

677. For citations, see Lofgren, *supra* note 548, at 118-20. As Lofgren explains, *Missouri* was “the *bête noire* of the [Amendment’s] proponents.” *Id.* at 119 (quoting Zechariah Chaffee, *Stop Being Terrified of Treaties: Stop Being Scared of the Constitution*, 38 A.B.A. J. 731, 732 (1952)).

678. See 100 CONG. REC. 2374-75 (1954). For discussion, see TANNANBAUM, *supra* note 674, at 180-81. The vote was not as close as at first appears. See *id.* at 188-89. The vote was on Senator George’s substitute, which had virtually abandoned the effort to amend the Treaty Clause and had focused instead on executive agreements. See *id.* at 146-47; *infra* notes 686-689 and accompanying text.

679. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’LL. 341, 348-50 (1995).

680. See TANNANBAUM, *supra* note 674, at 42 (noting that although Bricker “was usually a vocal critic of any attempts to expand the power of the federal government, Bricker’s years in the Senate had convinced him that there were some topics that came ‘within the legitimate scope of, treaties, notwithstanding the fact that the States maybe deprived of some of their jurisdiction’” (quoting Letter from Bricker to Eberhard Deutsch (Nov. 5, 1951)).

681. See TANNANBAUM, *supra* note 674, at 91-92 (describing how Bricker caved into political pressure from the ABA to accept the “which” clause). The “which” clause provided: “A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.” *Id.* This provision had two aspects. First, it made all treaties non-self-executing, and second, it overruled *Missouri*. This version of the amendment was adopted by the Senate Judiciary Committee, with a positive recommendation to the Senate. See *id.* There was a third section which gave Congress the power to regulate all executive agreements. See *id.* Initially, Bricker had sought to draft the amendment to prohibit the entry into human rights treaties (treaties “respecting the rights of citizens of the United States” or vesting “in any international organization or in any foreign power any of the legislative, executive, or judicial powers vested by this Constitution in the Congress, the President, and in the courts”), to make treaties non-self-executing, and to limit the President’s powers to make executive agreements. See *id.* at 221-22.

moreover, which provoked the unbending hostility of President Eisenhower, Secretary of State John Dulles, and the administration as a whole.<sup>682</sup> Eisenhower pledged to “fight to the bitter end against the ‘which clause’, if need be by going into every State in the Union.”<sup>683</sup> Overruling *Missouri*, the President observed, would force the “Administration to represent 49 governments in its dealings with foreign powers, whereas he was convinced that in foreign affairs there could be only one United States.”<sup>684</sup> It would take the United States “back to the days ‘when American Ambassadors were subject to ridicule abroad because [they] represented thirteen states, not one central government,’” and hence Eisenhower “would ‘fight up and down [the] country . . . call names’ . . . [and] denounce the amendment as a ‘stupid, blind violation of the Constitution by stupid, blind isolationists.’”<sup>685</sup>

Eisenhower and Dulles quickly convinced much of the Senate that *Missouri* could not be overturned without seriously endangering the conduct of U.S. foreign policy and the interests of American citizens abroad. As a result, support in the Senate evaporated, and Bricker was forced to abandon the “which” clause even before it had reached the floor of the Senate.<sup>686</sup> In the climactic battle, none of the three contending versions of the amendment would have had any effect on *Missouri*.<sup>687</sup> The one version that actually came within a vote of passage, moreover, dealt only with executive agreements, leaving the treaty power wholly untouched.<sup>688</sup> In later years, Bricker still persisted in (unsuccessfully) pushing for an amendment, but he was never again

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682. See, e.g., *id.* at 89-90 (noting Dulles’s testimony that the administration was even more opposed to the ABA’s “which” clause than to the Bricker Amendment itself); *id.* at 95, 98-102, 136-46 (describing the administration’s intense hostility to overruling *Missouri*). The administration engaged in intensive efforts to block the “which” clause, which are recounted by Tannanbaum. See *id.*

683. Memorandum by the Assistant White House Staff Secretary (Minnich) (Jan. 11, 1954), in 1 FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954, at 1832 (William Z. Slany et al. eds., 1983).

684. *Id.* at 1832. For the Secretary of State’s view that the “which” clause “would at once have a seriously damaging effect on what we are trying to do,” see Memorandum from John Foster Dulles to President Eisenhower (Jan. 20, 1954), in 1 FOREIGN RELATIONS OF THE UNITED STATES, 1952-1954, *supra* note 683, at 1835-37.

685. TANNANBAUM, *supra* note 674, at 138. For Dulles’s view, see *id.* at 89-90, 98, 100-01, 108.

686. See TANNANBAUM, *supra* note 674, at 139-43, 148, 153.

687. See *id.* at 157-81. Even without the “which” clause, Bricker’s proposal could not muster a majority vote in the Senate. See *id.* at 167-68.

688. See *id.* at 169-81. This was Senator George’s substitute proposal, which was the mildest of the various versions. As with all of the proposed versions, it did have a provision reaffirming that treaties and executive agreements conflicting with the Constitution would have no force or effect. See *id.* at 225. That point was uncontroversial. Its other provision made executive agreements, but not treaties, non-self-executing. See *id.* George’s version lost by a vote of 60 to 31. See 100 CONG. REC. 274-75 (1954).

able to mount an effective challenge to *Missouri*.<sup>689</sup> As a result, the issue once again retreated to the background.

Rather than providing grounds for doubt about the nationalist view, then, the Bricker Amendment controversy demonstrated how fully that view had been accepted as an essential strut in the foreign affairs apparatus of the federal government.<sup>690</sup> Having been decisively defeated in the realm of constitutional politics, there would seem to be little basis for revisiting the question today through judicial construction. Two other important considerations, moreover, undergird this conclusion. First, despite the intensity of its support among certain groups, the Bricker Amendment(s) never achieved any significant measure of popular support, thus undermining any claim that Bricker's movement was an expression of popular sentiment that should be given due respect.<sup>691</sup> Second, even as Bricker continued his efforts into the late 1950s, the Supreme Court decided *Reid v. Covert*.<sup>692</sup> Justice Black, speaking for a plurality of four, deliberately reached out to calm some of the fears that Bricker advocates had flamed. They had claimed that *Missouri* meant that treaties were free from constitutional limitations of any kind, including those protecting individual rights. Justice Black put that question to rest by striking down a treaty provision as inconsistent with the Fifth and Sixth Amendments.<sup>693</sup> At the same time, however, he once again explicitly reaffirmed *Missouri*:

There the Court carefully noted that the treaty involved was not inconsistent with any specific provision of the Constitution. The Court was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government. To the extent that the United States can validly make treaties, the people and

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689. See TANNANBAUM, *supra* note 674, at 192-215.

690. Professor Bradley suggests that the Bricker Amendment was defeated, inter alia, because of the Supreme Court's recognition of expansive congressional powers to regulate human rights. See Bradley, *supra* note 2, at 427. The implication seems to be that Bricker proponents recognized the futility of their efforts and just gave up. There is no evidence of which I am aware that would support this claim. On the contrary, Professor Henkin later wrote a lengthy article to point out how the Bricker proponents had failed to recognize this defect in their strategy. See HENKIN, *supra* note 16, at 192-93; Henkin, *supra* note 36, at 903-06. In any case, the amendment was defeated because of President Eisenhower's determined resistance and the administration's arguments that overruling *Missouri* would seriously damage U.S. foreign policy interests and undermine the country's ability to protect the rights of U.S. citizens abroad. See *supra* notes 682-689 and accompanying text. Eisenhower's political concession that he would not submit the then-proposed human rights conventions to the Senate also played a significant role. See TANNANBAUM, *supra* note 674, at 89, 199.

691. See TANNANBAUM, *supra* note 674, at 128-32.

692. 354 U.S. 1 (1957).

693. See *Reid*, 354 U.S. at 17-18. For a discussion of how Justice Black reached out to answer the claims of Bricker and company, see TANNANBAUM, *supra* note 674, at 213.

the States have delegated their power to the National Government and the Tenth Amendment is no barrier.<sup>694</sup>

The Court thus put the nation on notice that *Missouri* was good law and that if a different rule was to prevail, it would have to be the result of constitutional amendment. The Court has never retreated from that position; nor has the Senate shown any tendency to be less vigilant in protecting state interests.<sup>695</sup>

## V. THE CONTEMPORARY DEBATE

Most proponents of the states' rights view, including Professor Bradley, have claimed that *Missouri* and the nationalist view are without support in the constitutional history of the United States.<sup>696</sup> It ought to be clear by now that this claim is entirely unwarranted. Indeed, in light of the materials we have reviewed, it is the states' rights view that must stretch for historical validation. Although Professor

694. 354 U.S. at 18.

695. As recently as 1999, the Court reaffirmed the validity of *Missouri*. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204-05 (1999). Although the majority suggested that a treaty which was "irreconcilable with a state's sovereignty" over its natural resources and deprived it of "an essential attribute of its governmental existence" might be invalid, see 526 U.S. at 204, the Court affirmed a treaty with the Mille Lacs Band of Chippewas that granted the tribe hunting and fishing privileges on state lands. Citing *Missouri*, it noted that regulatory authority over natural resources within a state's borders "is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making." *Id.* Notwithstanding the serious federalism issues raised by the treaty, the dissents apparently fully concurred in this aspect of the majority's opinion. See *id.* at 219-20 (Rehnquist, C.J., dissenting); *id.* at 221-26 (Thomas, J., dissenting).

As to the Senate, it has, for example, continued to insist in the few cases in which it has approved human rights treaties that state interests be fully safeguarded. See HENKIN, *supra* note 16, at 464-65 (describing Senate's attachment of federalism reservations); Bradley, *supra* note 2, at 428 (same). The Senate's reservation to the International Covenant on Civil and Political Rights provides

[t]hat the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; 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.

138 CONG. REC. 8070 (1992). For an argument that the Senate's persistent refusal to ratify human rights treaties, and its insistence on federalism based reservations in the few cases in which it has consented to such treaties, constitutes an informal overruling of *Missouri*, see Spiro, *supra* note 3, at 572-78. Although there are no doubt some senators who still cling to the states' rights view, in my view, the practice on which Professor Spiro relies largely reflects the continuing effectiveness of the special procedural safeguards that the Framers created for treaty-making — the two-thirds rule for Senate advice and consent. For discussion, see *supra* notes 56, 167-170, 178, 425 and accompanying text; *infra* notes 748-756, 772 and accompanying text.

696. For multiple citations to portions of Professor Bradley's article making this claim, see *supra* note 61.

Bradley devotes considerable attention to the historical questions, he mostly cites authorities supporting the states' rights view (without explaining their historical context), quickly deflects a few contrary precedents, and largely ignores the rest. This approach is particularly inadequate in light of Professor Bradley's professed aim simply to be working out the logic of recent Supreme Court federalism opinions.<sup>697</sup> If those opinions reveal anything about the current Court's jurisprudence, it is the extent to which the Court, in undertaking constitutional adjudication, takes history seriously.

I turn now to the doctrinal and policy-based arguments that have been launched against *Missouri*. Because Professor Bradley is the latest, and one of the more thorough, advocates of *Missouri*'s dissolution, I focus most closely on his contentions. I also consider his somewhat surprising hybrid proposal for reconciling the conflicting concerns which the question poses — permitting the federal government to make treaties on any subject but declining to accord treaties on subjects beyond Congress's legislative authority the status of law of the land. In my view, his arguments are no more persuasive than his historical claims, and his proposal is entirely without support in the Constitution.

### A. *Professor Bradley's Arguments Against the Nationalist View and for Overturning Missouri*

#### 1. *Tenth Amendment Redux*

Advocates of the states' rights view have uniformly relied upon the Tenth Amendment. Professor Bradley is no exception. Although the Tenth Amendment explicitly "reserves" to the states only those powers "not delegated to the United States by the Constitution," Professor Bradley nevertheless contends that it requires that the treaty power be limited by the "reserved powers of the states." The argument that the treaty power is "delegated" and, hence, that its scope is not limited by the Tenth Amendment has, he claims, only "superficial appeal." The flaw in the argument is "that it fails to provide any reason for giving special Tenth Amendment immunity to the treaty power."<sup>698</sup> All federal powers have been delegated to the national government, but they are not, he says, immune from the Tenth Amendment. Indeed, citing *Hammer v. Dagenhart*,<sup>699</sup> he contends that the Tenth Amendment "operates as a substantive restraint."<sup>700</sup> This is confirmed, he claims,

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697. See Bradley, *supra* note 2, at 394.

698. Bradley, *supra* note 2, at 434.

699. 247 U.S. 251, 274-76 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941). He also cites *Kansas v. Colorado*, 206 U.S. 46, 85-92 (1907).

700. Bradley, *supra* note 2, at 435.

by the Court's recent decisions in *New York v. United States* and *Printz v. United States*.<sup>701</sup>

This sweeping argument is nothing short of a *tour de force* that, if accepted, would radically transform accepted constitutional jurisprudence. The main difficulty flows from Professor Bradley's failure to distinguish between two entirely different kinds of Tenth Amendment restraints. In its literal sense, the Tenth Amendment, of course, does deal with the subject matter of federal power and is a reminder that the federal government cannot exercise authority over any subject that is beyond the powers delegated to it. It is hardly news that the powers reserved to the states by the Tenth Amendment are defined negatively — as that set of subjects which are not delegated to the United States. As a result, it is simply incoherent to suggest that there is a set of powers “reserved” to the states that can be determined without reference to, and as an a priori limitation upon, the subject matter scope of any individual delegated power. We cannot say what powers are “reserved” to the states until after we determine the full scope of the powers delegated to the federal government, including not only those enumerated in Article I, but the treaty power as well. According to the nationalist view, then, as a subject matter limitation on the delegated powers, the Tenth Amendment applies in precisely the same fashion to the treaty power as it applies to all of the other delegated powers — that is, not at all.<sup>702</sup> Rather, the Tenth Amendment aims at

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701. *Printz v. United States*, 521 U.S. 898, 924 (1997) (holding that the federal government may not commandeer state executive officials to carry out federal programs); *New York v. United States*, 505 U.S. 144, 156-57 (1992) (holding that the federal government cannot commandeer state legislative processes by requiring states to adopt legislation).

