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# The Divergence of Modern Jurisprudence from the Original Intent for Federalist and Tenth Amendment Limitations on the Treaty Power

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# The Divergence of Modern Jurisprudence from the Original Intent for Federalist and Tenth Amendment Limitations on the Treaty Power

STEVEN T. VOIGT \*

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## INTRODUCTION

The treaty-making authority in the U.S. Constitution is found in Article II, Section 2, Clause 2 and states, “He [the President] shall have Power, by and with Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur[.]”<sup>1</sup> Article VI also refers to treaties and states that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land[.]”<sup>2</sup>

That the federal treaty-making authority is constrained by the other parts of the Constitution does not sound like the stuff of law journals. It seems like common sense. After all, we would not expect someone to argue that

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

the ability to “regulate Commerce”<sup>3</sup> entitles Congress to disregard the Third Amendment and quarter soldiers in our houses. We would not expect to see an argument that the power to “establish Post Offices”<sup>4</sup> enables Congress to disregard the freedom of the press in the First Amendment. So, why is the Tenth Amendment so fully disregarded with respect to treaties?

What the federal government is authorized to do under the treaty-making power is not limitless.<sup>5</sup> This power was intended to be constrained by the other parts of the Constitution and the fundamental concept of federalism itself that was embodied in the Tenth Amendment.<sup>6</sup>

This brings us to an initial question. Who really cares? Is there really much of a danger of unconstitutional treaties influencing domestic state policy? The answer is yes. As I previously have written, the International Criminal Court is antagonistic to the Constitution and could, if ratified, affect domestic criminal trials and prosecution.<sup>7</sup> There are other examples of contrary burgeoning foreign and international law. In 2009, various Islamic nations proposed a non-binding U.N. resolution defining the questioning of

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3. *Id.* art. I, § 8, cl. 3.

4. *Id.* art. I, § 8, cl. 8.

5. See generally HADLEY ARKES, *FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE* 31–32 (Princeton Univ. Press 1986) (“Republican government is first and foremost a government of law, a constitutional order. It might be said that its first maxim, arising from the logic of morals itself, is that people in positions of authority should be compelled to cite some law beyond their own self-interest as the ground of their official acts.”).

6. See William E. Mikell, *The Extent of the Treaty-Making Power of the President and Senate of the United States*, 57 U. PA. L. REV. 435, 439–40 (1909) (“A treaty then may possibly be unconstitutional in any of the following cases: (1) If it alters the form of our government; (2) If it alters the general departmental construction of the government; (3) If it changes the constitution of any of the departments; (4) If it deprives the federal government or any of its departments of its delegated powers, or transfers such power to another department; (5) If it seeks to exercise a power confided to another department of the federal government; (6) If by it is sought to exercise a power prohibited to the federal government or reserved to the States.”). There is more reserved to individuals and states than the Bill of Rights and the mere right to govern. HADLEY ARKES, *BEYOND THE CONSTITUTION* 73 (Princeton Univ. Press 1990) (“To pick out certain uses of freedom, such as speech and assembly, for a special mention in the Constitution, runs the risk then of disparaging, by implication, the freedoms that have not been mentioned. That was the warning posted by the Federalists, and we would be obliged to consider seriously whether their fears have not in fact been borne out.”).

7. See Steven T. Voigt, *The International Criminal Court’s Antagonism to Our Constitution and Our Need to Articulate an Alternative*, in *THE NUREMBERG WAR CRIMES TRIALS AND THEIR POLICY CONSEQUENCES TODAY* 157, 162–64 (Beth Griech-Poelle ed., 2009) (stating “[a]n American tried before the ICC could be denied the right to a speedy and public trial, reasonable bail, and protection from cruel and unusual punishment, due process protections found in Amendments VI and VIII of the Constitution” and “the ICC will have the authority to second-guess trials in the U.S.”).

