

NOTE

“THE GOOD OF EACH OF THE
PARTS”: A COLLECTIVE ACTION
UNDERSTANDING OF THE TREATY
CLAUSE

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INTRODUCTION

Article II, Section 2 of the Constitution gives 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.”¹ The Supremacy Clause gives treaties—like federal statutes—the status of supreme law in the constitutional system.² But the process for concluding treaties differs markedly from the process for passing an act of Congress. First, the Constitution’s normal lawmaking powers reside in Article I,³ but the Treaty Clause rests in Article II with the President’s powers.⁴ Second, states can typically make their own law alongside federal legislation, but the Constitution expressly forbids states from entering into any “Treaty, Alliance, or Confederation.”⁵ Third, the Constitution requires that acts of Congress earn the approval of only a majority of the House and the Senate and signature from the President to become law; whereas treaty-making requires leadership from the President and approval by a supermajority of present senators but no formal input or approval from the House of Representatives.⁶

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1. U.S. CONST. art. II, § 2, cl. 2.
2. *Id.* art. VI, § 2.
3. *Id.* art. I, § 1.
4. *Id.* art. II, § 2.
5. *Id.* art. I, § 10.
6. *Id.* art. II, § 2, cl. 2.

Many endeavors to rationalize the treaty power’s peculiarities start with the distinction between domestic and foreign lawmaking. What might explain the differences between the treaty and legislative powers is that foreign affairs raise unique concerns and therefore require unusual procedures. After all, American foreign relations were precarious when the Constitution was ratified—America’s survival was not assured, and the new government needed safeguards to ensure that it arranged its foreign affairs carefully.⁷ But one does not need to separate foreign lawmaking from domestic lawmaking to make sense of the treaty power. Rather, this Note argues that an understanding of collective action—defined broadly as “action taken by or on behalf of groups of individuals”⁸—can explain the treaty power just as collective action reasoning can illuminate Congress’s Article I powers.⁹ But where much of the Constitution *enables* collective action by empowering a simple legislative majority to act,¹⁰ the Treaty Clause imposes a higher procedural bar to *restrain* collective action and prevent states in the majority from exploiting states in the minority.

Prer ratification history is essential to understanding the treaty power through a collective action framework. Founding-era regional tension was the primary factor that shaped the Treaty Clause. States worried that their fellow sovereigns would abuse the treaty power to enjoy the benefits of a treaty themselves while imposing the costs

7. See GEORGE WILLIAM VAN CLEVE, *WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION* 17 (2017) (“The 1783 Treaty of Peace greatly expanded the United States’ boundaries But the peace terms had strong enemies in Britain, other major European powers, and Native Americans.”).

8. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 5 (1965).

9. See Robert D. Cooter & Neil Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 *STAN. L. REV.* 115, 117 (2010) (explaining that under the Articles of Confederation, states could not protect themselves from foreign military war or interstate commercial war because they “acted individually when they needed to act collectively”).

10. See Part I, *infra*. Several provisions of the Constitution addressed a primary weakness of the Articles of Confederation—the inability of the Confederation Congress to solve collective action problems among the states. See Cooter & Siegel, *supra* note 9, at 117 (“Article I, Section 8 of the new Constitution gave Congress additional powers to address collective action problems.”). For example, the Confederation faced extreme debt from fighting the Revolutionary War, but the Articles did not empower the Confederation Congress to raise revenues to pay down that debt. See VAN CLEVE, *supra* note 7, at 48 (“By far the most momentous problem facing both American leaders and many ordinary citizens after the war was a giant overhang of debt.”). The new Constitution avoided such a collective action problem by fixing the power to raise revenues firmly within Congress’s enumerated powers. U.S. CONST. art. I, § 8, cl. 1. Because the states could not coordinate to collectively fund the demands of their shared government, Congress would be empowered to raise funds directly. See Cooter & Siegel, *supra* note 9, at 119 (“The theory of collective action federalism interprets the clauses of Section 8 as authorizing Congress to tax, spend, and regulate when two or more states face collective action problems.”).

elsewhere. The Treaty Clause embodies that tension: It empowers *some* collective action among the states, but action is still restrained by the Treaty Clause's procedural requirements, which ensure that a majority of states cannot form a treaty that exploits a minority.

Because the interstate tension that shaped the Treaty Clause has long-since dissipated, the Clause restrains collective action and makes forming treaties too difficult today. The modern preference for non-Article II agreements (e.g., congressional-executive agreements) supports that notion. Accordingly, non-Article II processes may be most appropriate for agreements that distribute benefits and costs evenly among states. Although identifying such treaties is likely a value-driven exercise, some examples might be those that set national policies applicable to all states, such as regulations pertaining to capital punishment or national greenhouse gas emissions standards. Although collective action reasoning is useful for understanding the origins of the treaty clause, it does not fully delineate which agreements should, as a normative matter, pass through the Article II process. Moreover, it does not explain, as a descriptive matter, the split in modern practice between those agreements that pass through the Article II process and those that do not.

Part I of this Note will briefly explain collective action reasoning. Part II will examine treaty-making under the Articles of Confederation and other preratification history that informs our understanding of the Treaty Clause. Part III will explore the extent to which collective action reasoning influenced the Framers as they debated the treaty power during the drafting and ratification of the Constitution. It will sample debates over the Treaty Clause at the Constitutional Convention and the Virginia and North Carolina ratification conventions. Part IV will first examine the original assumptions behind the treaty power and whether they should continue to inform our procedures for modern international agreements. Next, it will consider non-Article II international agreements and evaluate what their prevalence means for the collective action understanding of the treaty process. Lastly, Part V will consider the criticisms and limits of understanding the treaty power through a collective action framework.

I. COLLECTIVE ACTION AND TREATYMAKING

Treatymaking can be understood as a collective action problem.¹¹ A collective action problem occurs when members of a group face a common problem, but something (e.g., competing incentives, inadequate communication, information asymmetries, etc.) prevents them from cooperating to solve it.¹² Often, the factor that prevents cooperation is the incentive to act self-interestedly, rather than to maximize the whole group's well-being.¹³

Members in a group can more easily act together when doing so does not require unanimous approval, but any threshold below unanimity may subject the minority to the majority's will. The difference between interstate compacts and congressional legislation illustrates this relationship between collective action and minority exploitation. Interstate compacts require unanimity from participating states.¹⁴ But Congress can pass a federal law through a majoritarian process and impose solutions that the states would not reach otherwise.¹⁵ Legislating based on majority rule reduces the threat of holdouts—that one state will hold up the entire project to draw out more concessions—but it raises the risk that the legislative majority will exploit the minority.¹⁶ Acting on majority rule through Congress thus produces a tradeoff between facilitating collective action and protecting the minority.¹⁷

11. "Collective action" is a broad term that encompasses many different types of behavior within a group. *See generally* Clint Peinhardt & Todd Sandler, *Principles of Collective Action and Game Theory*, in TRANSNATIONAL COOPERATION: AN ISSUE-BASED APPROACH (2015) (using introductory game theory to explain general principles of collective action and common archetypes of collective action problems). This Note uses the term in the context of the Treaty Clause to refer to a situation where states have narrowly self-interested reasons to support or oppose entering the United States into an international agreement.