702. See *New York v. United States*, 505 U.S. at 155-59; *United States v. Oregon*, 366 U.S. 100, 124 (1961) (citing *Case v. Bowles*, 327 U.S. 92, 102 (1946), which reaffirmed the long-settled principle “that the Tenth Amendment ‘does not operate as a limitation upon the powers, express or implied, delegated to the national government’ ” (quoting *Fernandez v. Wiener*, 326 U.S. 340, 362 (1945))). For further discussion, see *infra* note 706 and accompanying text. Thus, for example, we cannot determine what subjects are reserved to the states from exercise of the powers to coin money, to define offenses against the law of nations, and to declare war by reference to the scope of the commerce power. That the commerce power may not reach a certain subject does not mean that the subject cannot be reached under, for example, the war power. That depends entirely on the scope of the war power. See *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948); *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919); *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 506-07 (1870). According to the nationalist view, the same analysis applies to the treaty power.

Indeed, in the instance where such a claim could be most persuasively maintained — the power to tax and spend for the general welfare — even the conservative states' rights Court of 1935 resolved the longstanding controversy over the issue in favor of the view that the power was not limited to taxing and spending in support of the other delegated powers. See *United States v. Butler*, 297 U.S. 1, 64-67 (1935) (holding “that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution”). The Court has subsequently made clear that, subject to other unrelated requirements, the only question is whether the measure is designed to further the general welfare. See *New York v. United States*, 505 U.S. at 171-73 (affirming this view as expressed in *Dole*); *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987) (affirming the view but, in conditional spending cases, adding a germaneness requirement,

exercises of nondelegated authority. Were the President and Senate to make a treaty on a subject inappropriate for negotiation and agreement, and thus beyond the scope of the treaty power, the treaty would be invalid under the Tenth Amendment.<sup>703</sup>

The second kind of restraint imposed by the Tenth Amendment — or rather the penumbra of the Tenth Amendment — is indeed an affirmative restraint on the delegated powers, but a restraint of an entirely different order. In combination with other provisions and general structural considerations, the Court has found that the Tenth Amendment provides the states with certain special immunities from federal regulation — such as the prohibition on Congress to “commandeer” state legislative or executive processes or subject states to suit in federal or state court. These more nebulous “Tenth Amendment” dignitary limitations arise from, or are closely related to, principles of sovereign immunity, and they apply to exercises of authority that are admittedly within the subject matter scope of congressional powers.<sup>704</sup> As I have already indicated, nothing in *Missouri* or the na-

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among others). Professor Bradley seeks to blunt the force of the analogy by pointing out that spending measures do not create preemptive federal law. See Bradley, *supra* note 2, at 436-37 n.269. However, as is widely recognized, the Court’s expansive approach to the taxing and spending power enables Congress as a practical matter to avoid federalism restrictions to a very great extent. In the taxing and spending context, moreover, there are no obvious countervailing considerations other than the text in favor of permitting Congress to override state authority through such an expedient. See, e.g., Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism’s Trojan Horse*, 1988 SUP. CT. REV. 85. In contrast, as we have seen, in the treaty context, there are a host of compelling reasons to permit the federal government the necessary flexibility in conducting negotiations with foreign nations, including that the states are themselves precluded.

703. For discussion, see *supra* note 28 and accompanying text. Professor Bradley reads the Tenth Amendment as if it said that the powers not delegated to “Congress” are reserved to the states rather than the powers not delegated to the “United States.” U.S. CONST. amend. X. Congress, however, is not the sole repository of delegated federal powers.

704. See *Alden v. Maine*, 527 U.S. 706 (1999) (resting on the Tenth and Eleventh Amendments for ruling that pursuant to its Article I powers, Congress cannot subject a state to private suits for damages in state court); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (same as to federal courts); see also *Printz v. United States*, 521 U.S. 898 (1997) (ruling that pursuant to its delegated legislative powers Congress cannot commandeer state executive officials into executing a federal program); *New York v. United States*, 505 U.S. at 171-73 (same as to state legislative processes). There was no question in any of these cases — nor any doubt — but that Congress’s legislative powers extended to the subject matter regulated. The only question was whether the particular fashion in which Congress chose to regulate was justified, or whether by the manner in which the regulation applied to the states as states, it unconstitutionally trespassed upon their sovereign immunity or dignitary interests. See also *National League of Cities v. Usery*, 426 U.S. 833 (1976) (“Appellants in no way challenge these decisions establishing the breadth of authority granted Congress under the commerce power. Their contention, on the contrary, is that when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitution. Congressional enactments which may be fully within the grant of legislative authority contained in the Commerce Clause may nonetheless be invalid because found to offend against the right to trial by jury . . . or the Due Process Clause . . . . Appellants’ essential contention is that the 1974 Amendments . . . while undoubtedly within the



nationalist view compels the conclusion that these limitations do not apply to exercises of the treaty power.<sup>705</sup> But that is an entirely different subject. The only question at issue — and to which Professor Bradley devotes his entire argument — is whether the Tenth Amendment imposes a special subject matter limitation on the treaty power: to wit, that it may be exercised only on subjects falling within the scope of the legislative powers delegated to Congress.

Indeed, had Professor Bradley not so boldly asserted that the Tenth Amendment is a substantive or affirmative restraint upon the subject matter scope of the delegated powers, it would have seemed unnecessary even to address the point. Although claims of this kind had strong resonance during the height of strict constructionism and the struggle over slavery, they have long since been abandoned.<sup>706</sup> It is

scope of the Commerce Clause, encounter a similar constitutional barrier.”), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

705. For the antebellum strict constructionist view, see *supra* notes 455-458, 470-475, 494, 506, 510-512, 514-519. See *supra* notes 27, 30-35 and accompanying text. It is an open question whether some or all of these rights apply in full to exercises of the treaty power.

706. I suspect that few would doubt that Professor Bradley's view is inconsistent with the great opinions of the Marshall Court in, inter alia, *McCulloch* and *Gibbons*. Corwin thought that the whole question of the nationalist versus the states' rights view of the treaty power was resolved, from a logical point of view, by the post-Civil War decisions in *Chy Lung v. Freeman*, 92 U.S. 275 (1875), and *Henderson v. Mayor of New York*, 92 U.S. 259 (1875), both of which rejected the approach of Chief Justice Taney in the *Passenger Cases* and other decisions. See CORWIN, *supra* note 62, at 183-86. Both cases affirmed that exercises of delegated federal powers were not limited by the states' police powers and thus necessarily superseded inconsistent state law “no matter under what class of powers [state law] may fall, or how closely allied to powers conceded to belong to the States.” *Henderson*, 92 U.S. at 272. Indeed, this is the very point which Holmes adopted from Corwin in his opinion in *Missouri*. See *supra* notes 637-640 and accompanying text. Despite Professor Bradley's suggestion to the contrary, moreover, the Court's discussion of the nature of Tenth Amendment limitations in *New York v. United States* did nothing to undermine this longstanding view. Justice O'Connor reaffirmed once again that as a subject matter limitation, “the Tenth Amendment ‘states but a truism that all is retained which has not been surrendered.’” *New York v. United States*, 505 U.S. at 156 (noting that Justice Story expressed the same view in the Commentaries and quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)). The Tenth Amendment, she noted, does restrain the power of Congress, “but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology.” *New York v. United States*, 505 U.S. at 156-57. Rather, insofar as the principle of state sovereignty (loosely derived from the Tenth Amendment) precludes Congress from commandeering the state legislatures, then the exercise of such a power “is necessarily a power the Constitution has not conferred on Congress.” *Id.* at 156. As a result,

it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.

*Id.* at 159. That, however, does not support the quite different claim that the Tenth Amendment is an affirmative *subject matter* restraint on the exercise of the *delegated* powers. See *Reno v. Condon*, 120 S. Ct. 666, 671-72 (2000). Surprisingly, Professor Bradley does not rely on the Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995) (striking down a congressional statute prohibiting the possession of a gun within one thousand feet of a school as beyond the commerce power). *Lopez* and the even more recent decision in *United States v. Morrison*, 120 S. Ct. 1740 (2000) (striking down the Violence Against Women Act

telling that Professor Bradley relies upon *Hammer v. Dagenhart* for support.<sup>707</sup> He declines to tell us, however, just how we should go about determining the content of those “substantive” powers that are affirmatively “reserved” to the states. Apparently, they are just those subjects that are beyond the scope of Congress’s delegated powers. Thus, even in his view, the Tenth Amendment does not operate as an affirmative subject matter restraint on Congress’s delegated powers. Yet, for reasons not explained, it does with regard to the *treaty power*. The treaty power, then, does not claim a “special immunity” from subject matter limitations to which the other delegated powers are subject, but Professor Bradley wishes to subject it to a special Tenth Amendment limitation that does not apply to the others.<sup>708</sup>

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as beyond Congress’s powers under the Commerce Clause and § 5 of the Fourteenth Amendment), provide at least some arguable, albeit unpersuasive, support for his view. In both, the Court adopted a narrow construction of the scope of the commerce power, *inter alia*, to avoid rendering it limitless and thereby permitting Congress to oust the states from areas in which they have traditionally regulated. The Court has not done so, however, by imposing limitations that are not derived from the object and purpose of the power. Rather, the Court has simply reformulated the long accepted effects test, sharply limiting its application to the regulation of activities that are not themselves “commercial” in character. See, e.g., *Lopez*, 514 U.S. at 559-61, 566-67; *Morrison*, 120 S. Ct. at 1749-54. Whatever one may think of these decisions, the Court has acted to restrict the commerce power to matters more closely allied with what the Court believes is its core purpose — affording Congress legislative authority over *commerce* among the states. *Morrison* is similar in tying its restrictive construction of § 5 of the Fourteenth Amendment to what the Court understands the object and purpose of § 5 to be. See *Morrison*, 120 S. Ct. at 1759 (holding that the Violence Against Women Act was beyond Congress’s § 5 powers because it afforded a remedy against private individuals rather than against state actors).

707. Even in *Hammer*, the Court did not claim that the Tenth Amendment was an affirmative restraint on the scope of the commerce power. Although Congress had literally prohibited the movement of goods (those produced by child labor) in interstate commerce, the majority thought that the commerce power should not be given a literal reading which would allow Congress to prohibit the sale of goods, in themselves harmless, for the purpose of achieving certain regulatory aims regarding matters internal to the states. See *Hammer v. Dagenhart*, 247 U.S. 251, 272-77 (1918). This was certainly a narrow construction of the scope of Congress’s power, but one which the Court claimed was derived from the nature and object of the grant. In any case, *Hammer* has hardly found favor even in the Supreme Court’s most recent decisions. *Kansas v. Colorado* provides even less support for Professor Bradley’s view. See *Kansas v. Colorado*, 206 U.S. 46, 85-92 (1907).

708. Professor Bradley also observes that statutes and treaties are of equal status under the Constitution, such that in the event of conflict, the later in time prevails. See Bradley, *supra* note 2, at 457 (citing *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 600-02 (1889)). From this, he thinks that it follows that treaties and laws should both be equally subject to the “reserved powers” of the states. It should be clear, however, that the mere fact that treaties and laws are treated similarly for one purpose does not entail that they should be treated similarly for all other purposes. Be that as it may, Professor Bradley again errs in thinking that treaties and laws are being treated according to some different Tenth Amendment standard. On the contrary, the standard is the same. Insofar as the subject matter of a law falls within the scope of one of the legislative powers granted to Congress, it does not violate any subject matter limitation arising from the Tenth Amendment. Likewise, insofar as a treaty deals with a subject falling within the scope of the treaty power, it too does not violate any Tenth Amendment subject matter limitation. Moreover, the scope of Congress’s legislative powers and the scope of the treaty power are determined in accordance with the same principle: the scope of all delegated powers is derived from the nature and object of the power.

Professor Bradley, however, also makes a more novel Tenth Amendment objection. He understands the nationalist view as arguing that Tenth Amendment subject matter limitations that apply to other delegated powers are inapplicable to the treaty power because the latter is not only a delegated power but also a power *exclusively* delegated to the national government. "This argument," he claims, "is a non-sequitur."<sup>709</sup> On the contrary, the non-sequitur is to claim that the Tenth Amendment applies as a subject matter limitation on the other delegated powers. Professor Bradley simply misunderstands the argument. To be sure, that the treaty power is exclusive is of considerable significance. Its significance, however, is not that it exempts the treaty power from Tenth Amendment limitations that apply to other powers. In that respect, it is utterly irrelevant whether the treaty power is an exclusive or a concurrent power.<sup>710</sup> Rather, its exclusivity provides compelling (though hardly the only) structural grounds for construing the treaty power as an independent "delegated" power, rather than as a secondary mode for exercising the legislative powers delegated to Congress. Otherwise, a whole class of potentially beneficial agreements, appropriate for international negotiation and agreement, would be beyond not only the power of the national govern-

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Professor Bradley also worries that the nationalist view entails that there are some treaty stipulations which Congress does not have the power to override as a matter of domestic law. As to treaty stipulations falling within Congress's legislative authority, it is well settled that Congress has the power to pass laws which are inconsistent with those treaty obligations and thereby supersede them as a matter of domestic — but never international — law. See, e.g., HENKIN, *supra* note 16, at 211-12. However, according to Professor Bradley, when a treaty deals with a subject beyond Congress's legislative authority, Congress will be precluded from exercising this authority. See Bradley, *supra* note 2, at 457. So what? Perhaps there are a small number of cases when Congress cannot place the United States in violation of its treaty obligations by passing inconsistent legislation. The United States always retains the option to terminate the treaty, whether in accordance with the requirements of the treaty or not. How that is done is itself a vexed question. See Golove, *supra* note 16, at 1848 n.180. In any event, there are two possible cases: self-executing and non-self-executing treaties. As to the latter, there is little difficulty. Given that Congress has the power under the Necessary and Proper Clause to pass legislation implementing such a treaty, see *supra* notes 20, 57 and accompanying text; *infra* notes 800-801 and accompanying text, it undoubtedly has the power to repeal any such legislation. As to self-executing treaties, the problem is slightly more difficult, but hardly beyond solution. Were the issue ever to arise — which is highly doubtful — Congress could probably rely on the Necessary and Proper Clause to pass the inconsistent statute, so long as the statute was limited to removing the effect of the treaty and did not purport to legislate another rule for the states. For discussion, see HENKIN, *supra* note 16, at 487, and Anderson, *supra* note 596, at 663. This potential technical difficulty hardly amounts to a reason for overruling *Missouri*.