Islam as a human rights violation.<sup>8</sup> The Alliance Defending Freedom reports that in Europe

[t]here are unprecedented international attacks on rights of conscience and religious expression from so-called “hate speech” regulations, allegedly designed to protect listeners from “hurtful” expressions. These laws have been used specifically and repeatedly to censor and restrict traditional Christian expression. The basis of these laws as applied is simple: *any* speech that *any* listener finds “offensive” is banned. Not surprisingly, Christian religious speech is often singled out for elimination.<sup>9</sup>

The 2013 U.N. Arms Trade Treaty<sup>10</sup> includes startling “national control”<sup>11</sup> and “record keeping”<sup>12</sup> provisions that would likely conflict with the Second Amendment and similar protections in the constitutions of the various states.<sup>13</sup> If ever converted into a treaty, the U.N. Conference on Environment and Development, Agenda 21, would drastically affect local land use and clash with private property rights.<sup>14</sup> There are many more

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8. *Proposal at U.N. to Criminalize “Defamation of Islam,”* U.N. WATCH (Mar. 11, 2009), <http://www.unwatch.org/site/c.bdKKISNqEmG/b.1289203/apps/s/content.asp?ct=6831061>.

9. *The Threat of the ACLU, Planned Parenthood, and Their Radical International Allies*, ALLIANCE DEFENDING FREEDOM, <http://www.alliancedefendingfreedom.org/issues/global> (last visited Nov. 10, 2013) (emphases in original).

10. *Arms Trade Treaty, adopted* Apr. 2, 2013, [http://treaties.un.org/doc/Treaties/2013/04/20130410%2012-01%20PM/Ch\\_XXVI\\_08.pdf#page=21](http://treaties.un.org/doc/Treaties/2013/04/20130410%2012-01%20PM/Ch_XXVI_08.pdf#page=21) (ratification pending).

11. *Id.* art. 5, para. 3.

12. *Id.* art. 10, para. 1–2.

13. By way of example regarding state constitutions, Section 21 of the Pennsylvania Constitution states, “[t]he right of the citizens to bear arms in defense of themselves and the State shall not be questioned.” PA. CONST. art. 1, § 21. Regarding the Arms Trade Treaty and the Second Amendment, former U.N. Ambassador John Bolton has warned, “[g]un-control advocates will use these provisions to argue that the U.S. must enact measures such as a national gun registry, licenses for guns and ammunition sales, universal background checks, and even a ban of certain weapons. The treaty thus provides the Obama administration with an end-run around Congress to reach these gun-control holy grails.” John Bolton & John Yoo, *Obama’s United Nations Backdoor to Gun Control*, WALL ST. J. (Apr. 14, 2013, 6:06 PM), <http://online.wsj.com/article/SB10001424127887324504704578413110123095782.html>.

14. See U.N. Sustainable Development, Agenda 21 from the U.N. Conference on Environment & Development, §§ 10.5–10.6 (June 1992), available at <http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> (stating in part that, “[t]he broad objective is to facilitate allocation of land to the uses that provide the greatest sustainable benefits” and “[g]overnments at the appropriate level, with the support of regional and international organizations, should ensure that policies and policy instruments support the best possible land use and sustainable management of land resources”).

examples of divergent foreign laws and resolutions, and it is not such a big step for ratification of any of them as a treaty. All it takes is a willing foreign partner, a President, and a Senate.

The U.S. Supreme Court has addressed the scope of the treaty power only in a couple instances and in those cases the Court has adopted an expansive view of the power. Sadly, the Supreme Court and other courts have an academically dishonest record of deciding the meaning of constitutional provisions—including this one—with no or virtually no exploration of original intent.

#### I. THE SUPREME COURT'S EXPANSIVE VIEW OF THE TREATY-MAKING AUTHORITY

One of the foremost U.S. Supreme Court decisions discussing the domestic reach of the federal treaty authority was in 1920 in *Missouri v. Holland*.<sup>15</sup> The state of Missouri had challenged a 1916 treaty between the United States and Great Britain, which provided for protection to migrating birds within the United States, and federal regulations giving effect to the terms of the treaty.<sup>16</sup> The treaty and regulations pursuant to it “prohibited the killing, capturing or selling any of [particular] migratory birds . . . except as permitted by regulations compatible with those terms, to be made by the Secretary of Agriculture.”<sup>17</sup>

Missouri asserted that the federal government’s actions were “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.”<sup>18</sup> It argued that “what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do.”<sup>19</sup> The Supreme Court heard the case and decided that the bird migration treaty was a constitutional application of the treaty power and unaffected by the Tenth Amendment.<sup>20</sup>

The *Missouri* Court’s rationale was a classic example of the living Constitution doctrine. The Supreme Court held that the original intent for the Tenth Amendment does not control the Tenth Amendment’s application.<sup>21</sup>

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15. 252 U.S. 416 (1920).