12. Vincent McGuire, *The Collective Action Problem*, <https://spot.colorado.edu/~mcguire/collect.html> (last visited Mar. 3, 2021).

13. *See* OLSON, *supra* note 8, at 2 ("If the members of a large group rationally seek to maximize their personal welfare, they will not act to advance their common or group objectives unless there is coercion to force them to do so, or unless some separate incentive . . . is offered to the members of the group . . ."); *see also* Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 71–72 (2003) (amending Olson's logic to suggest that individuals in a group are motivated not by purely rational calculations, but by a "more emotionally nuanced reciprocal" posture under which the decision to cooperate or not is also motivated by what other individuals decide).

14. *See* Cooter & Siegel, *supra* note 9, at 140.

15. *See id.* at 144 ("The central government operating through majority rule can find solutions that elude states cooperating through unanimity rule.")

16. *See id.* at 142 ("Switching from unanimity rule to majority rule ameliorates the problem of holdouts, but it creates a new problem: minority exploitation.")

17. *See id.* at 144 ("Empowering Congress animates collective action, but risks exploiting

The state compact example provides general lessons that can apply in other collective action contexts. When parties lack a centralized system through which they can collectively act, they must resort to ad hoc agreements to solve collective problems. Parties pursue agreements that promote their own interests, and each agreement binds only the parties that consent to it. When each party is free to participate (or defect) at-will, collective action requires unanimity. But groups can avoid this unanimity requirement by acting through a central government, which facilitates collective action through a less-than-unanimity rule.¹⁸

Using these concepts, treaty-making can be understood through a collective action framework. Foreign relations is an area where states must act as a collective and speak with one voice.¹⁹ It makes intuitive sense that individual states cannot effectively conduct foreign relations for the whole country, and this intuition is reflected in doctrines like preemption and the assignment of some powers exclusively to the executive in the foreign affairs context.²⁰

If a federal process for making treaties did not exist, states that wanted to enter treaties could only offer foreign nations the resources or cooperation of other consenting states in the treaty. This effective unanimity requirement would mean that the nation would ultimately make few treaties because few would win unanimous approval from the states.

Article I, Section 9 of the U.S. Constitution prohibits states from entering treaties themselves, meaning that if the states want to make

states in the minority.”).

18. See Peinhardt & Sandler, *supra* note 11, at 21 (explaining that institutional design can help solve collective action problems through cost sharing and other schemes that shape actors’ incentives).

19. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964) (noting that various constitutional provisions and statutes reflected “a concern for uniformity in this country’s dealings with foreign nations” and indicated “a desire to give matters of international significance to the jurisdiction of federal institutions”).

20. See, e.g., *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 30 (2015) (holding that Congress could not regulate the President’s exercise of the recognition power because doing so would “prevent the Nation from speaking with one voice” and “prevent the Executive itself from doing so in conducting foreign relations”); *Arizona v. United States*, 567 U.S. 387, 409 (2012) (holding that federal immigration law preempted several provisions of state immigration law in part because decisions that bear on the removability of foreign nationals “touch on foreign relations and must be made with one voice”); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381 (2000) (finding that a state law restricting state business with Burma was preempted by federal law in part because it “compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments”).

treaties, they must do so by working together through the federal government.²¹ But under the federal treaty-making power, treaties can come into being with less than unanimous approval from the states.²² Instead, two-thirds of states can—through their senators—commit the whole nation to a treaty.²³ By requiring less than unanimity from the states, the treaty power thus enables collective action. But the supermajority requirement for treaties also restrains collective action—particularly in comparison to Congress’s majority-rule functions. This restraint represents a decision to err on the side of preventing minority exploitation by making collective action harder.

It is significant that a minority of states can block a treaty because treaties can reach substantive areas in which small groups of states might self-interestedly oppose collective action.²⁴ For example, a treaty that settles a boundary dispute to avoid international conflict might protect the whole country from the peril and cost of war, but the state or region asked to cede territory might be inclined to hold out for a different resolution. Alternatively, an international trade deal that secures lower-cost foreign goods may benefit consumers nation-wide, but states with companies that produce substitute goods might oppose the deal.

There are multiple ways to view the treaty power in a collective action framework. For example, when treaties create obligations on behalf of the states, the federal government faces a potential collective action problem in getting states to comply.²⁵ By the same token, nations can use treaties to solve international collective action problems.²⁶

21. U.S. CONST. art. I, § 9; *see also* John C. Calhoun, Speech in the Commercial Convention with Great Britain (Jan. 9, 1816), in 2 THE WORKS OF JOHN C. CALHOUN 132 (Richard K. Cralle ed., 1864) (discussing the treaty power and remarking that in relation to the rest of the world, “the states disappear” so that the country can present “the exterior of undivided sovereignty”).

22. U.S. CONST. art. II, § 2, cl. 2.

23. *Id.*

24. *See* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1089–90 (2000) (noting that the Framers could have easily limited the substantive reach of the treaty power but chose not to, producing the clear implication that “the President and Senate can make treaties on any subject appropriate for negotiation and agreement among the states”).

25. *See, e.g.*, JAMES MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES (1787), reprinted in 2 THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING HIS NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED 362 (Gaillard Hunt ed., 1901) (“[N]ot a year has passed without instances of [treaty violations] in some one or other of the States. The Treaty of peace—the treaty with France—the treaty with Holland have each been violated.”).

26. *Missouri v. Holland*, 252 U.S. 416, 435 (U.S. 1920) (upholding the Migratory Bird Treaty Act of 1918 as a constitutional implementation of a treaty between the United States and Great

Further, allowing the President, a unitary actor, to control treaty negotiations mitigates collective action problems that would result if a more numerous body, like the Senate or full Congress, had the power to negotiate directly with foreign countries.²⁷ While these and other suggestions are worthy areas for study, this Note will focus on the history of the Treaty Clause itself and the extent to which that history reflects collective action reasoning.

II. TREATIES AND COLLECTIVE ACTION BEFORE THE CONSTITUTION

The Articles of Confederation imposed a high procedural bar that made it difficult for the states to collectively form treaties with foreign powers. That restraint played out in the Jay-Gardoqui treaty negotiations between the Confederation and Spain, which can be understood as an example of restrained collective action among the states. This Part will first discuss the treaty power under the Articles of Confederation and how it influenced the controversy surrounding the Jay-Gardoqui treaty. Next, it will consider how the Jay-Gardoqui controversy may have affected delegates' attitudes heading into the Constitutional Convention.

A. *The Articles of Confederation and the Jay-Gardoqui Controversy*

The Articles of Confederation centralized the treaty-making power in the Confederation Congress.²⁸ Each state could send up to seven delegates to the Congress, but delegates voted together such that each state had one vote.²⁹ Article IX imposed a supermajority threshold, requiring agreement from nine of the thirteen states to conclude a treaty.³⁰ Under Article VI, individual states could not circumvent this process—any state seeking to make its own “conference, agreement,

Britain and noting that the national interest at issue “can be protected only by national action in concert with that of another power”).