709. Bradley, *supra* note 2, at 436.

710. Indeed, the exclusivity of a federal power may in some cases provide grounds for giving it a narrow construction. For example, were the Commerce power exclusive, as was often claimed in the early period, it might well have been necessary to give it a narrow construction in order to avoid ousting the states from broad swaths of regulatory authority, particularly given Congress's apparent inability to cover the field on its own. This difficulty preoccupied the Court in its early commerce power decisions. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

ment but also that of the constituent governments of which it is composed. As the Court in *Missouri* observed, "it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' " is somehow denied both to the nation acting collectively and to the individual states acting separately.<sup>711</sup> Especially in the face of strong language suggesting that the treaty power is a delegated power, its exclusivity argues strongly against imposing implied limitations that would render the nation less than fully capable of making the entire range of beneficial international agreements.

Professor Bradley compounds his error by extrapolating from the "logic" of the exclusivity argument, which he wrongly attributes to the nationalist view, conflicts with separation of powers and thus demonstrating the argument's problematic implications. "One could argue," he contends, "that, like federalism restrictions, separation of powers restrictions do not apply to powers exclusively delegated to a branch of the federal government."<sup>712</sup> What he means by this argument is less than clear. One thing is clear, however: the argument is based on at least two fundamental mistakes about the contentions of those favoring the nationalist view. First, as just noted, nationalist view proponents do not argue that the treaty power, because it is exclusively granted to the federal government, is therefore free from federalism limitations that would apply to concurrent powers. Second, as I have also previously pointed out, they do not contend that the treaty power is categorically exempt from either affirmative federalism limitations, such as the principle of state sovereign immunity, or from the general Tenth Amendment declaration that exercises of nondelegated authority are unconstitutional.<sup>713</sup> The only question is how to construe the scope and extent of the treaty power as an independent delegated power. Thus, his argument, whatever it might mean, is irrelevant.<sup>714</sup>

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711. *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (quoting *Andrews v. Andrews*, 188 U.S. 14, 33 (1903)). For further discussion and qualifications, see *supra* notes 51-53, 532, 543-545, 561, 590 and accompanying text; *infra* notes 804-806 and accompanying text.

712. Bradley, *supra* note 2, at 437.

713. See *supra* notes 24-35, 703 and accompanying text.

714. Professor Bradley invokes the controversial decision in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), to support his argument. See Bradley, *supra* note 2, at 437-39. He seems to wish to tar *Missouri* and the nationalist view with the justified doubts about Justice Sutherland's expansive dicta. Ironically, the one aspect of the case that seems to have any relevance to Professor Bradley's argument is the only part that has received widespread acceptance — the Court's holding that the non-delegation doctrine applies less rigorously to foreign than to domestic affairs. See *Curtiss-Wright*, 299 U.S. at 329. What has been (rightly) criticized is Sutherland's dicta that the foreign affairs powers are not enumerated but inherent and that the President, as the sole organ of the nation, has the lion's share of the foreign affairs powers. As best I can make out Professor Bradley's argument, it is something like this: from the President's vaguely defined exclusive authority over foreign affairs, Sutherland found grounds for weakening the usual separation of powers principle that would apply to delegations of legislative authority. Professor Bradley seems to

It may nevertheless be worthwhile to clarify the relationship between the treaty power, on the one hand, and federalism and separation of powers limitations, on the other. The relationship is precisely parallel. The treaty power empowers the President and Senate, incident to making agreements with foreign states, to promulgate laws. As a result, whenever a treaty makes stipulations on subjects falling within the scope of Congress's legislative authorities, the treaty overrides the general separation of powers principle that legislative authority is vested in Congress. This is just a function of the overlapping grant of power and does not suggest that the treaty power is any more immune to separation of powers principles than any other power.<sup>715</sup> Likewise, whenever a treaty makes a stipulation on a subject falling within the exclusive legislative competence of the states, the "federalism" subject matter restrictions which would apply to acts of Congress are not applicable, but this by no means suggests that treaties are exempt from federalism principles. The parallel, moreover, works in the other direction as well. Thus, a treaty purporting to authorize the President rather than Congress hereafter to make laws regulating interstate and foreign commerce would violate the separation of powers. Even though a treaty can regulate particular matters falling within those subjects, it may not change the internal distribution of power between Congress and the President.<sup>716</sup> Likewise, a treaty purporting to grant Congress hereafter legislative authority over, say, real property in the states, would fall afoul of federalism. Although a treaty can regulate particular aspects of real property relations in the states, it cannot transfer legislative authority over those subjects from the states to Congress. Beyond these cases, treaties are as subject to federalism as they are to the separation of powers.<sup>717</sup>

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interpret the opinion to mean that the holding of an exclusive power exempts the President from all other separation of powers principles that would ordinarily apply to the exercise of constitutional authorities. I suppose this would mean that, in the exercise of his exclusive foreign affairs powers, the President could unilaterally regulate foreign commerce, make war, define offenses against the law of nations, and conduct executive adjudications without reference to the Article III courts. Even Justice Sutherland would, I assume, be shocked to learn that this is where the "logic" of his opinion led!

715. See *supra* notes 20-23, 57, 708 and accompanying text; text following note 26. There are, of course, complications, — for example, for self-executing and non-self-executing treaties. As to the latter, the treaty does not override the usual principle that legislative power is vested in Congress. See HENKIN, *supra* note 16, at 203-04; *supra* notes 20, 57, 708 and accompanying text; *infra* note 799 and accompanying text.

716. See *supra* notes 22-23, 53, 292 and accompanying text.

717. Thus, for example, "constitutional limitations on delegation of legislative power apply as well to delegation by treaty." HENKIN, *supra* note 16, at 195. Professor Bradley seems to think that this is just a bad faith concession nationalists make to avoid revealing the true implications of their views. See Bradley, *supra* note 2, at 439. On the contrary, this principle follows directly from the fact that treaties are alternative modes of promulgating laws and, hence, ought presumptively to be subject to the same restrictions on delegations to which the identical laws would be subject. This principle follows directly from the logic of the nationalist view; it is not a concession to mitigate its implications. Professor Bradley re-

## 2. *The Treaty Power and the Enumerated Powers Doctrine*

Professor Bradley also argues that permitting the treaty power to extend to subjects beyond Congress's legislative powers somehow renders the treaty power limitless and thus undermines the enumerated powers doctrine.<sup>718</sup> This argument, too, is unpersuasive. It does not follow from the fact that treaties may include matters that could not otherwise be regulated by Congress that the treaty power is limitless. Conversely, even supposing that the enumerated powers doctrine entails that every power delegated to the national government must have legally definable limits, that does not mean that just any limits will do. One principal difficulty with the states' rights position is that it fails to justify limiting the treaty power in the particular way it advocates. The scope of a delegated power can only be determined by reference to its object.<sup>719</sup> Hence the traditional view, endorsed virtually uniformly from the beginning of our history: the treaty power extends to all proper subjects of negotiation and agreement between states.<sup>720</sup> To put the point more precisely — and here I offer my own interpretation — the object of the treaty power is to enable the federal government to protect and advance the national interests by obtaining binding promises from other states regarding their conduct. To be within the scope of the treaty power, therefore, the purpose of a treaty must be to advance those interests — that is, our foreign policy interests. This does not mean that treaties may not incidentally regulate domestic matters. That is often the price paid for obtaining equivalent concessions from the other side, and the Supremacy Clause specifically recognizes the necessity for permitting such concessions by making the obligations we undertake in treaties the supreme law of the land. Nevertheless, the purpose of a treaty cannot be to adopt domestic standards just because the President and Senate believe them to be laudable. A treaty is unconstitutional if it does not serve a foreign

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peatedly claims that the nationalist view rejects all federalism limitations on the treaty power and that it renders uncertain whether separation of powers principles apply. See Bradley, *supra* note 2, at 391, 393. These claims are simply false. See *supra* notes 20-35, 53, 292 and accompanying text. Nevertheless, as previously noted, given the different contexts to which treaties and laws apply, federalism and separation of powers principles may sometimes apply differently to treaties. See *supra* notes 28-35 and accompanying text.

718. See Bradley, *supra* note 2, at 393-94.

719. See, e.g., *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 531 (1870) (noting that it cannot "be questioned that, when investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted"); *supra* note 209 and accompanying text.

720. See *supra* notes 26, 28, 39, 41-42, 49, 61, 131-134, 256-257, 291-292, 424-431, 435, 480-481, 557, 560, 564, 624 and accompanying text; *infra* notes 724-739, 747-748 and accompanying text.

policy interest or if it is concluded not to affect the conduct of other nations but to regulate our own.<sup>721</sup>

Professor Bradley is not satisfied, however, that these limits actually apply to the treaty power. He notes that there are two different types of potential subject matter limitations on the treaty power. The first is general "subject matter" limitations — stated variously as the requirement that a treaty deal only with subjects appropriate for international negotiation and agreement, with matters of international concern, or with matters that relate to our foreign relations. The second is federalism, or "reserved power," limitations — such as the requirement, which he advocates, that treaties may not touch on subjects that are beyond the legislative competence of Congress. There is significant historical support, he claims, for one or the other of these limitations. Yet, both have been rejected. As a result, the treaty power is now unlimited as against the states in violation of the basic principles of federalism and the enumerated powers doctrine. The solution, he urges, is to adopt "reserved power" limitations.<sup>722</sup>

There are several difficulties with this formulation of the argument. Most important, Professor Bradley here engages in sleight of hand: it is of course true that there is significant historical support for one or the other of these limitations, but that is because virtually every authority, including the Supreme Court, has on countless occasions from the earliest days recognized general subject matter limitations on treaties. Professor Bradley, however, is not arguing for general subject matter limitations. Those he willingly abandons.<sup>723</sup> He is arguing for "reserved power" limitations, for which, as I have tried to show, there is at best only weak historical support. He wishes to transfer the overwhelming historical support for one kind of limitation — a limitation which has strong roots in text and structure as well — to another limitation which lacks all of these. That simply will not work. A constitutional limitation must be justified in its own right; it is not sufficient to point out that another well-established limitation has eroded over time. Constitutional limitations are not fungible.

This is especially so given that Professor Bradley rather heatedly claims that general subject matter limitations were rejected "by commentators only recently" — in bad faith too boot.<sup>724</sup> According to Professor Bradley, this rejection was part of "a rather disturbing phe-

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721. See *supra* notes 41, 49 and accompanying text; *infra* notes 728-730, 747-748 and accompanying text. On the breadth of the "national interest," which may include not only economic or strategic but moral interests as well, see *supra* note 41. On the need for some treaties that impose binding obligations only on ourselves, see *supra* note 49.

722. This argument appears at numerous points in his argument. See Bradley, *supra* note 2, at 393-94, 417, 429-33, 450-55.

723. See *id.* at 450-55.

724. *Id.* at 451.

nomenon in the development of American foreign affairs law," in which Professor Henkin has used his position as Chief Reporter for the *Restatement (Third) of Foreign Relations Law* to incorporate questionable positions into the final document.<sup>725</sup> Why such deference, then, to recent commentators? If Professor Bradley is correct — if the only thing standing in the way of reviving subject matter limitations is the self-serving dictum of Professor Henkin — then why discard subject matter limitations, so often affirmed by the Court, in favor of "reserved powers" limitations? Why do so when "reserved powers" limitations were explicitly rejected by the Supreme Court eighty years ago in a nearly unanimous decision by a Court well known for its sensitivity to states' rights, and when that decision has deep roots in history, text, and the structure of the Constitution? To whom is deference due?

The irony runs deeper. In my view, Professor Bradley, in fact, misinterprets the positions of both Professor Henkin and the *Restatement (Third)*. Contrary to Professor Bradley's claim, Professor Henkin and the *Restatement (Third)* — and commentators more generally — have not rejected subject matter limitations.<sup>726</sup> What has been widely rejected is a particular interpretation of the subject matter limitation that hails back to extemporaneous comments made by Charles Evans Hughes in 1929, which were later used during the Bricker Amendment campaign and beyond in an effort to establish the unconstitutionality of human rights treaties. Reformulating the traditional notion that treaties must deal with subjects appropriate for negotiation and agreement or which relate to our foreign relations, Hughes stated that treaties must deal with matters of "international concern."<sup>727</sup> Some later sought to interpret this requirement as establishing a fixed category of subjects which are a priori matters of con-

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725. *Id.* at 432.

726. I suspect that the vast majority of commentators on foreign affairs and the Constitution believe that there are subject matter limitations on the scope of the treaty power. Certainly, none of those that Professor Bradley cites rejects such limitations. See, e.g., BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 166 (2d ed. 1995); Ackerman & Golove, *supra* note 19, at 843-44; 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). Professor Bradley acknowledges that Professor Tribe supports subject matter limitations. See Tribe, *supra* note 35, at 1261 n.133. Nor did Professor Tribe have in mind anything more than requiring that treaties have a bona fide foreign policy purpose. See Letter from Laurence H. Tribe to David Golove (Apr. 30, 1998) (on file with author) ("[I] did not say that the U.S. could not enter a treaty with Canada committing both nations to providing their citizens with health care systems. Rather, I stated that the President and Senate may not use a 'treaty' with Canada to make an end-run around the House of Representatives in setting up a U.S.-only health care system. In my view, my illustration does not even remotely call into doubt the permissibility of human rights treaties."). For the views of Professor Henkin and the Restatement (Third), see *supra* note 41; *infra* note 728 and accompanying text.