16. *Id.* at 430–31.

17. *Id.* at 431–32.

18. *Id.* at 431.

19. *Id.* at 432.

20. *Id.* at 435.

21. *Missouri*, 252 U.S. at 433 (stating that “[t]he case before us must be considered in light of our whole experience and not merely in that of what was said a hundred years ago”).

Instead, the Court said, “[w]e must consider what this country has become in deciding what that amendment has reserved.”<sup>22</sup> In other words, the judicial reasoning in *Missouri* is antithetical to original intent. First, the Court held that the treaty was not “forbidden by some invisible radiation from the general terms of the Tenth Amendment.”<sup>23</sup> This “invisible radiation” phraseology depicts the Tenth Amendment as though the entire catalog of states’ rights must somehow be articulated to be reserved. In addition, the Court suggested that the treaty power might extend even beyond other constitutional powers, stating it is “obvious” there may be situations “that an act of Congress could not deal with but that a treaty followed by such an act could[.]”<sup>24</sup>

Two decades after *Missouri*, the Supreme Court again opined that the Tenth Amendment is essentially irrelevant to the scope of federal power. In the 1941 case *United States v. Darby*,<sup>25</sup> the Court decided that the Fair Labor Standards Act, requiring employers to conform to federal wage and hour requirements for employees engaged in the production of goods for interstate commerce, was a valid exercise of the constitutional authority under the Commerce Clause.<sup>26</sup> In reaching this decision, the Court called the Tenth Amendment “but a truism,” stating “[t]he amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution[.]”<sup>27</sup>

While *Darby* did not involve a treaty, the Supreme Court relied on *Darby* in the next major treaty power case, the 1947 case of *Reid v. Covert*.<sup>28</sup> The *Reid* Court, citing *Darby* and *Missouri*, stated that while the treaty power has constitutional limitations, it is not limited by states’ rights.<sup>29</sup>

In *Reid*, the Supreme Court considered the jurisdiction of two military court-martials over two civilian dependents of armed services personnel for the alleged murders of servicemen stationed in Great Britain.<sup>30</sup> At the time of the alleged offenses, the United States and Great Britain had an executive agreement permitting the “United States’ military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by [service

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22. *Id.* at 434.

23. *Id.* at 433–34.

24. *Id.* at 433.

25. 312 U.S. 100 (1941).

26. *Id.* at 125–26.

27. *Id.* at 124.

28. 354 U.S. 1 (1957).

29. *Id.* at 18.

30. *Id.* at 3–5.

members] or their dependents.”<sup>31</sup> The Supreme Court held that the military trials would have lacked many of the safeguards in the Bill of Rights and the military did not have jurisdiction over the civilian dependents.<sup>32</sup>

The Court rejected the argument that the federal treaty-making power superseded the other provisions of the Constitution, holding, “[t]his Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.”<sup>33</sup> The Court observed that legislation is equivalent in authority to treaties:

This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null. It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.<sup>34</sup>

In discussing the Tenth Amendment, however, the Court, citing *Missouri and Darby*, stated that the Tenth Amendment “is no barrier” to the scope of treaties that are “validly” made.<sup>35</sup>

What are we to make of *Missouri* and *Reid*’s explanation of the treaty authority? It would appear from *Missouri* and *Reid* that the Supreme Court—at least historically—has viewed the Tenth Amendment as no limitation whatsoever to the treaty power or otherwise as a mere declaration of the relationship between the states and the federal government. If that is really true, however, how can this power be squared with the *Reid* Court’s “recogni[tion of] the supremacy of the Constitution over a treaty”<sup>36</sup> or its proscription that

[i]t would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power

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31. *Id.* at 15.

32. *Id.* at 39–41.

33. *Id.* at 17.

34. 354 U.S. at 18 (footnote omitted).

35. *Id.*

36. *Id.* at 17.

under an international agreement without observing constitutional prohibitions.<sup>37</sup>

And what can we make of the *Reid* Court's claim that "[t]here is nothing in [*Missouri*] which is contrary to the position taken here"?<sup>38</sup> As the Court in *Reid* stated:

The [*Missouri*] 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 the States have delegated their power to the National Government and the Tenth Amendment is no barrier.*<sup>39</sup>

What is meant by "validly made" and "delegated"? If "validly made" only refers to whether there was adherence to proper procedure rather than adherence to other constitutional prohibitions, is this remotely consistent with the original intent of our Founding Fathers? Could our Founding Fathers have possibly intended for there to be no limitation on the subject matter of treaties because, after all, the treaty-making authority was a "delegated power" given to the federal government? Is it conceivable that our Founding Fathers wanted the federal government to govern internal affairs of states, so long as this was preceded by a treaty with a willing partner abroad?