27. THE FEDERALIST NO. 75, at 389 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (explaining that the “variable and . . . numerous” nature of the House of Representatives was incompatible with the qualities needed to properly execute the treaty-making power).

28. Golove, *supra* note 24, at 1103.

29. See MICHAEL J. KLARMAN, THE FRAMER'S COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 725 n.182 (2016) (“All states were entitled to send seven delegates to the Confederation Congress—who would collectively cast their state’s one vote—but none of them in fact sent that many, and many states regularly failed to send even the two delegates that were required for a state’s vote to count.”).

30. ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 1.

alliance or treaty” with a foreign power would need the consent of Congress.³¹

This construction of the treaty power was highly flawed in light of Congress’s limited powers to legislate. Congress could make treaties but often could not pass laws to ensure that states would abide by them.³² As a result, states could—and often did—violate the nation’s treaties.³³ The gulf between Congressional treaty power and legislative power thus enabled states to flout treaty obligations in their own self-interest and imperil the nation as a whole.³⁴

But setting aside the question of Congress’s legislative power, the treaty power under the Articles was beneficial in a narrower sense. At a time when state identity likely superseded national identity,³⁵ the treaty power prevented one group of states—even a majority of states—from concluding a treaty at the expense of another group. The supermajority requirement gave a small number of states effective veto power over any proposed treaty, preventing a majority of states from using the power of Congress to advance an interest that was sectional rather than truly national.³⁶

The minority veto power served that exact function in the Jay-Gardoqui treaty controversy. During that controversy, northern and southern states split on the question of whether the states’ navigation rights to the Mississippi River should be exchanged in a treaty with

31. *Id.* art. VI, para. 2.

32. See Golove, *supra* note 24, at 1103 (“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.”).

33. See MADISON, *supra* note 25, at 362 (noting that states had imperiled the whole country by violating treaties with foreign powers and asserting that “it ought to be least in the power of any part of the Community to bring [foreign aggression] on the whole”).

34. See Golove, *supra* note 24, at 1103 (“[C]onflicts over the treaty power and states’ rights were recurrent under the Confederation . . . 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.”).

35. See ARTICLES OF CONFEDERATION OF 1781, art. II (asserting that under the Articles of Confederation, each state retained its “sovereignty, freedom, and independence, and every power, jurisdiction, and right” not expressly delegated to the Confederation Congress).

36. See Golove, *supra* note 24, at 1099. In describing the supermajority requirement that the Constitution would contain, which was effectively equal to the supermajority requirement under the Articles, Golove explains that it enabled the “special political task of refusing . . . any treaty that trenched too far on the interests of states without serving a sufficiently powerful countervailing national interest.” *Id.* Golove thus casts the minority veto as a tool for states to guard against the tensions of state versus national interests. But for some conflicts, the tension can be restated as between the interests of a minority of states and the incompatible interests of a majority states who—without a supermajority requirement—could assert their interests as emblematic of the national interest.

Spain. Were it not for the Articles' supermajority requirement for treaties, the treaty may have been ratified.

The southern states valued their access to the Mississippi River because it had preserved their connection with the many southerners who had already settled in the west and represented their prospects for further expansion that could increase the south's power in the union.³⁷ The river had long been of strategic importance. Spain controlled the river's mouth before and during the American Revolution; it had granted Great Britain free navigation of the river, but the rebelling colonies could no longer claim that right.³⁸ By 1778, a handful of southern states claimed territory between the Ohio and Mississippi rivers, but they all recognized that access to the west would have little use if the Mississippi were unavailable to move products to the sea.³⁹

At the end of the American Revolution, the Treaty of Paris purported to promise the states free navigation of the Mississippi, but Spain failed to mention navigation of the Mississippi in its own peace treaty with Great Britain.⁴⁰ When Americans poured west after the Revolution, Spain reasserted its right to control navigation of the river, and by 1785, it regularly seized American vessels using the river for what it deemed to be illegal trade.⁴¹

With the threat of war looming, Spain sent a minister, Don Diego de Gardoqui, to the United States with authority to offer a commercial treaty in exchange for Congress's recognition that Spain controlled the Mississippi.⁴² Congress initially instructed Jay to hold firm on America's claims to the Mississippi.⁴³ But commercial conditions in the north worsened as Jay and Gardoqui negotiated—British interference with northern states' fishery rights spelled “practical ruin to the shipping interest of New York and New England.”⁴⁴ With the promise

37. See KLARMAN, *supra* note 29, at 54 (noting that most western settlers came from the south and that “many southerners hoped that westward expansion ultimately would lead to the creation of several western states”).

38. Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 GEO. WASH. L. REV. 271, 277 (1934).

39. *Id.* at 276.

40. KLARMAN, *supra* note 29, at 49.

41. *Id.*

42. *Id.* at 49–50.

43. Report of the Committee, Aug. 25, 1785, in 29 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 658 (Library of Congress ed., 1904) [hereinafter CONT. CONG. JOURNALS] (“That the Secretary to the United States for the Department of [F]oreign Affairs be and he is hereby instructed . . . particularly to stipulate the right of the United States to their territorial bounds, and the free Navigation of the Mississippi, from the source to the Ocean.”).

44. Warren, *supra* note 38, at 282.

that intercourse with Spain would secure northern industry, northern states became willing to concede American rights to the west.⁴⁵ Finally, Jay himself became convinced that *some* concession of western interests was necessary if a treaty with Spain were to take form.⁴⁶ He thus proposed that Congress give him new instructions that would let him sacrifice the American claim to the Mississippi for twenty-five years.⁴⁷

Jay's request for reinstruction stirred great controversy. Southerners who saw their future in the west perceived Jay's proposal as an unjust abuse of Congress's power.⁴⁸ Meanwhile, northern states "felt strongly on the subject of their devastated commerce and were little inclined to allow theoretical Western rights to stand in the way of the chances for their own increased prosperity."⁴⁹ The regional division crystallized when Congress finally voted on the question of whether to reinstruct Jay—Massachusetts, New Hampshire, Rhode Island, Connecticut, New York, Pennsylvania, and New Jersey voted for the measure, while Maryland, Virginia, North Carolina, South Carolina, and Georgia voted against it.⁵⁰ Although a majority of states had voted for reinstruction, the opposing minority would be able to block any subsequent treaty.⁵¹

B. Regional Tension Heading into the Constitutional Convention

The Jay-Gardoqui controversy can be understood as an instance of restraining collective action to prevent minority exploitation, and it created significant regional tension in the years preceding the Constitutional Convention. Framed in collective action terms, northern states wanted to secure a treaty with Spain that allocated benefits to the northern majority—in the form of a commercial boon for northern fisheries—while imposing costs on the southern minority by limiting access to the Mississippi River and hindering western expansion. As South Carolina's Charles Pinckney perceived the attempted treaty, it represented a policy that was "calculated to acquire benefits for one

45. *See id.* at 283 ("[S]elf interest led these [northern states] to join with the opponents of the West and to contend that Congress should allow Jay to obtain favorable terms of commercial intercourse from Spain, by a concession as to the Western rights.").