727. 1929 PROC. AM. SOC. INT'L L. 194.



cern only to ourselves and over which no officious intermeddling foreigners have any legitimate interest. What Professor Henkin criticized, and what the *Restatement (Third)* rejected, was simply this unjustifiable interpretation of the subject matter limitation.<sup>728</sup>

The irony runs deeper still. After calling Professor Henkin's integrity into question for supposedly rejecting subject matter limitations, Professor Bradley then proceeds to announce his own endorsement of that very position. Indeed, he (erroneously in my view) cites Professor Henkin approvingly as authority in support of that view!<sup>729</sup> As noted, however, it is not recent commentators who have rejected subject mat-

728. See RESTATEMENT (THIRD), *supra* note 19, § 302 cmt.c (acknowledging that treaties are limited to subjects "suggested by [U.S.] national interests in relations with other nations"); *id.* § 302 reporter's note 2 (characterizing Hughes's position approvingly as that "an international agreement of the United States must be a bona fide agreement with another state, serving a foreign policy interest or purpose or the United States," and stating that a "treaty . . . must be a bona fide international act with one or more other nations, not a unilateral act dressed as an agreement"). Professor Henkin has observed that a treaty must be

a bona fide agreement, between states . . . by hypothesis, a bona fide treaty deals with a foreign nation about matters "which pertain to our external relations", that are of mutual "international concern". But Hughes was interpreted to mean that some matters are not appropriate subjects for agreement with another country because they are our own affair and not the legitimate "concern" of any other country. I know no basis for reading into the Constitution such a limitation on the subject matter of treaties. . . . If there are reasons in foreign policy why the United States seeks an agreement with a foreign country, it does not matter that the subject is otherwise "internal" . . . . As other policies and laws of the United States become of interest to other countries, they are equally subject to modification by treaty if the United States has foreign policy reasons for negotiating about them.

HENKIN, *supra* note 16, at 197. To be sure, in a brief essay thirty years ago, Professor Henkin made some provocative remarks that could be misconstrued. See Louis Henkin, "International Concern" and the Treaty Power of the United States, 63 AM. J. INT'L L. 272, 278 (1969). His purpose was to challenge what he (correctly in my view) believed were misinterpretations of Hughes's remarks, not to deny that there were any subject matter limitations on treaties. Thus, Henkin concluded that treaties must "be used to further transnational foreign relations purposes of the United States, as the United States conceives them." *Id.* at 278. Absent bad faith, however, it may be impossible to conclude that a treaty does not serve transnational purposes of the United States. Why else would the President and Senate make a treaty?

Hughes made his comments during a meeting of the American Society of International Law in 1929. See 1929 PROC. AM. SOC. INT'L L. at 194-96. For discussion of the surrounding history, see Henkin, *supra*, at 274-77. Although the tone of Hughes's remarks does suggest concern over the rights of the states, his remarks do not, in my view, readily lend themselves to the construction they later received. Thus, for example, Hughes concludes by asserting that the treaty power "is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power." 1929 PROC. AM. SOC. INT'L L. at 196. His concern appeared to be that the treaty power might be used to deal with wholly internal matters in which other nations did not take a substantial interest. See *id.* at 195 (noting that the treaty power would extend to matters "which perhaps under former conditions had been entirely local," but which "had become so related to international matters that an international regulation could not appropriately succeed without embracing the local affairs as well"). I cannot undertake here a full exegesis of Hughes's views. What is important for present purposes is that Hughes too affirmed *Missouri*. See *id.* at 194.

729. See Bradley, *supra* note 2, at 454 & n.360 (citing Louis Henkin, *The Constitution, Treaties, and International Human Rights*, 116 U. PA. L. REV. 1012, 1025 (1968)).

ter limitations; it is Professor Bradley. His reasons for doing so are not difficult to discern: he is simply not satisfied with the traditional subject matter limitations that the Constitution imposes. What drives Professor Bradley is his own preference for more deeply cutting limitations that can be actively enforced by courts.

Professor Bradley's preferences are evident from the reasons which he gives for rejecting subject matter limitations. The plausible tests which he can imagine are too weak and apparently would not exclude enough treaties for his purposes.<sup>730</sup> Most important, they fail because they are unlikely to be strictly enforced by courts. Courts, he quite rightly observes, cannot be expected to second-guess the political branches on the question of whether a treaty deals with a matter that is sufficiently international in nature. Indeed, citing Professor Henkin, he argues that the dynamic nature of world conditions and international relations makes line-drawing in this area especially difficult.<sup>731</sup> Hence, on the unexamined assumption that it is essential that courts be available to enforce limits on the subject matter of treaties, something else is needed.<sup>732</sup>

To be sure, the traditional subject matter limitations on treaties are very general, and with globalization, the matters appropriate for treaties have expanded and will continue to do so. This development parallels the expansion in congressional powers brought about by the in-

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730. See *id.* at 451-55. He also considers some wholly implausible limitations that are clearly too strong. Thus, limiting treaties to those which were typical in 1789, he agrees, is out of the question. Such a limitation would, he concedes, be ridiculous on policy grounds and can find no support in history or in the intent of the Founders. See *id.* at 451. On the other hand, limiting treaties to those which are "truly 'international' in nature" — whatever that could mean — is too weak. Arguably, any treaty could meet this test — evidently a bad thing. See *id.* at 451-52. See also *supra* notes 208-210 and accompanying text. A necessity test seems to fail on both counts; it could either prove to be too strong or too weak depending on how it is interpreted. See *id.* at 453. Unfortunately, Professor Bradley does not consider what I believe is the most plausible test: a treaty is valid if its purpose is to advance the interests of the United States in its relations with other nations. See *supra* notes 41, 49, 721, 728 and accompanying text; *infra* notes 747-748 and accompanying text. No doubt, however, it would also be too weak from his perspective.

731. See *id.* at 453-54, (citing Henkin, *supra* note 36, at 1025). The power to regulate commerce, Bradley notes, at least has reference to the movement of goods or the exchange of money. In contrast, the power to make treaties has reference only to the fact of agreement. See Bradley, *supra* note 2, at 453-54. However, that is the whole point. The purpose of the treaty power is to enable the United States to advance its interests in the conduct of foreign states by making contracts with them. There are no other subject matter limitations because of the nature and object of the power.

732. Professor Bradley discusses at some length a recent Second Circuit decision, *United States v. Wang Kun Lue*, 134 F.3d 79 (2d Cir. 1998). See Bradley, *supra* note 2, at 454-56. The court upheld a statute enacted in implementation of the International Convention Against the Taking of Hostages. It had no difficulty finding that the Convention dealt with a matter of concern among nations. See *Wang Kun Lue*, 134 F.3d at 83. Professor Bradley never says why the decision is a matter for concern. Should the court have declared the treaty unconstitutional? How about the implementing statute?

tegration of the national and now the international economies.<sup>733</sup> Still, the scope of the treaty power is not unlimited. Treaties have hardly overtaken the field of domestic regulation at either the national or the state level, and it is doubtful that they ever will.<sup>734</sup> Be that as it may, the Constitution charges the President and Senate with balancing the gains to our foreign policy interests against the losses to the interests of the states and the nation, and to make this protection stronger, it gives a Senate minority veto power. That balancing must inevitably be controlled by political standards, and one can understand the whole history of the treaty-making practice of the President and Senate as a process of working out just those standards on a treaty-by-treaty, subject-by-subject basis.<sup>735</sup> But as in all matters controlled by political standards, the lines drawn are provisional and, as has also been the case throughout U.S. history, subject to revision as conditions change and new views emerge. From the beginning, the Supreme Court has recognized that the scope of the treaty power is not susceptible to precise definition and has repeatedly endorsed the notion that treaties may cover any subject appropriate for negotiation and agreement.<sup>736</sup>

As to the perceived imperative for judicial review, strikingly in over two hundred years the Court has never struck down a treaty on the ground that it exceeds the scope of the treaty power.<sup>737</sup> For obvious reasons, courts do not feel free to second-guess the political branches on whether a treaty furthers our foreign policy interests. Nor have they been willing to judge the motives of the political branches. This may perhaps mean that judicial review in this area is quite limited or even nonexistent. Why that should be a matter for regret, rather than celebration, is unclear. As Justice Chase declared in *Ware v. Hylton*: "If the court possess a power to declare treaties void, I shall never exercise it, but in a very clear case indeed."<sup>738</sup> In the following two hundred years, the Court religiously followed this advice.

733. See *infra* notes 779-783 and accompanying text.

734. For example, it is doubtful that a treaty establishing uniform zoning rules for, say, residential set-backs would be a proper subject for negotiation. Nor would a treaty establishing uniform municipal parking regulations. There would appear to be no sense in which treaties of this sort would advance our foreign policy interests. On the other hand, consider the controversy in New York City over the treaty-based immunity of United Nations diplomats from parking regulations. See, e.g., David Firestone, *Grumbling, Giuliani Accepts Truce in U.N. Parking War*, N.Y. TIMES, Apr. 19, 1997, at 1. These relatively trivial cases are just examples of a more general point. Large swaths of our domestic political, social, cultural, and even economic life have never become matters of concern to foreign nations and are not likely to become so in the foreseeable future.

735. See MITCHELL, *supra* note 526 (discussing the patterns that emerged from the first century and half of treaty practice under the Constitution).

736. See *supra* notes 120, 123-125, 226-234, 331, 367-369, 402-421, 480-481, 557, 564 and accompanying text.

737. See HENKIN, *supra* note 16, at 185.

738. 3 U.S. (3 Dall.) 199, 237 (1796).

Why, then, the sudden impulse to develop a formulation under which judicial review can blossom and assume control over the nation's foreign policy?<sup>739</sup>

At the outset of his article, Professor Bradley announces that he is not defending the value of federalism. Rather, posing as politically neutral, he claims only "that if federalism is to be the subject of judicial protection — as the current Supreme Court appears to believe — there is no justification for giving the treaty power special immunity from such protection."<sup>740</sup> If this is indeed his project, however, then presumably he ought to have followed the logic of the Supreme Court's recent opinions. Yet, he virtually ignores the questions raised by the several recent landmark decisions in which the Court has sought to create spheres of immunity to protect the states from direct applications of federal power. To what extent do these apply to the treaty power?<sup>741</sup> More importantly, he ignores the lesson of the other main branch of federalism decisions — those in which the Court has sought to define limits on the subject matter scope of federal powers, most notably the commerce power and § 5 of the Fourteenth Amend-

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739. Contrary to Professor Bradley's suggestion, moreover, the fact that the scope of the treaty power rests to some degree on subjective judgments of the President and Senate does not make it unique among the delegated powers. See Bradley, *supra* note 2, at 452. Consider the congressional power to provide for the "general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. Surely, determining the general welfare is as subjective an enterprise as deciding upon our foreign policy interests. Nor are courts any more likely to declare an appropriation unconstitutional for failing to promote the general welfare than a treaty unconstitutional for failing to serve the foreign policy interests of the United States. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Still less are they likely to interfere with a congressional decision to declare war, a power that affords Congress a degree of latitude in no way inferior to that which the treaty power affords the President and Senate. Likewise, there is nothing unique about linking the scope of a delegated power to the conduct of foreign nations. Consider in this regard the congressional power to define and punish "Offenses against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10. Just as international practice, with regard to what matters are appropriate for negotiation and agreement, develops over time in accordance with changing conceptions of the interests of nations, so too the law of nations develops new offenses over time in accordance with their practices and judgments. When international law develops a new offense, congressional power correspondingly expands. In any case, it is an inescapable fact of the world that we cannot control how other states define their interests. We may regret this fact, but we cannot wish it away. Perhaps sometimes — perhaps often, given our preeminent international position — we can successfully resist demands that impose a high cost on our notions of local, or of national, autonomy, but we can never know in advance what the costs will be. To impose artificial limits on the treaty power would be to risk placing the nation in a weakened, and potentially vulnerable, position.

740. Bradley, *supra* note 2, at 394.

741. For discussion of the Court's recent decisions in *New York, Printz, Alden*, and *Seminole Tribe*, see *supra* notes 27, 30-35, 704-705 and accompanying text. Professor Bradley does briefly discuss *Breard v. Greene*, 523 U.S. 371 (1998), and interprets it as holding that the Eleventh Amendment does apply to treaties. See Bradley, *supra* note 2, at 458. On the contrary, although *Breard* certainly suggests that the Court might ultimately come out that way, it does not purport to be an authoritative resolution of the question. For brief discussion of *Breard* and the Eleventh Amendment issue, see *supra* note 30 and accompanying text.

ment.<sup>742</sup> Whatever one might think of the success of the Court's efforts in these cases, the Court has looked for limits in the nature and purpose of the grants of power themselves. If Professor Bradley had wished to follow the Court in that course, he would certainly have searched for additional subject matter limits in the nature and object of the treaty power. No doubt, as he concedes, it would have proved difficult. In over two hundred years, no one has proposed a workable limitation other than the obvious: treaties may only deal with matters of mutual concern between nations.

### 3. *The Significance of the Special Political Protections Afforded State Interests in the Treaty-Making Process*

Professor Bradley also argues that the special political protections which the Senate affords the states in the treaty process are irrelevant to the question of whether "reserved power" limitations ought to be accepted. He contends that this argument really amounts to nothing more than the claim that it is unnecessary to overrule *Missouri* because the Senate is in any case doing a good job of protecting state interests. Otherwise, the argument is subject to all of the difficulties that apply to the political safeguards argument endorsed by the Supreme Court in the controversial decision in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>743</sup> The Founders, he contends, did not mean to make the Senate the sole safeguard. Moreover, although it is true that the Senate has protected state interests, this pattern could change.<sup>744</sup>

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742. See *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000) (ruling that the Age Discrimination Employment Act is beyond Congress's § 5 powers); *Reno v. Condon*, 120 S. Ct. 666 (2000) (upholding the Driver's Protection Privacy Act under the commerce power); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2219 (1999) (ruling that the Patent Remedy Act is beyond Congress's § 5 powers); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking the Religious Freedom Restoration Act as beyond Congress's powers under § 5 of the Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down statute prohibiting the possession of guns within 1,000 feet of a school as beyond Congress's commerce power); *United States v. Morrison*, 120 S. Ct. 1740 (2000) (striking down the Violence Against Women Act as beyond Congress's powers under the Commerce Clause and § 5 of the Fourteenth Amendment). For discussion of *Morrison* and *Lopez*, see *supra* note 706.

743. 469 U.S. 528 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), and leaving to the political process the protection of traditional governmental functions from federal regulation under the commerce power). For citations to critical appraisals of *Garcia*, see Bradley, *supra* note 2, at 441 n.297 (collecting citations). For present purposes, it is unnecessary to take a position on the *Garcia* controversy. I note that Larry Kramer has developed a persuasive account of the role of political parties in the constitutional structure that may provide a compelling justification for *Garcia's* reliance on the political process. He also usefully examines the Founders' intent regarding the role of the Court in upholding federalism limitations. See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 234-52, 268-87 (2000).