## II. DID OUR FOUNDING FATHERS INTEND FOR A LIMITLESS SCOPE OF THE TREATY POWER?

The answer in short is "no." In fact, an examination of the writings and oratories of our Founding Fathers on this topic—which is unfortunately absent from *Missouri*, *Darby*, and *Reid*—puts the answer in plain sight. The Constitution was only ratified based on an understanding that the federal treaty authority indeed had limitations. Sadly, far-reaching jurisprudence has arisen from our courts, including the Supreme Court, without any consideration whatsoever of this history, original intent, or the reasoning under which the very document was ratified.

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37. *Id.*

38. *Id.* at 18.

39. *Id.* (emphasis added).



## A. The Virginia Convention

The most significant discussion of the treaty power took place during Virginia's ratifying convention. There, George Mason and Patrick Henry raised concerns about the treaty authority. Their first objection was that there was no bill of rights that would constrain the treaty power.<sup>40</sup> Recall that the Constitution went into effect on March 4, 1789, without a Bill of Rights. The first ten amendments were only later ratified on December 15, 1791. Mason and Henry argued that even though the Constitution delegated only specific powers to the federal government, the Constitution nevertheless needed a Bill of Rights as an additional safeguard for the rights held by the people. Mason stated:

*Though the king [of England] can make treaties, yet he cannot make a treaty contrary to the constitution of his country. Where did their constitution originate? It is founded on a number of maxims, which, by long time, are rendered sacred and inviolable. Where are there such maxims in the American Constitution?*<sup>41</sup>

Likewise, Henry asserted:

I dread that our rights are about to be given away, though I may possibly be mistaken. . . .

. . . When a person shall be treated in the most horrid manner, and most cruelly and inhumanly tortured, will the security of territorial rights grant him redress? . . .

I might go on in this discrimination; but it is too obvious that the security of territory is no security of individual safety. I ask, How are the state rights, individual rights, and national rights, secured? Not as in England; for the authority quoted from Blackstone would, if stated right prove, in a thousand instances, that, if the king of England attempted to take away the rights of individuals, the law would stand against him. The acts of Parliament would stand in his way. The bill and declaration of rights would be against him. The common law is fortified by the bill of rights. . . . If you look

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40. JONATHAN ELLIOT, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 508, 512–13 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES].

41. *Id.* at 508 (emphases added) (reporting remarks of George Mason at the Virginia convention).

for a similar security in the paper on your table, you look in vain. That paper is defective without such a declaration of rights. It is unbounded without such restrictions. . . . The rights of persons are exposed as it stands now.<sup>42</sup>

Henry and Mason also expressed concern that the treaty-making authority could interfere with the rights of states.<sup>43</sup> Their primary concern was the federal government ceding territory of individual states to foreign powers under this power. Henry said:

We are told that the state rights are preserved. Suppose the state right to territory be preserved; I ask and demand, *How do the rights of persons stand, when they have power to make any treaty, and that treaty is paramount to constitutions, laws, and every thing? . . .*

. . . If the Constitution be paramount, how are the constitutions and laws of the states to stand? Their operation will be totally controlled by it; for it is paramount to every thing, unless you can show some guard against it.<sup>44</sup>

Mason stated:

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? . . . *We wish an express and explicit declaration, in that paper, that the power which can make other treaties cannot, without the consent of the national Parliament—the national legislature—dismember the empire.*<sup>45</sup>

James Madison, Governor Edmund Randolph, George Nicholas, and Francis Corbin responded to the objections by Patrick Henry and George Mason by assuring the Virginia Convention that the treaty power was limited only to “external affairs” and treaties could not infringe on states’ rights or individuals’ rights. Corbin “contended that *the empire could not be*

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42. *Id.* at 512–13 (reporting remarks of Patrick Henry at the Virginia convention).

43. *See id.* at 509, 512–13.

44. *Id.* at 512–13 (emphasis added) (reporting remarks of Patrick Henry at the Virginia convention).