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 284–85.

50. *Id.* at 285. Delaware was absent from the vote. *Id.*

51. *See supra* note 30 and accompanying text.

part of the confederacy at the expence [sic] of the other.”⁵² If the Articles had required a simple majority of states to make a treaty, the northern states likely would have succeeded.⁵³ A majority of states would have acted collectively, but it would have come at the expense of the minority.

Even though the Jay-Gardoqui treaty did not come into force, the controversy surrounding it aggravated regional tensions and sowed regional distrust in the years leading up to the Constitutional Convention. Some believed that the northern states were willing to sacrifice the Mississippi in order to “keep[] the weight of [government] and population” in the north and east, and they would have rather seen the Union destroyed than fail in their effort.⁵⁴ Looking ahead to the potential for a new government, James Madison predicted that “unless the project to yield . . . the Mississippi for twenty-five years be abandoned by Congress, the hopes of carrying [Virginia] into a proper federal system will be demolished.”⁵⁵ Madison thus echoed a sentiment similar to Pinckney’s: Navigation of the Mississippi was an interest itself, but it also had serious implications for southern states’ place in the national order.

Some northern delegates reciprocated the southern delegates’ mistrust and held similarly strong views about their southern counterparts after the Jay-Gardoqui controversy. Rufus King of Massachusetts doubted whether it was really in the northern states’ interest to preserve the south’s ability for westward expansion. Doubting that the nation would ever raise “a penny of revenue” from western settlers, he wrote, “I should consider every emigrant to that country from the Atlantic states as forever lost to the Confederacy.”⁵⁶ Theodore Sedgwick—also of Massachusetts—similarly doubted if cooperation was in the northern states’ interests and encouraged the

52. Charles Pinckney, Speech, In Answer to Mr. Jay, Secretary for Foreign Affairs, on the Question of a treaty with Spain (Aug. 16, 1786), in 31 CONT. CONG. JOURNALS, *supra* note 43, at 945. For Pinckney, the controversy extended beyond the particular treaty at issue and cast doubt on the Confederation Congress’s viability as a government. He questioned whether states that felt themselves injured by an imbalanced treaty would continue to trust Congress to wield its power: “Will [the injured states] not urge . . . the impropriety of vesting that body with further powers, which has so recently abused those they already possess?” *Id.*

53. See Warren, *supra* note 38, at 285.

54. Letter from James Monroe to Patrick Henry (Aug. 12, 1786) in 8 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS, 1785-1789, at 424-25 (Edmund C. Burnett ed., 1936) [hereinafter CONT. CONG. LETTERS].

55. Warren, *supra* note 38, at 287.

56. *Id.* at 286.

northern states to seriously “consider what advantages result to them from their connection with the southern states.”⁵⁷

These statements, although merely samples of the sentiment leading up to the Constitutional Convention, reflect strong distrust between groups of states who needed to cooperate to secure a peaceful and prosperous future through international agreements. The Articles’ supermajority requirement for treaties kept the Confederation from concluding the controversial treaty with Spain. But for many southerners, the treaty came uncomfortably close to fruition. For Monroe and many of his fellow Virginians, the Jay-Gardoqui affair and the division it fomented became a substantial driving force behind the Constitutional Convention.⁵⁸ But whatever changes southern delegates to the Constitutional Convention had envisioned for a new system of government, they “embarked on constitutional reform with vivid memories” of the Jay-Gardoqui negotiations.⁵⁹

III. COLLECTIVE ACTION AND TREATIES DURING DRAFTING AND RATIFICATION

The Framers and Ratifiers were acutely aware that an insufficiently-restrained treaty power could empower the tyranny of the majority. At times, the delegates stated explicitly that restraining the treaty power was one of their goals.⁶⁰ Further, a clear pattern emerged among their proposals: Many offered ways to limit the treaty power by procedural means.⁶¹ This part will first show that fear of minority state exploitation motivated debates over the Treaty Clause at the Constitutional Convention. Next, it will demonstrate that the same concern resurfaced during the ratification debates in Virginia and North Carolina. Lastly, it will briefly describe the diversity of viewpoints in the broader ratification discussions.

57. Letter from Theodore Sedgwick to Caleb Strong (Aug. 6, 1787), in 8 CONT. CONG. LETTERS, *supra* note 54, at 415.

58. See Lance Banning, *Virginia: Sectionalism and the Common Good*, in RATIFYING THE CONSTITUTION 261, 267 (discussing some Virginians’ reactions to the Jay-Gardoqui controversy and noting that “no other episode . . . engendered such intense and uniform emotional revulsion” or “suggested so convincingly how chronic differences between New England and Virginia could suddenly erupt in pressing dangers”).

59. *Id.*

60. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 393 (Max Farrand, ed., 1911) [hereinafter RECORDS].

61. See *infra* note 67 and accompanying text.

A. *The Constitutional Convention*

Statements at the Constitutional Convention speak directly to the Framers' goal of limiting the new government's treaty-making power. When an early version of the treaty power gave the responsibility to the Senate alone, Madison—likely recalling the Jay-Gardoqui affair—advocated for including another procedural hurdle. He observed “that the Senate represented the States alone, and that . . . it was proper that the President should be an agent in Treaties.”⁶² Requiring approval from the President would add another procedural check on the treaty-making process, and one from an official who would be accountable to all voters by virtue of a national electorate. Gouverneur Morris of Pennsylvania was unsure that the treaty power should rest with the Senate, and he moved to amend the power to clarify that no treaty would be binding on the country unless implemented by a corresponding act of *Congress*.⁶³ He argued that the Framers should craft a deliberately onerous treaty-making process because it would be disadvantageous to multiply the country's treaty obligations.⁶⁴ “The more difficulty in making treaties,” he explained, “the more value will be set on them.”⁶⁵

Other proposed modifications, some adopted and many unadopted, show that the Framers looked to procedural mechanisms to restrain treaty-making and to ensure that ratified treaties had broad, cross-regional support. Like Morris's proposal to require implementing legislation for all treaties, the proposal to give the House of Representatives a treaty-making role would have diffused regional tensions by requiring approval from a national, directly-apportioned body.⁶⁶ Requiring approval from a supermajority of the Senate—either the full body or just present members—would preserve the system of the Articles of Confederation, under which a minority of states could block any treaty.⁶⁷

62. 2 RECORDS, *supra* note 60, at 392.

63. *Id.*

64. *Id.* at 393.

65. *Id.*

66. *Id.* at 538.

67. *Id.* at 540. Numerous other proposals would have treated different types of treaties as more or less deserving of restraint. *Id.* For example, to facilitate the end of war when it was quickly needed, Madison suggested that peace treaties should be exempt from the supermajority requirement, and that the Senate should be able to conclude them without the president. *Id.* Delegates also suggested that the treaty power should subcategorize even further and still subject peace treaties to the supermajority requirement if they affected territorial rights. *Id.* at 540–41.