744. See Bradley, *supra* note 2, at 440-45.

Once again, however, Professor Bradley misapprehends the nature of the argument for the nationalist view and the role that the political safeguards argument plays in this context. In *Garcia*, the Court acknowledged that “the Constitution’s federal structure imposes limitations on the Commerce Clause.”<sup>745</sup> It nevertheless left it to the political process to define and enforce those limitations.<sup>746</sup> In contrast, the argument for the nationalist view is not that the Senate is the exclusive agent for the protection of the constitutional rights of the states, and therefore that the courts need not assume their customary role. On the contrary, whatever federalism limitations there are should of course be enforced by the Senate, the House, the President, and, if called upon in a proper case, the courts.<sup>747</sup> What the nationalist view contends, rather, is that the treaty power is not limited by the scope of the powers delegated to Congress in Article I. The only limits on the treaty power are those implicit in the requirement that treaties extend only to proper subjects for negotiation and agreement. Beyond those, there are no “reserved powers” subject matter limitations and therefore nothing for the Senate, or the courts for that matter, to enforce. The relevance of the Senate to the argument is simply to show why the Founders were comfortable in granting such a broad power to the federal government. In addition to the affirmative reasons that justified giving the power exclusively to the national government, they created a unique procedure for ensuring that the interests of the states would be adequately secured.<sup>748</sup>

In assigning the treaty power to the Senate, and safeguarding it with a minority veto, the Founders were only partly concerned about exercises of the treaty power that would trench on the exclusive legis-

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745. *Garcia*, 469 U.S. at 547.

746. *See id.* at 547-55.

747. For reasons which I have already discussed, the courts have been and are likely to continue to be highly deferential in reviewing whether a treaty falls within the scope of the treaty power — because they feel incompetent to assess whether a treaty advances U.S. foreign policy interests, or because they fear the possible consequences should they overturn a treaty already concluded, and because they are reluctant to second guess the motives of the political branches in making a treaty. *See supra* notes 41, 731-732, 737-739 and accompanying text. Wholly apart from *Garcia*, therefore, the courts are unlikely to play a significant role.

748. Strictly speaking, *Garcia* is irrelevant to the question of whether the courts should review treaties to ensure that they remain within the subject matter scope of the treaty power. *Garcia* dealt with congressional regulation of the states as states, not with the subject matter scope of the commerce power. Insofar as there are subject matter limitations on the commerce power, the Court has continued to enforce them. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995) (striking down act of Congress prohibiting the possession of guns within 1,000 feet of a school as beyond the subject matter scope of the commerce power); *see also, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down Religious Freedom Restoration Act as beyond Congress’s power under § 5 of the Fourteenth Amendment). For discussion, *see supra* notes 706, 742. As previously noted, however, wholly apart from *Garcia*, it is doubtful whether the courts will be willing or able to play a similar role in the treaty context. *See supra* notes 41, 731-732, 737-739, 747 and accompanying text.

lative sphere of the states. Treaties well within Congress's powers could profoundly threaten state interests. Indeed, the navigation of the Mississippi River and access to the Newfoundland fisheries seem to have been their largest concerns, but they also had serious worries about the dangers posed by peace and commercial treaties. The two-thirds rule was designed as a special political protection for state and sectional interests because the Founders felt compelled both to cede the power over treaties and to refrain from limiting it in ways that might ultimately prove detrimental to the national interest. By ensuring the most rigorous protection consistent with prudence, they believed that they had harmonized the conflicting considerations in the manner most advantageous to the nation.<sup>749</sup>

To be sure, as Professor Bradley points out, much has changed since 1789. The Seventeenth Amendment provided for direct election of Senators, and the relationship between the President and Senate in the treaty process did not work out in precisely the fashion that had been anticipated. There were other changes as well.<sup>750</sup> Nevertheless, if the question is whether the Founders' expectation that the Senate would safeguard state interests in treaties has proven correct, the answer has been from the beginning a resounding "yes," as even Professor Bradley is forced to concede.<sup>751</sup> Indeed, the Senate has often been

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749. See *supra* notes 159-170, 177-178, 183-186, 194-212 and accompanying text.

750. See Bradley, *supra* note 2, at 442. Professor Bradley points out that the Senate was expected to play a more prominent role in advising the President regarding treaties. See *id.* On the other hand, the abandonment of the executive council model may have intensified the Senate's tendency to view its function as independent of, and even antagonistic to, the presidential negotiation function, leaving the foreign policy process in a dysfunctional state of conflict. See EDWARD CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* 32-36 (1945); Ackerman & Golove, *supra* note 19, at 869-70. Professor Bradley also points to the emergence of the executive agreement as an alternative to the treaty and suggests that this has undermined the protection which the Senate affords. On why this argument is seriously mistaken, see discussion *infra* notes 784-792 and accompanying text. In any case, whatever implications it may have for executive agreements, it has none for treaties — which is the only matter in issue. Professor Bradley further points to a number of deficiencies which others have identified in the treaty-making process: that as compared to the legislative process, the treaty process is opaque, public participation is diminished, and the Senate has less freedom to determine the shape which the treaty provisions take; that there are sometimes overriding foreign policy considerations which may make the Senate feel constrained to accept treaties even with highly objectionable provisions; and that treaties may contain vague and aspirational language making their implications for the states less predictable, especially when an international body is charged with their interpretation. See Bradley, *supra* note 2, at 442-43. For the most part, these points are not new. They were simply part of the calculus which the Founders had to consider in 1787-89. In any case, they apply equally to a wide range of treaties, not just to those with implications for the interests of the states. If they argue for anything, it is for a reformation of the treaty-making process to make the executive more accountable. They do not make it any more sensible to place states' rights restrictions on the subject matter of treaties.

751. See Bradley, *supra* note 2, at 443-44 (conceding that notwithstanding his objections to the political process argument, "it must be acknowledged that the Senate often has acted to protect states' rights in the treaty context, especially with respect to human rights treaties"). The Senate has acted vigorously to protect state interests throughout American his-

so vigorous in upholding the interests of the states, and in promoting an isolationist foreign policy, that the Founders' decision to create a minority veto has been quite plausibly condemned as the "fatal defect" in the Constitution.<sup>752</sup> As I have tried to show elsewhere, it led to a virtual constitutional revolution during the World War II years, provoking the development of an alternative form for making international agreements — the so-called congressional-executive agreement.<sup>753</sup> It is not clear what conclusions would follow were the Senate's performance to have proven less protective, but given the success of the Founders' plan, there is no need to face that question.<sup>754</sup>

This is not to suggest that the treaty power cannot be abused. For example, the President and Senate could in theory make a treaty serving only a relatively weak foreign policy purpose even while trenching heavily on the interests of some states. All powers, however, are susceptible to abuse. Where the political branches never-

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tory. See HENKIN, *supra* note 16, at 191-93, 463-65 (providing examples and discussing the use of federal-state clauses); STOKE, *supra* note 550, at 190-98; WRIGHT, *supra* note 21, § 50, at 93. In recent times, even when it has reluctantly approved human rights conventions, it has uniformly attached federalism reservations which severely limit the impact of the conventions on the states. See Bradley, *supra* note 2, at 428-29, 444 (describing the Senate's practices and providing citations). Professor Kramer attributes the continuing sensitivity of the political branches to federalism concerns to the workings of the party system. See Kramer, *supra* note 743, at 278-87.

752. See DENNA F. FLEMING, *THE UNITED STATES AND THE WORLD COURT* 156 (1945); see also DENNA F. FLEMING, *THE TREATY VETO OF THE AMERICAN SENATE* (1930); Ackerman & Golove, *supra* note 19, at 861-62. For an excellent discussion of the various ways in which the states have influenced U.S. treaty practice from the beginning, see MITCHELL, *supra* note 526, *passim*. As Secretary of State Hay famously observed a hundred years ago: "A treaty entering the Senate is like a bull going into the arena; no one can say just how or when the final blow will fall — but one thing is certain — it will never leave the arena alive." 2 THAYER, *LIFE OF JOHN HAY* 393 (1915) (quoting John Hay).

753. See Ackerman & Golove, *supra* note 19, at 861-96 (describing the rise of the congressional-executive agreement as a reaction to the Senate's consistent resistance to treaties).

754. Professor Bradley also suggests that the senatorial safeguards are inadequate because it is Congress and not the Senate that implements treaties. Thus, in adopting implementing regulations, Congress operates under normal simple majority legislative procedures, rather than under the two-thirds requirement. See Bradley, *supra* note 2, at 444-45 (citing the possible use of stipulations in human rights treaties to justify domestic implementing legislation in areas otherwise beyond congressional authority). Obviously, however, the additional layer of congressional implementation — which applies only to non-self-executing treaties — simply provides an added protection. The treaty first has to obtain two-thirds Senate consent and hence is subject to a double security. Perhaps what Professor Bradley has in mind is that treaty stipulations can be vague, and that Congress in implementing the treaty may claim wide discretion to regulate in ways that were unanticipated by the Senate when it gave its consent. How serious a problem this is can only be determined by reference to practice. To the extent that it is an issue, however, the remedy lies in more strictly applying the requirement that implementing legislation (at least insofar as that legislation is otherwise beyond Congress's regulatory powers) be reasonably related to the treaty obligations it is designed to execute. See *United States v. Wang Kun Lue*, 134 F.3d 79, 84 (2d Cir. 1998) (affirming the application of the rational basis test to implementing legislation).



theless act within the scope of their delegated authority, the remedy for abuse lies ultimately in the people and not the courts:

The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.<sup>755</sup>

In the case of the treaty power, the Founders created special procedural safeguards which provide the people and the states with an added security that does not apply in the ordinary legislative process. As a result, there are few, if any, examples of treaties that might rightfully be described as an abuse of the treaty power, and Professor Bradley does not claim otherwise.<sup>756</sup>

Although Professor Bradley does not press the point, there is a related argument that has sometimes been made in favor of the states' rights view which is worth noting in this context. The claim is that there is something incoherent in permitting two "branches" of the federal government — the President and the Senate — to regulate matters which the three "branches" — the House, the Senate, and the President — are prohibited from regulating. If the whole legislature cannot touch upon the matter, then surely, it is said, the President and Senate are precluded as well.<sup>757</sup>

Presumably, those who make this argument find an inconsistency in allowing a greater intrusion on state interests by a process subject to lesser checks and balances in favor of the states. It is highly doubtful, however, that the treaty power is in fact a greater intrusion on the interests of the states, except in the formal sense that it can in principle

755. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824) (Marshall, C.J.).

756. It is not difficult to hypothesize possible abuses of the treaty power. For a more ambiguous case, consider the following: Suppose that Congress's legislative powers do not extend to prohibiting the states from imposing the death penalty. Suppose further that the President and Senate decide to conclude a treaty prohibiting the imposition of the death penalty as a violation of human rights and that their sole reason for concluding the treaty is that they wish to further the moral aspiration, not shared by some states, of a world without executions. Such a treaty would serve a foreign policy purpose — to advance the nation's moral interests by altering the conduct of foreign nations regarding the death penalty — and would thus be constitutional. However, it could plausibly be attacked as an abuse of the treaty power. Did the President and Senate take seriously their role in weighing the moral benefits of imposing a no-death-penalty rule on foreign nations against the arguably substantial federalism costs of imposing a similar rule on dissenting states? In any case, whatever one might conclude about this scenario, the main point is that it is entirely unrealistic. If past experience is any guide, without a weighty foreign policy purpose of a more narrowly self-interested kind, the President and Senate would never make such a treaty. Moreover, the reason, at least in part, is the safeguard provided by the two-thirds rule.

757. This argument was made by Jefferson in his *Manual of Parliamentary Practice*. See Jefferson, *supra* note 347, at 442 (claiming that the Constitution "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").

touch on matters which Congress may not regulate. Surely our national experience suggests that congressional legislation is the greater threat. In any case, it is well known that the exclusion of the House from the treaty process reflects the Founders' judgment that the House was too numerous a body, whose members had too short a term of office, to enable it to act with the kind of secrecy, despatch, and long-term perspective that they felt were necessary for supervising treaty-making. They therefore assigned the advice and consent power to the Senate alone (where state interests would be most tenaciously protected).<sup>758</sup> Contrary to the implication of the states' rights view, however, in doing so they acted to ensure that both state and national interests would be even more fully protected than in the normal legislative process. Not only is there the extraordinary two-thirds supermajority requirement, but also the President is afforded an even greater check on the Senate than he exercises in the ordinary legislative process. The Senate can neither originate treaties, nor can it force the President to ratify a treaty even after it has given the treaty its consent.<sup>759</sup> In contrast to the legislative process, then, the President effectively wields a veto that cannot be overridden. In order to make a treaty, both the President and two-thirds of the Senate must agree — whereas a law requires only a simple majority of both houses, with the concurrence of the President, or two-thirds of both houses without the President's assent. It is simply not the case, therefore, that the Constitution subjects treaties to lesser protections for state interests than those applying in the legislative process. In fact, given the dynamics of the political process, the two-thirds rule has proven to provide far greater protection than the ordinary procedures for passing laws.

#### 4. *The Maintenance of National Unity in Foreign Negotiations and Human Rights Treaties*

Professor Bradley also seeks to challenge a central claim of the nationalist view — that a unified bargaining posture is important to assure that the United States maximizes its collective influence in international negotiations. He refers to this claim as the “one-voice argument” and contends that it is overdrawn.<sup>760</sup> According to Professor Bradley, although the Supreme Court has often made statements affirming the one-voice view, in fact the claim has often been overstated. Moreover, the Court's decision in *Barclay's Bank PLC v. Franchise Tax Board*,<sup>761</sup> he claims, sharply eroded the doctrine.<sup>762</sup>

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758. See, e.g., THE FEDERALIST, *supra* note 176, NO. 64 (John Jay), at 39.

759. See RESTATEMENT (THIRD), *supra* note 19, § 303; cf. U.S. CONST. art. I, § 7 (providing for presidential vetoes and congressional overrides).

760. Bradley, *supra* note 2, at 445.

761. 512 U.S. 298 (1994).