Given the importance of properly allocating treaty-making power within the new government and the many choices for how that power could be structured, the delegates ended their first major discussion of the treaty power by noting that “almost every Speaker had made objections to the clause as it stood.”⁶⁸ When the Framers eventually settled on the final version, it was undoubtedly a political concession.⁶⁹ At the time the Constitution was written, states representing around 14 percent of the population had enough votes in the Senate to block a treaty if their priorities aligned.⁷⁰ In a new system generally predicated on majority rule, the Treaty Clause was an unusual departure.

B. The Ratification Debates

The ratification debates in Virginia and North Carolina show that the treaty power was an important factor for southern states in evaluating the new Constitution. Delegates who attacked the treaty power argued that Article II might fail to prevent treaties that exploited a minority of states.

The treaty power was a significant sticking point for many critics of the Constitution in Virginia. Nearly 10 percent of pages in the printed debates from the Virginia convention are focused on the treaty power alone.⁷¹ The discussions reflected delegates’ serious skepticism that the treaty clause would sufficiently restrain northern states from disadvantaging the south.⁷² According to James Monroe, the proposed Constitution made treaty-making too easy because it required only the President and “[t]wo thirds of those [senators] who may *happen* to be present.”⁷³ Implied in Monroe’s emphasis is the fear that senators from the north could conclude a treaty in a session with a sufficient quorum to conduct business, but without full representation from the south. Alluding to the south’s fear from the Jay-Gardoqui controversy,

68. *Id.* at 393.

69. See VAN CLEVE, *supra* note 7, at 289 (noting that to ensure ratification, “the convention had no political alternative but to make concessions to persistent sectional jealousies and states’ sovereignty claims,” including over the supermajority requirements for treaties and constitutional amendments).

70. EDWARD S. CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* 48 (1944).

71. Warren, *supra* note 38, at 297.

72. See Banning, *supra* note 58, at 279–80 (noting that fear of northern domination characterized discussions at the Virginia ratification convention, and that it was the Mississippi controversy that best demonstrated the potential for sectional aggression to arise).

73. 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 221 (Jonathan Elliot ed., 2nd ed. 1891) [hereinafter *DEBATES*].

Monroe explained that “a very small number” of senators could “sacrifice the dearest interests of the Southern States” by ceding their territory.⁷⁴ Patrick Henry argued similar points and expressly referenced the dispute over the Mississippi.⁷⁵ Arguing that the Articles’ treaty power was diluted in the proposed Constitution, Henry explained, “While the consent of nine states is necessary to the cession of territory, you are safe. If it be put in the power of a less number, you will most infallibly lose the Mississippi.”⁷⁶

John Dawson, another delegate, framed the issue in even more striking collective action terms. For Dawson, concern over the Mississippi in particular was justified, but the Jay-Gardoqui controversy broadly illustrated that the treaty clause could enable a small group of states to pursue their own self-interest at the expense of other states and the union as a whole.⁷⁷ For Dawson, the treaty power in the Articles had nearly ceded the Union’s hopes for western expansion.⁷⁸ So even if the proposed treaty power in the new Constitution were equally as restraining, it would still fail to “guard against . . . a scheme, to which nothing but an inattention to the general interest of America, and a selfish regard to the interest of particular states, could have given rise.”⁷⁹ The proposed Constitution’s treaty power thus appeared insufficient to stop the minority exploitation that the Articles of Confederation narrowly prevented.

Delegates to the first North Carolina ratification convention also expressly referenced the Jay-Gardoqui controversy as they debated the proposed Constitution’s merits. Like Monroe, William Porter of North Carolina feared that the treaty power would enable minority state exploitation.⁸⁰ The President and a small number of senators, he explained, “might give up the rivers and territory” of the southern states to make a treaty that advantaged the northern states but equally injured the south.⁸¹ In doing so, the northern states would pass off their

74. *Id.*

75. *Id.* at 141.

76. *Id.*

77. *See id.* at 609 (“My objections to it do not arise from a view of the particular situation of the western part of this state . . . but from an apprehension that the principle pervades all America, and that in its operation, it will be found highly injurious to the southern states.”).

78. *See id.* at 610 (stating that the treaty power under the Articles had already given southern states “cause to tremble”).

79. *Id.*

80. 4 DEBATES, *supra* note 73, at 115.

81. *Id.*

regional interest as the national interest.⁸² If the President and two-thirds of present senators were to have such power, Porter feared nothing would counsel them against abusing it.⁸³

Porter was not alone in his sentiment that the Treaty Clause created the potential for significant abuse of majority power. Timothy Bloodworth, another delegate to the North Carolina convention, indirectly commented on the treaty power as he emphasized what he perceived as government's inherent tendency to expand its own authority.⁸⁴ Bloodworth reminded his audience of the Jay-Gardoqui controversy to illustrate his point that "[e]very possible precaution should be taken" when granting powers.⁸⁵ Although the Jay-Gardoqui treaty never became operative, it was enough for Bloodworth that a majority of states voted to sacrifice the Mississippi.⁸⁶ That Congress reinstructed Jay despite lacking supermajority support vindicated Bloodworth's fear of misplacing power and underscored that the Articles' treaty power was all that stopped a northern majority from sacrificing the interests of a southern minority.⁸⁷

These examples from Virginia and North Carolina do not fully capture the diversity of southern delegates' views on the treaty power. Some delegates to those conventions supported the Treaty Clause.⁸⁸ The Treaty Clause also had plenty of support elsewhere—Alexander Hamilton, for example, wrote that it was "one of the best digested and most unexceptionable parts" of the constitutional plan.⁸⁹ For some federalists, defense of the treaty power reflected aspirations for a future of national unity. In this hopeful vision, the equally-represented states

82. *See id.* (suggesting that northern states would ratify an exploitive treaty but that "in the preamble of the Constitution, they say all the people have done it").

83. *See id.* ("I should be glad to know what power there is of calling the President and Senate to account.").

84. *Id.* at 167.

85. *Id.*

86. *See id.* at 167–68 ("By [the Articles of Confederation], nine states are required to make a treaty; yet seven states said that they could . . . repeal part of the instructions given our secretary for foreign affairs, which prohibited him from making a treaty to give up the Mississippi to Spain . . .").

87. *Id.*

88. *See, e.g.*, 3 DEBATES, *supra* note 73, at 500. James Madison argued at the Virginia Convention that the threat of impeachment would prevent the President from concluding unfair treaties. *Id.* Governor Samuel Johnson argued the same at the first North Carolina Convention and dismissed the concern that the Treaty Clause only required a supermajority of *present* senators because senators would not be absent if their states' interests were at risk. 4 DEBATES, *supra* note 73, at 115.

89. THE FEDERALIST NO. 75, at 387 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

would assume in the Senate “a national form, and a national character” that would remember “that the good of the whole can only be promoted by advancing the good of each of the parts” that comprise it.⁹⁰ But whatever hopes some had for the future of the treaty power, the version enshrined in the Constitution arose not from unity, but from interstate distrust and fear of the tyrannical majority.

IV. COLLECTIVE ACTION IMPLICATIONS OF THE TREATY POWER TODAY

The historical conditions animating the treaty power carry much less weight today. The supermajority requirement no longer has to guard against the pronounced regional rivalries of 1787, and it likely precludes treatymaking where states would benefit from it. The modern preference for alternative forms of international agreements supports this assertion, as the federal government has found a work-around to treatymaking by using executive agreements instead.

A. *Challenging the Treaty Power’s Assumptions*

As Part III illustrates, the Treaty Clause developed from two assumptions that arose during the Jay-Gardoqui controversy. The framers assumed that (1) some treaties would benefit a majority of states by threatening to exploit the opposing minority, and (2) senators would be sufficient bulwarks to prevent that exploitation from happening. But historical and political developments since the founding reduce the weight of these animating assumptions.

First, southern concern over the Mississippi River became moot long ago—that debate ended in 1803 when the Louisiana Purchase secured permanent control of the Mississippi for the United States.⁹¹ That control neutralizes what made the Jay-Gardoqui treaty such a salient example of minority exploitation: the clean split of its costs and benefits among the states based on the states’ narrow self-interests. The west was considered uniquely vital to the south’s future.⁹² Access to the

90. THE FEDERALIST NO. 64, at 336 (John Jay) (George W. Carey & James McClellan eds., 2001).

91. Some scholars argue that the Louisiana Purchase was itself an unconstitutional exercise of the treaty power. See, e.g., Robert Knowles, *The Balance of Forces and the Empire of Liberty: States’ Rights and the Louisiana Purchase*, 88 IOWA L. REV. 343, 345 (2002). President Jefferson himself worried that it was unconstitutional—in rejecting the argument that purchasing the territory would be permissible because the treaty power was boundless, Jefferson wrote, “If it is, then we have no Constitution.” *Id.* at 346.

92. See Banning, *supra* note 58, at 265 (“[A]s of 1786, the West was everywhere perceived

west was central to southern states' understanding of their power in the union and to the future of slavery.⁹³ Moreover, southerners—unlike most northerners—had familial connections and kinship with the newly settled westerners.⁹⁴ A state's position on the Jay-Gardoqui treaty could be predicted by its position on a map, because depending on where each state sat, it either received all of the benefits of the exchange or bore all of its costs.⁹⁵ When ceding territory through a treaty was a real possibility, it made sense that a minority of states—those most affected by the cession—should have had the power to defeat the treaty.

However, modern analogs are unlikely to threaten minority state exploitation as plainly as the Jay-Gardoqui treaty did because America's borders are settled, and treaties are unlikely to alter them in a significant way. A treaty today could still evoke a clear split between regions of the country. But that would likely result from ideological or partisan differences that tend to track the geography of states and not any factor that can itself determine which states enjoy the treaty's benefits and which states internalize its costs.⁹⁶

For example, several treaties obligate signatories to abolish the death penalty in all or virtually all cases.⁹⁷ If one such treaty came before the Senate, and if each senator voted consistent with her home state's rule on the death penalty, the vote would split evenly along

as an extension of the South.”).

93. See Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L. J. 1236, 1283 (2008) (“Free trade and emigration were, in turn, viewed by many as essential to maintaining the South's political clout in the new union, presumably thereby protecting the tenuous compromise over slavery by making it possible for new slave states to form in the south.”).

94. See Banning, *supra* note 58, at 265 (“Settlers in Kentucky or in Tennessee were often literally the kin or former neighbors of important southern families, and a great deal more than family fortunes seemed at stake in their continued membership in the American union.”).

95. See *supra* note 50 and accompanying text.

96. A geography-based treaty split among the states would not be impossible today. For example, a treaty that sacrifices America's control over Guam, might evoke strong objections from states in the western U.S. that would feel vulnerable without the geostrategic protection that Guam and other Pacific U.S. territories provide. But it is unlikely that eastern states today would be as willing to concede territory as the northern states were in the 1785 because, as Jay hoped in THE FEDERALIST NO. 64, the determination would take on a more national character. See *supra* note 90 and accompanying text.

97. See, e.g., Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at abolition of the death penalty, G.A. Res. 44/128, 29 I.L.M. 1464 (1990); Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty, Europ. T.S. No. 114 (entered into force Mar. 1, 1985).

roughly regional lines.⁹⁸ States on the west coast and in the northeast and upper midwest have already abolished or restricted the death penalty, and states in the southeast and western heartland retain it for the most part.⁹⁹ Because the vote would split with twenty-five states on either side, the treaty would fall far short of Article II's supermajority requirement.¹⁰⁰ This regional split is not unique to the death penalty—for example, a treaty addressing climate change by setting greenhouse gas emission targets would likely track along those same geographical lines.¹⁰¹

Because most modern treaties are unlikely to implicate the minority state exploitation that animated the Treaty Clause, it is difficult to see why the supermajority requirement should continue to restrain agreements for national issues like capital punishment or greenhouse gas emissions. To be sure, a self-executing treaty on one of those subjects would surely implicate federalism concerns just like analogous domestic lawmaking. But if the supermajority requirement for treaties were bypassed, each state would still have a voice under a majority threshold in the Senate—or a sixty-vote threshold to invoke cloture—just like they do for domestic legislation.

One could still argue that each state needs *more* of a voice when the federal government is considering action that will bind states collectively on the international stage.¹⁰² Under that reasoning, fidelity to Article II is what gives treaties their status as binding law.¹⁰³ Thus,

98. *State by State*, THE DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited Mar. 3, 2021).

99. *Id.*

100. *Id.* This split does not reflect the efforts to end capital punishment in Virginia that are in-progress as of the time of writing on March 3, 2021. See Laura Vozzella & Gregory S. Schneider, *Lawmakers Vote to Make Virginia First Southern State to Abolish Death Penalty*, WASH. POST (Feb. 22, 2021, 2:50 PM), https://www.washingtonpost.com/local/virginia-politics/virginia-death-penalty-ban/2021/02/22/742eed3e-7146-11eb-93be-c10813e358a2_story.html (“Two bills to abolish the death penalty in Virginia won final approval in the state General Assembly on Monday and were headed to Gov. Ralph Northam (D), who is expected to sign them.”).

101. *State Climate Policy Maps; Greenhouse Gas Emissions Targets*, THE CTR. FOR CLIMATE & ENERGY SOLS., <https://www.c2es.org/content/state-climate-policy/> (last visited Jan. 12, 2021).

102. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1246–47 (1995) (“The United States Constitution tries to define with some precision the processes that determine which laws, treaties, or agreements will in fact be binding upon us. We must look to the procedural requirements of these enabling provisions to evaluate the validity of something purporting to be law.”).

103. See *id.* at 1247 (“We can know that something has the binding force of law only if it complies with the requirements that, as a matter of social fact, we have agreed must be met when law is to be made.”).