The view that we are one nation in our relations with foreign nations and that the foreign affairs powers are exclusively lodged in the federal government has been affirmed on so many occasions, and repeated by the Supreme Court so many times, that citations to establish the point seem hardly necessary.<sup>763</sup> The idea that *Barclay's Bank* has somehow overridden all that past history is, to say the least, wildly exaggerated, if not outright misleading.<sup>764</sup> *Barclay's Bank* dealt with the dormant foreign commerce clause and specifically with the role of the Court in policing the states. At issue was California's worldwide combined reporting method for taxing multinational corporations, which had caused friction with U.S. trading partners. What is significant from Professor Bradley's perspective is that the Court was unwilling to strike down the law on its own authority notwithstanding the law's significant indirect impact on the conduct of foreign relations. Whatever implications this development may have, however, it provides no support for his argument here. Although the Court declined to use its implied dormant commerce powers, it positively referred the matter to Congress for action by the political branches and thus fully vindicated the supremacy of federal authority over the field.<sup>765</sup> In contrast, Professor Bradley is not arguing for a limitation simply on the Court's powers, while leaving the political branches free to exercise their plenary authority. He seeks instead to impose states' rights limitations on the political branches — here, the President and Senate — in a core field of foreign relations and in an area where their power is expressly

762. See Bradley, *supra* note 2, at 445-48.

763. The view has been virtually uniformly held, including by the most states' rights-oriented jurists — for example, Taney in *Holmes v. Jennison*, 39 U.S. 540 (1840), and Calhoun in the Disquisition. See also, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) (observing that the United States is “vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective. The only government of this country, which other nations recognize or treat with, is the government of the Union . . . . The Constitution of the United States speaks with no uncertain sound upon this subject”); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 604, 606 (1889) (observing that the “United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory” and that “[f]or local interests the several States of the Union exist; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power”); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 555 (1870) (Bradley, J., concurring) (observing that the “United States is not only a government, but it is a national government . . . . It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the states governments”).

764. For discussion, see Harold Hongju Koh, *Commentary: Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1848-49 (1998).

765. See *Barclay's Bank*, 512 U.S. at 321-30. Indeed, the Court relied heavily on its construction of Congress's prior actions as demonstrating that Congress had intended to preserve the rights of the states to use the worldwide combined reporting method. See *id.*

affirmed by the text in the strongest possible language. That is an entirely different matter. Ironically, if the states' rights view were adopted, it would mean not that the United States would speak with multifarious voices on the affected treaties, but that potentially the country would speak with no voice at all.<sup>766</sup>

Notwithstanding his doubts about the one-voice argument, however, Professor Bradley himself concedes its "strong intuitive appeal" in regard to "traditional" treaties, like peace treaties.<sup>767</sup> In his view, however, this intuitive appeal runs out when it comes to newfangled treaties "that regulate many subjects formerly considered domestic in nature, especially in the human rights area." These treaties are not "truly inter-national." For example, it "is not at all obvious," he thinks, "that it is necessary or desirable that the country speak through the Executive with respect to the regulation of religious freedom."<sup>768</sup>

This argument reveals Professor Bradley's true target. Although more nuanced than the Brickerites of fifty years ago, he too seeks a constitutional doctrine that will effectively prevent the United States as a nation from adhering to human rights treaties, at least insofar as those treaties protect rights that are not already protected by the Constitution or otherwise within the scope of federal authority. Indeed, he seems virtually to concede the importance of avoiding federalism limitations in other areas of treaty-making, because in those areas "the intuitive appeal" of the one-voice argument is strong enough to carry the day.

Professor Bradley's appeal to intuition is no more than an appeal to untutored prejudice. To be sure, the development of human rights treaties, though not as new as many seem to believe, does represent a profound transformation in international legal theory and practice.<sup>769</sup>

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766. As this Article was going to press, the Supreme Court rendered its decision in *Crosby v. National Foreign Trade Council*, 68 U.S.L.W. 4545 (2000), striking down a Massachusetts state law imposing sanctions on companies doing business with Burma. Although I cannot analyze the case here, suffice it to say that the Court unanimously and forcefully reaffirmed the importance of speaking with "one voice" in foreign affairs. It also narrowly construed *Barclay's Bank* as premised on Congress's express intent to permit state regulation irrespective of the potential impact on foreign relations. *Crosby* seems to indicate that the Court continues to be committed to broad federal power over foreign affairs notwithstanding conflicts with state regulatory authority.

767. Bradley, *supra* note 2, at 445-46. Thus, he notes:

Foreign affairs, after all, concern the entire nation. Moreover, effective international bargaining may well require that we have a national representative with the power to make binding commitments. . . . Most of us would agree . . . that the Executive should not be hampered by federalism concerns when negotiating a peace treaty.

*Id.* He even quotes Madison's observation that "if we are to be one nation in any respect, it clearly ought to be in respect to other nations." THE FEDERALIST, *supra* note 176, No. 42 (James Madison).

768. Bradley, *supra* note 2, at 446.

769. See HENKIN, *supra* note 16, at 196-98. Nor are human rights conventions the only kind of treaties which limit the way a government can treat its own nationals. See *id.* at 474-

It does not, however, represent a change in the respects relevant to the scope of the treaty power. The United States does not, and may not, enter into human rights treaties in order to engage in the regulation of domestic activities. In this respect, human rights treaties are no different from any other treaties. It bears repeating that treaties are bargains between states, and just as in a contract between private individuals, agreement requires mutual concessions. The United States agrees to do or to forbear from doing certain activities in return for promises by its treaty partners to do or to forbear from doing the same or other activities. The purpose from our perspective is not to restrict our own liberty of action, but to restrict the liberty of our treaty partners. Certainly, the concessions that other states demand may require the United States to change its domestic legislation. However, that is not peculiar to human rights treaties; nor is it an unanticipated development arising after the adoption of the Constitution.<sup>770</sup>

In this crucial respect, then, human rights treaties are the same as all other treaties, and the reasons why maximizing our national influence is important in negotiating "traditional" treaties apply as well to these "new" conventions. The United States enters human rights treaties in order to secure the promises of other states to abide by basic human rights standards. Obtaining these promises, and the enforcement mechanisms that accompany them, are widely recognized as national interests of the highest magnitude, implicating, *inter alia*, our national security and economic interests.<sup>771</sup> We do not — and consti-

75 (listing examples, including conventions concerning narcotic drugs, safety at sea, and armaments limitations); Henkin, *supra* note 36, at 911-13 (same); *supra* note 648.

770. As we have seen, the Founders were painfully aware that treaty stipulations would require implementation in domestic law. See *supra* Section II.A and accompanying text. Indeed, the whole point of the Supremacy Clause was to ensure that treaties requiring the regulation of domestic activities would, of their own force, become supreme law of the land. Notwithstanding the extreme sensitivity of some early treaties precisely on states' rights grounds, the Supreme Court acted vigorously to ensure domestic respect for the obligations imposed. See *supra* notes 103, 120, 123-125, 226-234, 311, 367-369, 402-421 and accompanying text (describing numerous early Supreme Court decisions, including *Ware v. Hylton* and *Fairfax's Devisee v. Hunter's Lessee*, that enforced treaty stipulations notwithstanding their impact on state laws). Indeed, it was the resistance of the states to complying with the Treaty of Peace and other treaty obligations that was among the principal motivations leading to the Philadelphia Convention and the Supremacy Clause. See *supra* notes 99-142 and accompanying text. As we have also seen, even after the adoption of the Constitution, treaties frequently imposed obligations of the most sensitive and intrusive kind. See *supra* Sections II.B and IV.C and accompanying text.

771. See HENKIN, *supra* note 16, at 475-76. The way that other states treat their own nationals is of crucial importance to us for a variety of compelling reasons: because we believe that states that violate fundamental human rights are more likely to be aggressive externally and unstable internally and thus to undermine international peace and security, because the humanitarian and economic disasters that frequently accompany regimes that systematically violate human rights have and will continue to force us to make substantial financial and even military commitments when conflicts erupt, because such regimes do not make good trading partners and disrupt the flow of international commerce, because we feel powerful moral commitments to uphold basic rights for all persons wherever located, and

tutionally may not — enter into human rights treaties as a means of achieving domestic policy ends, and so far as I am aware no responsible official of the United States government has ever suggested otherwise. If the President disagrees with domestic law concerning freedom of religion, as Professor Bradley hypothesizes, he may not attempt to alter that law by making a treaty. That would be to make an unconstitutional end-run around our normal domestic lawmaking institutions. Indeed, it would be equally illegitimate whether the subject matter of the treaty lies within the legislative jurisdiction of Congress or within the legislative jurisdiction of the states.<sup>772</sup>

### 5. *Changed Circumstances and Missouri*

Finally, Professor Bradley addresses a major practical obstacle to his view — *Missouri* is, after all, a well-established precedent of nearly a hundred years vintage. Given what we have seen, it would be absurd to claim that it does not have deep roots in constitutional history and in the text and structure of the Constitution. Why should it be overruled now? Professor Bradley's answer: *stare decisis* carries less weight in constitutional adjudication, especially “when fundamental

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because our international standing may be seriously compromised unless we are willing to make the same commitments that we urge — indeed sometimes coerce — other states to undertake.

In practice, the United States has often refused to join human rights conventions, and when it has joined, it has done so at the last moment, after most other states have already become parties. It might be argued, therefore, that our participation was unnecessary to obtain the promises of other states to uphold human rights; they had made those promises even without our making mutual concessions. Surely, however, the United States is not constitutionally compelled to be a free rider. Nor is free riding really “free.” By withholding its participation, the United States forgoes important foreign policy benefits. Among other things, ratifying a human rights convention, even after other nations have joined, affords the United States access to the procedural mechanisms created by the treaty to encourage respect for human rights in other countries, strengthens the convention by making participation more universal and by lending it the preeminent influence of the United States, encourages other states to join, and, perhaps most importantly, bolsters the reputation and influence of the United States by demonstrating its good faith and willingness to compromise and to undertake reciprocal obligations.

772. Professor Bradley cites the Senate's practice of attaching federalism reservations to human rights treaties as evidence that the one-voice argument is not important in this area. Since we already recognize states' rights limits as a practical matter, why not constitutionalize the practice? See Bradley, *supra* note 2, at 447. On the contrary, what the Senate's practice reveals is that the system is operating in precisely the fashion that the Founders envisioned. The Senate carefully weighs the states' interests in autonomy against the gains to our national interests, and it accords a heavy presumptive weight to the former. The compelling point is that the political process adequately protects state interests. Indeed, the United States has paid a heavy price in its foreign relations because of the solicitude of the Senate for state interests. At some point, however, the balance may shift. Imperative foreign policy reasons may demand that we more fully and unconditionally accede to existing or future international human rights regimes. Overruling *Missouri* would place the United States under rigid limitations that might have deleterious consequences for our foreign policy. Yet, Professor Bradley would impose these limits despite his acknowledgment that the Senate is adequately performing its watchdog task.

assumptions in the first decision no longer hold true."<sup>773</sup> He points to the rise of human rights agreements, which upsets the Court's assumption that treaties would deal with "truly *inter-national relations*";<sup>774</sup> the growing scope of treaty practice; the emergence of the executive agreement as perhaps the dominant domestic form of agreement-making; and the expansion in congressional powers generally.<sup>775</sup>

To the extent that these are "changes" at all, however, they have little or no bearing on the validity of *Missouri*. As we have just seen, human rights treaties are no different from older treaties in any respect relevant to the treaty power. All of the considerations that weigh in favor of the nationalist view apply as strongly to them as to more "traditional" treaties. Furthermore, as a historical matter, "human rights" treaties — or their functional equivalents — have been with us from the beginning. One need look no further than the Treaty of Peace itself for "human rights" provisions prohibiting the states from taking reprisals against U.S. citizens who had supported the British during the Revolutionary War.<sup>776</sup> As we have also seen and at great length, from the beginning the whole question of the scope of the treaty power has been fought out over treaties, usually dealing with the rights of aliens, that are close cousins of today's human rights treaties. Indeed, immediately preceding *Missouri*, the nation was treated to the spectacle of San Francisco resisting the effect of a treaty on its right to consign Japanese resident alien schoolchildren to separate but equal schools! *Missouri*, moreover, was itself rendered just as human rights conventions on the rights of labor were, in the most visible manner, in the process of negotiation. As we have also seen, the Court was fully aware that its decision opened up the possibility that *Hammer v. Dagenhart* would be affected by a treaty.<sup>777</sup>

To be sure, as Professor Bradley contends, international treaty practice has greatly expanded in the past half century and promises to expand further in the decades ahead as globalization proceeds. Professor Bradley expends considerable energy demonstrating that treaties today cover a wider range of subjects than was the case in 1789 or in even 1920. These are examples, he claims, of the ways "in which the treaty power might be used to overcome federalism restraints on domestic lawmaking."<sup>778</sup> This latter claim, however, is false.

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773. Bradley, *supra* note 2, at 459.

774. *Id.* at 460.

775. *See id.* at 459-61.

776. *See supra* notes 116-120, 127-137.

777. *See supra* notes 650-658 and accompanying text.

778. Bradley, *supra* note 2, at 402; *see also id.* at 402-09.

No knowledgeable person is likely to doubt that globalization has many important implications for our federal system.<sup>779</sup> The problem with Professor Bradley's argument, however, is that he mistakes the way in which globalization principally affects the states. As a result of increasing economic integration, nations have felt compelled to make treaties on subjects previously regulated only, or mostly, through domestic legislation. In the United States, regulatory authority over many of those subjects has long been exercised by the federal government. In others — and these are the cases on which Professor Bradley mainly focuses — regulatory authority admittedly exists in the federal government, but Congress has traditionally chosen to leave the matter to the states. The pressure of globalization has changed that practice. More and more, the federal government is exercising the full scope of congressional powers to deal with problems that until now were largely under state control. This development surely raises important federalism concerns, but they have little relation to *Missouri*. Nor would overruling *Missouri* have any effect upon the problem.<sup>780</sup>

This is not to deny that some of the new generation of treaties implicate *Missouri*. Principally, however, the treaties that do are human

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779. For an excellent discussion of the federalism issues in relation to NAFTA and GATT, see Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441 (1994). See also Samuel C. Straight, Note, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216 (1995).