“architectural provisions [of the Constitution] that specify the processes by which government is to effect legal change, such as . . . the Treaty Clause of Article II, clearly demand a fairly rigid definition.”¹⁰⁴ But internationally-binding non-Article II agreements have their own basis in the Constitution, and historical practice has long-since rejected formal adherence to the Article II treaty process.¹⁰⁵

Second, political changes to the Senate challenge the Treaty Clause’s assumption that senators will primarily protect their states in the treatymaking process. The Seventeenth Amendment likely changed the extent to which senators represent their particular states’ interests by providing that senators would take office through direct popular election instead of appointment by state legislatures.¹⁰⁶ Senate candidates instead must appeal to voters, not state legislators. If voters are less adept at recognizing—or less persuaded by—Senate candidates’ positions on treaties as compared to other issues, this change likely reduces the extent to which each senator represents her state as a player in the treatymaking process.¹⁰⁷ One can argue that the states’ interests *should* be better represented in the treaty process than they currently are. But that is a separate, normative claim, which admits that if the Article II supermajority requirement looks to senators to protect state interests, it may do so in vain.

B. *The Modern Use of Non-Article II Treaties*

The collective action understanding of the Treaty Clause becomes more persuasive in light of the modern U.S. practice for international agreements. The vast majority of international agreements that the U.S. joins today are not completed through the Article II treaty process.¹⁰⁸

104. *Id.* at 1248.

105. *See* Part IV.B, *infra*.

106. U.S. CONST. amend. XVII; *see* Sean Gailmard & Jeffery A. Jenkins, *Agency Problems, the 17th Amendment, and Representation in the Senate*, 53 AM. J. POL. SCI. 324, 332 (2009) (analyzing Senate voting records before and after the Seventeenth Amendment and concluding that after its passage, “senators became substantially less responsive to the policy interests of the state legislature”); *see also* AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 412 (2005) (discussing the effects of the Seventeenth Amendment and noting that after it, senators were “[l]iberated from all dependence on state governments” and “freer to pursue policies that state officials might not like”).

107. *See* Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 863 (1979) (“As Senators and Members of the House develop independent constituencies among groups such as farmers, businessmen, laborers, environmentalists, and the poor, each of which generally supports certain national initiatives, their tendency to identify with state interests and the positions of state officials is reduced.”).

108. *See* Hathaway, *supra* note 93, at 1287 (“Congressional-executive agreements have thus

Instead, most agreements proceed as either congressional-executive agreements or sole executive agreements.¹⁰⁹ The prevalence of executive agreements over treaties and the debate over the interchangeability of the two agreement forms likely suggest—consistent with collective action reasoning—that the Article II treaty process indeed over-restrains treaty-making.¹¹⁰

Executive agreements are international agreements that the U.S. joins outside the Article II treaty process. Executive agreements are either concluded by the President alone (sole executive agreements) or with Congress’s authorization (congressional-executive agreements).¹¹¹ Congressional-executive agreements can have either *ex ante* or *ex post* authorization from Congress.¹¹² *Ex post* approvals are negotiated by the executive branch before going to Congress for an up or down vote.¹¹³ *Ex ante* congressional-executive agreements do not go to Congress for a final vote—the executive branch forms them alone based on earlier statutory authorization, and they come into force when their party nations sign them.¹¹⁴

Executive agreements have existed since the time of America’s founding.¹¹⁵ But most of America’s early international agreements were formed as treaties—between 1789 and 1839, the United States

been present at nearly every period of American history, but they have rapidly grown more numerous and important since the 1940s.”).

109. *Id.*

110. *See id.* at 1307–37 (arguing that in the vast majority of cases where treaties and executive agreements are legally interchangeable, executive agreements should be preferred because they have stronger democratic legitimacy, require a less cumbersome process, and lead to more reliable international commitments).

111. Hathaway, *supra* note 93, at 1239. The President forms a sole executive agreement without any formal action from Congress. *Id.* In that sense, sole executive agreements represent the opposite extreme of treaties in America’s international lawmaking—whereas Article II treaties have a high procedural bar that restrains collective action, sole executive agreements are barred mostly by political checks. *Id.* But to note that difference is not to suggest easier international lawmaking is always better. *Id.* Unilateral lawmaking presents its own challenges, including restrained negotiating power and lessened democratic legitimacy. *Id.*; *see also* Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 *YALE L. J.* 140, 147 (2009) [hereinafter *Presidential Power*] (noting that Presidents may struggle to build political support for agreements concluded without input from Congress, and that negotiating with Congress’s input may enable a President to make concessions that would otherwise be unavailable).

112. Hathaway, *supra* note 93, at 1259.

113. *Presidential Power*, *supra* note 111, at 149.

114. *Id.*

115. For example, a 1792 Act of Congress authorized the Postmaster General to “make arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery” of mail. Act of Feb. 20, 1792, ch. 7, § 26, 1 Stat. 232, 239.

made sixty treaties and twenty-seven executive agreements.¹¹⁶ In each successive fifty-year period, the balance shifted away from the treaty process and towards executive agreements.¹¹⁷ The trend is pronounced, particularly in recent years: between 2001 and 2016, the United States concluded 3,021 executive agreements and only 132 treaties.¹¹⁸ The numerical shift alone suggests that the treaty power is not an effective facilitator of the country's high demand for international agreements.

Moreover, the lack of a meaningful distinction for when each type of agreement is used supports the suggestion that the treaty power's reasons for restraining collective action are less persuasive today. There is a limited connection between the substantive focus of an international agreement and the particular form of agreement used.¹¹⁹ Discernible patterns for choosing one agreement form versus another exist, but some scholars argue that those patterns are not based on any rational principle.¹²⁰

The current system took hold over the twentieth century and can be explained by America's growing appetite for international trade and regional opposition to human rights treaties.¹²¹ As the country benefitted from international agreements, the Treaty Clause's procedural protections became overly burdensome.¹²² But as the reach of non-Article II agreements grew, certain categories of agreement still evaded its grasp. When some senators perceived that human rights treaties would threaten segregation and Jim Crow, they proposed constitutional amendments to prevent the United States from entering those agreements.¹²³ After President Eisenhower campaigned against the amendments, the conflict ended in a compromise: The amendments

116. CONG. RES. SERV., S. PRT. 106-71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 39 (2001).

117. *Id.*

118. Jeffrey S. Peake, *The Decline of Treaties? Obama, Trump, and the Politics of International Agreements* 40 (Apr. 6, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3153840.

119. Hathaway, *supra* note 93, at 1239.

120. *See id.* at 1239–40 (noting content-based patterns for Article II treaties versus executive agreements and concluding that there is “no persuasive explanation . . . based on subject matter, form, topic, or any other substantive basis”).

121. *Id.*

122. *See id.* (asserting that executive agreements first enabled the country's abandonment of trade protectionism in favor of reciprocal trade agreements and “subsequently expanded to include almost every area of international law”).

123. *See id.* at 1303 (characterizing the amendments, referred to collectively as the Bricker Amendment, as a “thinly veiled effort to prevent the use of international human rights agreements to curtail racial segregation in the United States”).

would fail, thus preserving executive power over foreign affairs, but the United States would not join the growing collection of human rights treaties.¹²⁴ With this context, the line between Article II treaties and other international agreements appears motivated by disagreement over human rights obligations rather than a distinction between procedural mechanisms for any particular agreement.