780. Thus, for example, Professor Bradley emphasizes the many private international law conventions that have been proposed, some of which have been ratified by the United States. These treaties, he claims, involve "nothing less than federal arrogation of traditional state competence in the law governing private, and in particular commercial, relations." Bradley, *supra* note 2, at 406 (quoting Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 690 (1998)). Although strictly accurate, the point is misleading. These private law treaties, as Van Alstine explains, deal with contracts, financial leasing, factoring, bills of exchange and promissory notes, stand-by letters of credit, international security interests, and receivables financing. See Van Alstine, *supra*, at 689-99. Moreover, they apply specifically to international or transnational transactions. See *id.* at 690 n.14. Although there may have been a question at one time whether Congress's commerce powers extended to these matters, see *supra* notes 550-552, 670 and accompanying text, there is no doubt today, and Professor Bradley does not suggest otherwise. For the most part, however, Congress has not chosen to regulate in these areas before now. Certainly, taking over large areas of regulatory authority from the states has important federalism implications, but they have nothing to do with *Missouri*. The same applies to Professor Bradley's discussion of the Hostage Convention. See Bradley, *supra* note 2, at 404 (citing the Convention as a case in point, while at the same time noting a recent case, *United States v. Lopez-Flores*, 63 F.3d 1468, 1470 (9th Cir. 1995), upholding the implementing statute under Congress's power over aliens and foreign relations). The same applies to the NAFTA and GATT trade agreements as well. For discussion see *infra* notes 782-783 and accompanying text (noting that all of the provisions in these agreements fall under Congress's commerce power). Although Professor Bradley cites environmental treaties, he does not deny that for the most part there is no reason to believe that they deal with subjects outside of Congress's powers. See Bradley, *supra* note 2, at 408. In the event that the Court were to strike down one of Congress's environmental statutes, for instance the Endangered Species Act, the *Missouri* issue might arise. This hypothetical case, however, seems to illustrate the decision's merit. Should the United States be precluded from negotiating over a subject of such intense international interest?



rights treaties — or, rather, stipulations in human rights treaties that establish rights not already protected by the Fourteenth Amendment and arguably not susceptible to protection under Congress's commerce or other powers.<sup>781</sup> I certainly agree that these stipulations are extremely important, and they are clearly the real focus of Professor Bradley's concern. In this respect, however, the changes since 1789, let alone 1920, have been remarkably slight. As we have seen, treaties have always dealt with rights and have always imposed obligations on the states which some found extremely uncongenial. Certain stipulations in human rights treaties, if accepted, may well find a similar reception. This is just the same problem, in a slightly different form, which has existed from the beginning. Surely, it is not a development that could justify overruling *Missouri* on the grounds of changed circumstances.

This fundamental defect in Professor Bradley's argument is even more patent in his reliance on NAFTA and the WTO as prime evidence of new practices that justify overruling *Missouri*.<sup>782</sup> He does not specify any respect in which either of these landmark trade agreements trenches on subjects otherwise within the exclusive legislative power of the states. This is not surprising. Given the subject matter with which they deal, no one to my knowledge has doubted that all of the provisions in the agreements fall within the subject matter scope of Congress's commerce powers. To be sure, NAFTA and the WTO raise important federalism concerns, but that is because they regulate in areas which, though admittedly within congressional authority, Congress has previously decided to leave to the states.<sup>783</sup>

Indeed, were there provisions in NAFTA and the WTO going beyond Congress's powers, the agreements would probably be unconstitutional to that extent — which brings us to Professor Bradley's next claim. He relies on the increasing use of executive agreements in lieu of treaties. Executive agreements, he notes, are not subject to the special procedural protections which treaties are, and hence there is even

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781. Professor Bradley discusses a number of such treaties and hypothesizes a number of others. See Bradley, *supra* note 2, at 401-05. How many of these contain provisions that would actually be beyond Congress's legislative powers is debatable. In light of the Court's recent Fourteenth Amendment jurisprudence, however, it seems possible that the number of potentially affected stipulations will grow. See *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2219 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

782. See Bradley, *supra* note 2, at 407-08.

783. See Friedman, *supra* note 779, at 1478. Ironically, in a recent decision upholding NAFTA from constitutional challenge, an Alabama district court suggested, without finally deciding, that NAFTA might not even be permissible as a treaty: only Congress could approve it because it dealt so entirely with matters within congressional power over commerce. See *Made in the USA Found. v. United States*, 56 F. Supp. 2d 1226, 1255-56, 1317-23 (N.D. Ala. 1999). That suggestion is obviously incorrect, but it nevertheless nicely reveals the fallacy of Professor Bradley's reasoning.

less justification for “exempting” them from the Tenth Amendment.<sup>784</sup> It is unclear why Professor Bradley takes this to be an objection to *Missouri*. *Missouri* held only that *treaties* may deal with subjects that are beyond Congress’s legislative powers. It said nothing about executive agreements. If there is a valid objection to executive agreements being afforded the same treatment, that provides a reason for not extending the reasoning of *Missouri* to executive agreements. It hardly provides grounds for overruling *Missouri*.<sup>785</sup>

Although this simple point dispatches with Professor Bradley’s concern, it is worth noting as well that his basic premise is at best highly problematic. The vast bulk of executive agreements take the form of congressional-executive agreements.<sup>786</sup> The most outstanding recent examples are NAFTA and the WTO. That means that they were approved by Congress by simple majority votes in both houses, rather than by two-thirds of the Senate.<sup>787</sup> The constitutional basis for the congressional-executive agreement has been the source of substantial controversy.<sup>788</sup> Under the most plausible textual interpretation, however, a congressional-executive agreement is valid only if its subject matter falls within one of Congress’s legislative powers. Its validity stems from its being necessary and proper to carrying into execution one of Congress’s own delegated authorities.<sup>789</sup> On this view, the

784. See Bradley, *supra* note 2, at 398-99, 444, 460.

785. On this point, see Vásquez, Breard, *supra* note 3, at 1339 n.75.

786. See Executive Agreements, 14 WHITEMAN DIGEST § 22, at 210; Golove, *supra* note 16, at 1805 n.44.

787. See, e.g., Ackerman & Golove, *supra* note 19, at 801-08, 917-25; Golove, *supra* note 16, at 1793-94, 1798-99.

788. Compare Ackerman & Golove, *supra* note 19, *passim* (arguing for the constitutional validity of the congressional-executive agreement), and Golove, *supra* note 16, *passim* (same), with Tribe, *supra* note 35, *passim* (arguing for its unconstitutionality). See also HENKIN, *supra* note 16, at 216-17.

789. See Golove, *supra* note 16, at 1799-1800, 1808-09. The so-called “interchangeability” doctrine may create some confusion in this respect. According to this doctrine, Congress can approve any agreement as a congressional-executive agreement that the Senate could approve as a treaty. While as a practical matter that may be true, it is not so in theory. Interchangeability in practice results from the breadth of Congress’s powers over foreign affairs, which some claim are expansive enough to cover any stipulation which the United States ever has, or presumably ever will, include in a treaty. See *id.* at 1800 n.28; *supra* note 36. To the extent that this claim is exaggerated, interchangeability is an overstatement.

It is true that the advent of the congressional-executive agreement has federalism implications — it undermines to some degree the Founders’ special solicitude for state and sectional interests embodied in the two-thirds rule. That goes to the validity of the congressional-executive agreement as a form for approving international agreements and rests on the recognition that international agreements pose threats to state interests irrespective of whether they deal with matters within congressional or state legislative competence. See Ackerman & Golove, *supra* note 19, at 808-13; Tribe, *supra* note 35, at 1241, 1244, 1266-68. With the possible qualifications mentioned in the next paragraph of the text above, Congressional-executive agreements, however, do not — and cannot — deal with matters

only distinction between a treaty and a congressional-executive agreement is that *the Missouri doctrine does not apply to the latter*.<sup>790</sup> Thus, if NAFTA and the WTO are constitutional, it would only be because each and every provision in the agreements falls within the scope of Congress's powers.

Having said this much, however, a caveat is in order. It is sometimes claimed that the legitimate scope of a congressional-executive agreement may be extended somewhat by the President's independent constitutional authorities. Under this view, a congressional-executive agreement can be supported not only by Congress's legislative powers but additionally by the President's powers. The President's powers principally derive from his role as commander-in-chief, his power to receive ambassadors, and his position as "sole organ" of the nation in conducting its diplomatic relations. It is theoretically possible, then, that a congressional-executive agreement may extend somewhat beyond Congress's legislative powers.<sup>791</sup> Even if correct, however, this refinement is unlikely to pose much of a threat to the exclusive legislative powers of the states. The President's independent powers are largely confined to matters having little or nothing to do with domestic law, and Professor Bradley has not pointed to any congressional-executive agreement which he claims trenches on the exclusive legislative powers of the states.

The same applies to his concerns about sole executive agreements — agreements which the President makes strictly on his independent authority. The logic that applies to treaties may apply in this context as well because the sole executive agreement falls within a power delegated — albeit implicitly — to the President.<sup>792</sup> As with the

which are within the exclusive legislative powers of the states. Thus, the *Missouri* issue would not ordinarily arise.

790. See Golove, *supra* note 16, at 1800 n.28.

791. See RESTATEMENT (THIRD), *supra* note 19, § 303(2) (asserting that "the President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution"); *id.* § 303 reporter's note 7. As noted, the underlying assumption is that the President may have independent constitutional powers that reach subjects which are beyond Congress's powers and that Congress can approve an agreement that falls within his powers even if not within its own. Arguably, such an agreement would simply be a sole executive agreement supported by congressional implementing legislation, rather than a congressional-executive agreement. For discussion of the sole executive agreement, see *infra* note 792 and accompanying text.

792. The power to make sole executive agreements is incident to the exercise of the President's substantive authorities — his role as commander-in-chief and sole organ of the nation in diplomatic affairs and his power to receive ambassadors. See, e.g., RESTATEMENT (THIRD), *supra* note 19, § 303(4); Golove, *supra* note 16, at 1897-99 & n.329. Whether the exercise of these powers can extend to matters within exclusive state legislative competence is uncertain. The Supreme Court's decisions in *United States v. Belmont*, 301 U.S. 324 (1937) (upholding the Litvinov Assignment), and *United States v. Pink*, 315 U.S. 203 (1942) (same), did not explicitly resolve the question. They held that a valid sole executive agreement supersedes state law under the Supremacy Clause, but did not say whether a sole executive

congressional-executive agreement, however, the issue is largely theoretical. Only a very small percentage of international agreements are concluded in this form, and they typically (with exceptions) deal with matters having no domestic legal effect. Professor Bradley points to no sole executive agreements that potentially raise the *Missouri* question. If such a case should arise, there will be time enough to consider whether *Missouri* should or should not be extended in this manner. In any case, as previously noted, this theoretical possibility has no bearing on the validity of *Missouri* itself. At most, it raises the question whether sole executive agreements should be more strictly limited.

Finally, Professor Bradley relies on the vast expansion in the scope of congressional powers since *Missouri*. Perhaps, he concedes arguendo, *Missouri* was necessary when Congress could not pass legislation on many “‘matters of the sharpest exigency for the national well being,’” but now Congress’s authority is sufficient to cover any matter of importance to our national interests. Thus, it seems, there is no longer any pressing reason for *Missouri*.<sup>793</sup>

After the New Deal expansion of congressional powers, it is no doubt true that the importance of *Missouri* diminished, although it took some time for the full implications of this development to be appreciated. Hence the Bricker Amendment campaign. However, the resurgence of interest in *Missouri* — Professor Bradley being a prime example — is obviously connected to the possibility that Congress’s powers are now in a period of contraction and that *Missouri* might therefore reemerge both as an important ingredient in the federal foreign powers and as a significant factor in federal-state relations. Arguably, congressional power has already contracted enough to call into doubt Congress’s authority over some stipulations in human rights treaties that the United States might ratify. Were this possibility not serious, the whole subject would appear to be a tempest in a teapot. Be that as it may, Professor Bradley’s argument is easily turned around to make the opposite point. If there are few matters of importance to our foreign policy that are beyond Congress’s powers, why revisit and revise a venerable Supreme Court decision that settled the matter nearly a century ago?

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agreement could extend to a subject within the exclusive legislative powers of the state legislatures. See also *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding the Iranian Hostages Agreement). Certainly, the tenor of *Belmont* and *Pink* suggests that the Court would have so held were the issue squarely presented. Whether it would today is another matter. For discussion, see HENKIN, *supra* note 16, at 219-24.

793. See Bradley, *supra* note 2, at 459 (quoting *Missouri*).

## B. Professor Bradley's Solution

Despite his vigorous attack on *Missouri* and the nationalist view, Professor Bradley in the end adopts a surprising position. The federal government, he agrees, can make a treaty on any subject at all. When it makes one on a subject beyond Congress's regulatory authority, however, the treaty does not create binding law on the states nor does the treaty afford Congress a basis for implementing it through legislation. Thus, the states would be free to adopt, or reject, the necessary legislation at their discretion. As he describes it, "[u]nder this approach, the treaty power would not confer any additional regulatory powers on the federal government, just the power to bind the United States on the international plane."<sup>794</sup>

Whatever else might be said about this proposal, one thing is clear: it is entirely extraconstitutional in nature. There is absolutely no evidence in the text that treaties were to be subject to the approval or veto of the states, or that the states were to have any role whatsoever in their implementation. As we have seen, one of the principal concerns prompting the Philadelphia Convention was the difficulty experienced with ensuring state compliance with treaty obligations on matters within their legislative authority.<sup>795</sup> As Madison observed: "To counteract [a treaty] by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war."<sup>796</sup> Professor Bradley's proposal may warrant no further response than simply to quote Justice Johnson's reply to a similar proposal by Caroliniensis during the controversy over the Negro Seamen Act: "it is monstrous, it is reposterous."<sup>797</sup>

The Founders acted in no uncertain terms to obviate the possibility that the states would interfere with the nation's ability to comply with its treaty obligations. The Supremacy Clause declared that treaties were to be "supreme Law of the Land," and, to make the point unmis-

794. Bradley, *supra* note 2, at 456; *see also id.* at 450.

795. *See supra* Section II.A.

796. 3 DEBATES, *supra* note 194, at 515 (remarks of James Madison); *see also id.* at 510 (remarks of Corbin) ("Fatal experience has proved that treaties would never be complied with, if their observance depended on the will of the states; and the consequences would be constant war. For if any one state could counteract any treaty, how could the United States avoid hostility with foreign nations? Do not gentlemen see the infinite dangers that would result from it, if a small part of the community could drag the whole confederacy into war?"). For a similar proposal during the Jay Treaty controversy by Cato (Robert Livingston), *see supra* notes 273-277 and accompanying text.