V. CRITICISMS AND LIMITS OF THE COLLECTIVE ACTION FRAMEWORK FOR THE TREATY POWER

Collective action reasoning can provide a useful framework for understanding the treaty power. But that framework may be vulnerable to criticism based on the Constitution's text and a closer look at the modern use of Article II treaties and executive agreements. Moreover, even if, despite its faults, the collective action framework remains useful, its utility is still limited by the antecedent question of whether a proposed international agreement implicates minority state exploitation at all.

First, the treaty is the only form of international agreement that the Constitution expressly provides.¹²⁵ Insofar as the collective action understanding of the treaty power favors congressional-executive agreements over the excessively restrained Article II process, it must be reconciled with the textual absence of a Congressional-Executive Agreement Clause. But non-Article II agreements have their own bases in the text and historical practice. Article I clearly contemplates that Congress will act on the international stage without going through the treaty process,¹²⁶ and early America made both Article II treaties and congressional-executive agreements.¹²⁷ In addition, the Supreme Court has held that "all international compacts and agreements" are entitled to federal supremacy, just as treaties are.¹²⁸ More

124. *Id.* at 1303–04 (explaining that the Bricker Amendment had a lasting impact by delaying U.S. entry into many international human rights agreements and by laying the groundwork to render those that the U.S. *has* joined unenforceable through reservations, understandings, and declarations).

125. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 174 (1972) ("The Constitution expressly prescribes the treaty procedure, and nowhere suggests that another method of making international agreements is available, and that it would do as well.")

126. *See* U.S. CONST. art. I, § 8 (authorizing Congress to, among other powers, regulate commerce with foreign nations, define and punish violations of the law of nations, and declare war).

127. *See* Hathaway, *supra* note 93, at 1287 ("In the first half century of its independence, the United States ratified sixty treaties but joined only twenty-seven published executive agreements.")

128. *See* *United States v. Belmont*, 301 U.S. 324, 331 (1937) (explaining that all international

fundamentally, to read the Treaty Clause as prohibiting other types of agreements is itself an interpretation that requires justification. For example, the Declare War Clause does not practically prevent the President from using military force without authorization in what common parlance would deem acts of war.¹²⁹ Similarly, the Treaty Clause need not be read to restrain non-Article II agreements when the collective action justifications for the Treaty Clause's supermajority requirement are not implicated.

Congressional-executive agreements may still provoke some discomfort from a textual perspective. These agreements raise questions that Article II treaties do not, such as whether a veto-proof majority could pass an international agreement over the President's disapproval.¹³⁰ But acknowledging that collective action reasoning favors executive agreements over Article II treaties in *some* cases does not require one to argue for full interchangeability between the two agreement types.

Second, the collective action understanding does not fully explain the current practice surrounding international agreements. Although it helps illuminate why non-Article II agreements have come to predominate over traditional treaties, it does not explain why certain types of agreements are directed through one mechanism or the other. If collective action explained this split, Article II treaties would be those that raise a greater risk of exploiting a minority of states. In theory, this sorting of agreements would occur through political checks. If the President signaled plans for a new international agreement that was potentially exploitive, senators could protect minority states by conditioning their support on adherence to the Article II process. But no such pattern presents itself, so collective action reasoning cannot explain why some groups of agreements are seemingly administered through Article II while others are not.¹³¹

Moreover, collective action reasoning may only justify or explain the use of *some* non-Article II agreements. To use collective action

agreements are free from the states' interference because "complete power over international affairs is in the national government").

129. U.S. CONST. art. I, § 8, cl. 11; *see, e.g., Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 14–16 (2011) (statement of Harold Hongju Koh, Legal Adviser, Dep't of State) (arguing that President Obama did not need Congress's approval to continue air strikes in Libya).

130. *See generally* Tribe, *supra* note 102 (rejecting a flexible interpretation of the Treaty Clause).

131. *See supra* note 120 and accompanying text.

reasoning to support congressional-executive agreements as sensible workarounds to the Article II treaty process assumes that the agreements enable more collective action than treaties while still giving a say to the states acting through Congress. But that assumption is wholly untrue for sole executive agreements, and it is substantially weakened even for *ex ante* congressional-executive agreements. The executive branch makes sole executive agreements without any formal input from Congress, and although *ex ante* congressional-executive agreements hook onto authorizing statutes, they do not go back to Congress before they become operative.¹³² Thus, legislators do not cast final up or down votes on sole executive agreements or on *ex ante* congressional executive agreements, even though the agreements bind the U.S. on the international stage just as Article II treaties do.¹³³ So even if collective action reasoning explains why relatively few of the country's international agreements are concluded through Article II, it does not fully justify the large portion of non-Article II agreements that are formed without up or down votes from Congress.¹³⁴

Finally, even if one accepts the collective action understanding of the treaty power as a useful framework, it cannot fully answer which proposed agreements distribute costs and benefits among the states so unevenly that they should go through the Article II process. Identifying which agreements pose the greatest risk of minority state exploitation is likely a value-driven question on which objective agreement would be difficult. Moreover, the Senate itself would likely be the body that signals that the President must push an agreement through one mechanism or the other. But if an agreement had enough support to pass the Senate as a congressional-executive agreement, it is unlikely that a minority of senators would be able to force it through the Article II process.

132. Hathaway, *supra* note 93, at 1255–56.

133. See *Presidential Power*, *supra* note 111, at 150 (noting the lack of formal Congressional involvement in concluding sole executive agreements and *ex ante* congressional-executive agreements and claiming that “few outside the executive branch even know of their existence until after they have become binding on the United States”).

134. See *id.* at 155 (“Between 1990 and 2000, for example, approximately twenty percent of all executive agreements were sole executive agreements. The remaining eighty percent were congressional-executive agreements.”).

CONCLUSION

Collective action problems arise when actors need to work together to achieve a shared outcome but are either unable to do so or incentives discourage cooperation. Collective action is unlikely when it requires unanimous approval from the group. When groups work on majority rule, they can act more easily. But changing the threshold for action from unanimity to something less raises the risk that majority power will become majority tyranny.

The states struggled to solve collective action problems under the Articles of Confederation. Some provisions of the Constitution can be understood as facilitating collective action by creating a federal government that could act on majority rule. The Treaty Clause is another instance of withholding a power from the states and giving it to the federal government, but its supermajority requirement restrains collective action by setting a threshold for action between unanimity and mere majority rule.

Responding largely to the acute historical controversy over the Jay-Gardoqui treaty negotiations, the Framers gave a minority of states the power to limit collective action when they perceived that a treaty would unfairly burden them to other states' benefit. This collective action understanding of the treaty power suggests that its supermajority requirement is most important for agreements that would enable a majority of states to exploit a minority of states.

Today, the factors that animated the treaty power's supermajority requirement are no longer as relevant as they once were. Political and historical changes challenge the assumptions behind the treaty power. Because modern treaties are unlikely to exploit minority states in the way the Framers had feared, agreements that bypass Article II are reasonable workarounds to an overly-restraining supermajority requirement. The collective action framework cannot be applied as a formula to identify when a proposed agreement will distribute costs and benefits so poorly that it portends exploitation of a minority of states. But understanding the Treaty Clause's relationship to collective action can highlight that in most modern cases, the Clause's restraint on international agreements is unwarranted.