797. *Philonimus No. 7*, *supra* note 482; *see also supra* notes 472-475 and accompanying text (describing Caroliniensis's proposal); *supra* note 484 and accompanying text (describing Philonimus's response). For Jefferson's active opposition to a similar interpretation of the Articles of Confederation, *see supra* notes 148-152 and accompanying text. For Eisenhower's condemnation of the effort by Senator Bricker to achieve the same result by constitutional amendment, *see supra* notes 682-685 and accompanying text.

takable, they added “the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>798</sup> It is one thing to argue that the Supremacy Clause only applies to constitutionally valid treaties and that treaties touching on subjects beyond Congress’s legislative authority are unconstitutional. If the latter proposition were correct, the Supremacy Clause would not make them supreme law of the land. Although I believe this argument is fallacious for reasons which should by now be clear, it represents at least an attempt to ground the states’ rights view in the language of the Constitution. Without explanation, however, Professor Bradley simply disregards the direct and unequivocal commands of the text.

There are two types of treaties: those which are self-executing and those which are not. The latter require legislative implementation, while the former do not. According to early Supreme Court decisions, the command of the Supremacy Clause only applies to self-executing treaties.<sup>799</sup> The constitutional text, however, makes equally clear where authority lies for implementing non-self-executing treaties: Congress is given the authority “[t]o make all Laws which shall be necessary and proper for carrying into Execution” not only its own powers, but “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>800</sup> The treaty power is without doubt such a power, and there has never been any question but that Congress has the power under the Necessary and Proper Clause to implement any (constitutional) treaty made by the President and Senate:

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.<sup>801</sup>

Of course, it is always possible to retract a power granted. The usual method, however, is constitutional amendment, which is precisely what Senator Bricker tried (unsuccessfully) in the 1950s. His amend-

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798. U.S. CONST. art. VI, § 2. For discussion, see *supra* notes 95-98, 121-122, 127-142, 171-174, 180 and accompanying text.

799. See *Foster & Elam v. Nielson*, 27 U.S. (2 Pet.) 253, 314 (1829); see also HENKIN, *supra* note 16, at 198-204; *supra* notes 20, 57, 708 and accompanying text.

800. U.S. Const. art. I, § 8, cl. 18.

801. *Neely v. Henkel*, 180 U.S. 109, 121 (1901); see also HENKIN, *supra* note 16, at 199-200, 204; 1 WILLOUGHBY, *supra* note 21, § 217, at 506-07. For a recent reaffirmation of this basic principle, see *United States v. Wang Kun Lue*, 134 F.3d 79, 84 (2d Cir. 1998).

ment would have accomplished precisely what Professor Bradley's approach would manage without all the effort.<sup>802</sup>

Although it is thus clear that Professor Bradley's proposal is without support in the text or history of the Constitution, it is worth considering some of the further difficulties which the proposal would create. Professor Bradley says almost nothing about how he envisions his proposal working. One possibility, suggested by his brief description, is that he would permit the President and Senate to make any promises they wish, subject to whatever reaction the states may have. The states could pass implementing legislation if they wished, and having passed it, they could later repeal it if they developed second thoughts. If that is what he has in mind, his proposal seems strikingly irresponsible. It would leave the President and Senate with no way to know in advance whether they could keep the promises they made to foreign nations, and it would render them subject to state changes of heart at any point along the way. Perhaps, though, what Professor Bradley has in mind is to limit the President and Senate to promising that they will recommend certain measures to the states, leaving the decision ultimately up to the states themselves, subject, moreover, to whatever changes of heart the states may have over time. If that is all that his proposal would permit the federal government to do, however, then it simply collapses back into the traditional states' rights view. Even under the strictest states' rights position, such a treaty stipulation would be perfectly permissible, and, in fact, stipulations of that kind have appeared in treaties from time to time.<sup>803</sup>

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802. For the Bricker Amendment(s), see *supra* notes 676-689 and accompanying text. Professor Bradley also claims support in comparative practice. See Bradley, *supra* note 2, at 456. His only reference is to the differing practice in Canada, which adheres to the view he is advocating. See Jeffrey L. Friesen, Note, *The Distribution of Treaty-Implementing Powers in Constitutional Federations: Thoughts on the American and Canadian Models*, 94 COLUM. L. REV. 1415, 1428-33 (1994). The fact that another nation has a practice similar to what an American scholar advocates does not by itself constitute "comparative law" support. Aside from the very different constitutional provisions which led the House of Lords to construe the British North American Act in this fashion, and the special circumstances of the very tenuous Canadian federal system, Professor Bradley simply ignores the fact that this approach has been the subject of scathing criticism and has effectively hobbled Canadian foreign policy on many occasions. See *id.* at 1433-41. Notably, Professor Bradley also ignores the examples of federal systems that follow the *Missouri* approach. See, e.g., Brian R. Opekin & Donald R. Rothwell, *The Impact of Treaties on Australian Federalism*, 27 CASE W. RES. J. INT'L L. 1 (1995) (describing the Australian approach). A serious effort at comparative law might be helpful but is beyond the scope of this article.

803. For early examples, see Hayden, *supra* note 504, at 576-77, 582. Presumably, if this is his intention, Professor Bradley wishes to constitutionalize the use of so-called federal-state clauses under which a federal government only binds itself to those obligations which it has legislative power to fulfill and makes any other obligations conditional on legislation in its individual states or provinces. Some federal states have pushed for such clauses, as has the United States on occasion. For understandable reasons, however, non-federal states have complained bitterly about them, and in recent years, their resistance has stiffened. The inclusion of such a clause leaves the parties uncertain as to the scope of the obligations which a federal government has undertaken and thus as to the mutuality of the bargain. For dis-

It may be, however, that Professor Bradley has another idea in mind. Perhaps, he is contemplating that the President would act as the agent for the states in negotiating these sorts of treaties, but that the treaties would not become binding until all of the states, or perhaps until any state acting separately as to itself, gave their consent. The treaty's validity, then, would depend upon the consent of the state, but the state would thereafter be bound, no longer permitted to change its mind. This approach, however, immediately falls afoul of the principle, reaffirmed in *New York v. United States*, that the states cannot consent to an increase in federal power.<sup>804</sup> Moreover, if the treaty's validity is premised on the consent of the state, there does not appear to be any reason why the President should have to go to the Senate in the first place. If the states can consent to treaties brought to them by the President, why should the Senate be involved at all? Surely, there is no provision which suggests that treaties are subject first to the advice and consent of the Senate and then to the advice and consent of the state legislatures. On the other hand, given the explicit prohibition on state treaties,<sup>805</sup> it is difficult to see how this procedure could be squared with the text. Perhaps, then, these would not be treaties. Would they be "compacts" or "agreements"? If so, then congressional approval would seem to be requisite.<sup>806</sup>

There is no point in trying to work out the details. Professor Bradley's proposal simply fails to offer a serious alternative to the traditional states' rights view. Even if there were strong policy grounds supporting his proposal — which in my view there are not — it would still be necessary to conform to the structures of the constitutional system which we have. That he has failed to do.

## CONCLUSION

My defense of *Missouri* has largely been grounded in traditional sources of constitutional argument — text, structure, precedent, and history. As I have tried to demonstrate, these sources provide overwhelming support for the nationalist view. Indeed, in my judgment, that support is so strong that a decision overruling *Missouri*, far from being compelled by the Court's recent federalism jurisprudence,

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cussion, see RESTATEMENT (THIRD), *supra* note 19, § 302 reporter's note 4; HENKIN, *supra* note 16, at 191-92, 464-65.

804. *New York v. United States*, 505 U.S. 144, 181-83 (1992). Because "[t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities," but to secure the liberties of citizens, "[s]tate officials . . . cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution." *Id.* at 181-82.

805. See U.S. CONST. art. I, § 10, cl. 1.

806. See U.S. CONST. art. I, § 10, cl. 3 (prohibiting states from making compacts or agreements without the consent of Congress).



would raise serious questions about the Court's commitment to the interpretive methodologies which it has used in these and other cases.

Although my main aim has been to defend the specific holding in *Missouri*, I certainly do not deny that *Missouri's* affirmation of the nationalist view has wider doctrinal and theoretical significance. On the contrary, *Missouri* is one of the cornerstones of the whole edifice of the constitutional law of foreign affairs. Commensurately, Professor Bradley's attack on the nationalist view of the treaty power is a crucial part of a larger challenge to that edifice which he and a group of allied scholars have energetically waged in recent years. These scholars strenuously object to what they call — pejoratively — “foreign affairs exceptionalism” — the notion that the federal government's foreign affairs powers should be treated any differently from its domestic powers, especially when it comes to federalism issues.<sup>807</sup> For them, *Missouri* understandably presents a major theoretical obstacle: As we have seen, the nationalist conception of the treaty power is rooted in an explicit textual grant, is tied to a cognate provision explicitly excluding the states from treaty-making, has a deep historical pedigree which illustrates the profound importance of federal foreign affairs supremacy to the national welfare, and finds its ultimate justification in the Founders' decision to lodge the whole of the foreign affairs powers exclusively in the national government. It is not surprising, then, that Professor Bradley and company would see it as an grave threat to their larger project.

If *pace* Professor Bradley, “foreign affairs exceptionalism” has a long and venerable pedigree, stretching back to 1776, his own project can also claim a long, though perhaps less venerable, pedigree in another great American “ism,” American exceptionalism, itself inextricably intertwined with yet another long pedigreed “ism” — American isolationism. The underlying notion seems to be that the United States is better off to the extent that the Constitution can be made to limit and frustrate full U.S. participation in the burgeoning institutions and regimes of international society. But if the Constitution “does not enact Mr. Herbert Spencer's Social Statics,”<sup>808</sup> neither does it enact an isolationist foreign policy. Like other essentially political questions, foreign policy ought to be fought out in the political — not the judicial — forum. All the more so, given the Constitution's built-in preference, dramatically manifested in the two-thirds rule for treaty-making, for inaction over action. Why ought isolationism to be afforded not only an advantage but a trump?

*Missouri's* importance extends beyond the constitutional law of foreign affairs. As Justice Holmes recognized, the treaty power raises

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807. Bradley, *supra* note 2, at 461.

808. *Lochner v. New York*, 198 U.S. 45, 74, 75 (1905) (Holmes, J., dissenting).

questions going to the root of our identity as a nation. Its ultimate triumph did not come easily but flowed out of the national identity successfully forged on the field of battle. The Founders may have believed that “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.”<sup>809</sup> It took a Civil War to make it so. That national identity is a remarkable achievement and one which ought to be carefully nurtured. At its core is a sense of unity in our relations with other nations. Frittering away that national unity can be accomplished only at the cost of once again raising the question why we are a nation at all.

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809. THE FEDERALIST NO. 42, *supra* note 176, at 264.

## APPENDIX

## STATE OF MISSOURI

v.

HOLLAND, U. S. Game Warden.

252 U.S. 469

No. 609.

Supreme Court of the United States.

Argued March 2, 1920.

Decided April 19, 1920.

Appeal from the District Court of the United States for the Western District of Missouri.

Suit by the State of Missouri against Ray P. Holland, United States Game Warden. From a decree dismissing the suit on motion (258 Fed. 479), plaintiff appeals. Affirmed.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918, c. 128, 40 Stat. 755, and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and that the acts of the defendant done and threatened under that authority invade the sovereign right of the State and contravene its will manifested in statutes. The State also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the Government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a State. *Kansas v. Colorado*, 185 U. S. 125, 142, 22 Sup. Ct. 552, 46 L. Ed. 838; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237, 27 Sup. Ct. 618, 51 L. Ed. 1038, 11 Ann. Cas. 488; *Marshall Dental Manufacturing Co. v. Iowa*, 226 U. S. 460, 462, 33 Sup. Ct. 168, 57 L. Ed. 300. A motion to dismiss was sustained by the District Court on the ground that the Act of Congress is constitutional. 258 Fed. 479. *Acc. United States v. Thompson* (D. C.) 258 Fed. 257; *United States v. Rockefeller* (D. C.) 260 Fed. 346. The State appeals.

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President. It recited that many species

of birds in their annual migrations traversed many parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified closed seasons and protection in other forms, and agreed that the two powers would take or propose to their lawmaking bodies the necessary measures for carrying the treaty out. 39 Stat. 1702. The above mentioned act of July 3, 1918, entitled an act to give effect to the convention, prohibited the killing, capturing or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with those terms, to be made by the Secretary of Agriculture. Regulations were proclaimed on July 31, and October 25, 1918. 40 Stat. 1812, 1863. It is unnecessary to go into any details, because, as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article 2, Section 2, the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court. *United States v. Shauver*, 214 Fed. 154. *United States v. McCullagh*, 221 Fed. 288. Those decisions were supported by arguments that migratory birds were owned by the States in their sovereign capacity for the benefit of their people, and that under cases like *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the su-

preme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found. *Andrews v. Andrews*, 188 U. S. 14, 33, 23 Sup. Ct. 237, 47 L. Ed. 366. What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act. We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.

The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away. If we are to be accurate we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried

out by officers of the United States within the same territory, and that but for the treaty the State would be free to regulate this subject itself.

As most of the laws of the United States are carried out within the States and as many of them deal with matters which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties of course "are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States." *Baldwin v. Franks*, 120 U. S. 678, 683, 7 Sup. Ct. 656, 657, 32 L. Ed. 766. No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power. We do not have to invoke the later developments of constitutional law for this proposition; it was recognized as early as *Hopkirk v. Bell*, 3 Cranch, 454, 2 L. Ed. 497, with regard to statutes of limitation, and even earlier, as to confiscation, in *Ware v. Hylton*, 3 Dall. 199, 1 L. Ed. 568. It was assumed by Chief Justice Marshall with regard to the escheat of land to the State in *Chirac v. Chirac*, 2 Wheat. 259, 275, 4 L. Ed. 234; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628; *DeGeofroy v. Riggs*, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642; *Blythe v. Hinckley*, 180 U. S. 333, 340, 21 Sup. Ct. 390, 45 L. Ed. 557. So as to a limited jurisdiction of foreign consuls within a State. *Wildenhuis' Case*, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. Ed. 565. See *Ross v. McIntyre*, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581. Further illustration seems unnecessary, and it only remains to consider the application of established rules to the present case.

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. *Carey v. South Dakota*, 250 U. S. 118, 39 Sup. Ct. 403, 63 L. Ed. 886.

Decree affirmed.

Mr. Justice VAN DEVANTER and Mr. Justice PITNEY dissent.