45. *Id.* at 509 (emphasis added) (reporting remarks of George Mason at the Virginia convention).

*dismembered without the consent of the part dismembered.*"<sup>46</sup> Madison stated:

I do not conceive that power is given to the President and Senate to dismember the empire, or to alienate any great, essential right. I do not think the whole legislative authority have this power. The exercise of the power must be consistent with the object of the delegation.

. . . *The object of treaties is the regulation of intercourse with foreign nations, and is external.*<sup>47</sup>

Randolph agreed:

*I conceive that neither the life nor property of any citizen, nor the particular right of any state, can be affected by a treaty. . . .*

. . . Will not the President and Senate be restrained? Being creatures of that Constitution, can they destroy it? Can any particular body, instituted for a particular purpose, destroy the existence of the society for whose benefit it is created? . . . When the Constitution marks out the powers to be exercised by particular departments, I say no innovation can take place.<sup>48</sup>

As did Nicholas:

The worthy member says, that they can make a treaty relinquishing our rights, and inflicting punishments; because all treaties are declared paramount to the constitutions and laws of the states. An attentive consideration of this will show the committee that they can do no such thing. The provision of *the 6<sup>th</sup> article* is, that this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all the treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. *They can, by this, make no treaty which*

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46. 3 ELLIOT'S DEBATES, *supra* note 40, at 509 (emphasis added) (reporting remarks of Corbin at the Virginia convention).

47. *Id.* at 514 (emphasis added) (reporting remarks of James Madison at the Virginia convention).

48. *Id.* at 504 (emphasis added) (reporting remarks of Gov. Randolph at Virginia convention).

*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[.]<sup>49</sup>

The relevant portion of Article VI—to which Nicholas referred in his speech—states that “all Treaties made, or which shall be made, *under the Authority of the United States*, shall be the supreme Law of the Land[.]”<sup>50</sup> Nicholas viewed this phrase as a restraint on the scope of treaty-making authority according to the delegated authority in the Constitution and the fundamental concept of federalism.<sup>51</sup> Under Nicholas’ view, Article VI provided certain substantive limitations on the power.<sup>52</sup> The *Missouri* Court viewed this same phrase in Article VI as the formal act of voting on a treaty. In particular, the *Missouri* Court opined:

Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. *It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention.*<sup>53</sup>

Not surprisingly, the *Missouri* Court made this postulation without any citation to or support from the debates of the Ratifying Conventions or the Founding Fathers, nor any exploration of original intent. In fact, the *Missouri* Court went on to state that original intent of America’s Founding Fathers was not even relevant, stating that the words of the Constitution

called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . 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.<sup>54</sup>

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49. *Id.* at 507 (emphases added) (reporting remarks of George Nicholas at the Virginia convention).

50. U.S. CONST. art. VI, cl. 3 (emphasis added).

51. *See* 3 ELLIOT’S DEBATES, *supra* note 40, at 507.

52. *See id.*

53. *Missouri*, 252 U.S. at 433.

54. *Id.*

Despite the *Missouri* Court's implication that the Founding Fathers could not have foreseen the possibility of treaties interfering with states' rights, the debates in the Virginia Ratifying Convention prove otherwise. Virginia ratified the Constitution only after having answered Henry's and Mason's objections regarding the treaty power. Had no one responded to these concerns, or if Madison, Randolph, Nicholas, and Corbin added their voices in support of Henry and Mason, one must assume that the convention would have proceeded on an entirely different course. Certainly, the exchange cannot be over-looked.

#### B. The North Carolina Convention

In North Carolina's ratifying convention, some of the delegates made objections to the treaty power similar to those made in Virginia. There, however, the objections were not met with the same convincing assurances by others. As a result of this and other objections, North Carolina did not ratify the Constitution at its first convention.<sup>55</sup>

Mr. Porter was among those in the North Carolina convention who objected. He stated, "Mr. Chairman, there is a power vested in the Senate and President to make treaties, which shall be the supreme law of the land. Which among us can call them to account? . . . They might give up the rivers and territory of the Southern States."<sup>56</sup> Thereafter, Mr. M'Dowall followed with more objections:

[P]ermit me, sir, to make a few observations, to show how improper it is to place so much power in so few men, without any responsibility whatever. Let us consider what number of them is necessary to transact the most important business. Two thirds of the members present, with the President, can make a treaty. Fourteen of them are a quorum, two thirds of which are ten. These ten may make treaties and alliances. They may involve us in any difficulties, and dispose of us in any manner, they please.<sup>57</sup>

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55. North Carolina's first ratifying convention is referred to as the Hillsborough Convention. There, the delegates chose not to ratify or to reject the proposed Constitution. North Carolina did ratify the Constitution in a second convention held on November 21, 1789, after George Washington had been elected President. The second convention is referred to as the Fayetteville Convention. See Troy L. Kickler, *Ratification Debates*, N.C. HIST. PROJECT, <http://www.northcarolinahistory.org/encyclopedia/280/entry/> (last visited Nov. 11, 2013).

56. 4 ELLIOT'S DEBATES, *supra* note 40, at 115 (reporting remarks of Porter at the North Carolina convention).

57. *Id.* at 119 (reporting remarks of J. M'Dowall at the North Carolina convention).

In response to Porter and M'Dowall, Mr. Davie sought to assure them that this power was not a threat because Senators were elected by the state legislatures and therefore the Senate would protect the interests of the states. He said,

Mr. Chairman, although treaties are mere conventional acts between the contracting parties, yet, by the law of nations, they are the supreme law of the land to their respective citizens or subjects. All civilized nations have concurred in considering them as paramount to an ordinary act of legislation. . . .

. . . .

On a due consideration of this clause, it appears that this power could not have been lodged as safely any where else as where it is. . . . As the Senate represents the sovereignty of the states, whatever might affect the states in their political capacity ought to be left to them.<sup>58</sup>

But Davie failed to convince the body, as the subsequent comments by M'Dowall, Porter, and Mr. Spencer show. M'Dowall stated that “he was of the same opinion as before[,] . . . that giving such extensive powers to so few men in the Senate was extremely dangerous[.]”<sup>59</sup> Porter added, “My objection still remains. I cannot find it in the least obviated” by Davie’s opinion.<sup>60</sup> Spencer closed the discussion with his view that

no argument can be used to show that this power is proper. If the whole legislative body—if the House of Representatives do not interfere in making treaties, I think they ought at least to have the sanction of the whole Senate. . . . It appears to me that the powers are too extensive, and not sufficiently guarded.<sup>61</sup>

### C. The Pennsylvania, South Carolina, New York, and Connecticut Conventions

The delegates at the Pennsylvania and South Carolina ratifying conventions expressly discussed the treaty power, and in those conventions, the representatives made statements and assurances that the treaty power was

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58. *Id.* at 119, 123 (reporting remarks of Davie at the North Carolina convention).

59. *Id.* at 124 (reporting remarks of J. M'Dowall at the North Carolina convention).

60. *Id.* at 125 (reporting remarks of Porter at the North Carolina convention).

61. *Id.* at 131 (reporting remarks of Spencer at the North Carolina convention).

subject to other provisions of the Constitution. In these and other conventions, there was also discussion of the republican form of government and the preservation of states' rights.

During Pennsylvania's convention, James Wilson stated:

It well deserves to be remarked, that, though the House of Representatives possess no active part in making treaties, yet their legislative authority will be found to have strong restraining influences upon both President and Senate. *In England, if the king and his ministers find themselves, during their negotiation, to be embarrassed because an existing law is not repealed, or a new law is not enacted, they give notice to the legislature of their situation, and inform them that it will be necessary, before the treaty can operate, that some law be repealed, or some be made. And will not the same thing take place here? . . .*

. . . .  
We find, on an examination of all its parts, that the objects of this government are such as extend beyond the bounds of the particular states. This is the line of distinction between this government and the particular state governments.

. . . *It belongs not to this government to make an act for any particular township, county, or state.*<sup>62</sup>

As had happened in Virginia, Wilson's assurances convinced a sufficient number of delegates to ratify the Constitution over dissenting objections that the Constitution should contain a statement that no "treaties [would] be valid which are in contradiction to the constitution of the United States, or the constitutions of the several states."<sup>63</sup>

In South Carolina, Rawlins Lowndes observed "that no treaty concluded contrary to the express laws of the land could be valid."<sup>64</sup> Lowndes cited to Great Britain where "the king of Great Britain had not a legal power to ratify any treaty which trespassed on the fundamental laws of the country."<sup>65</sup> Ralph

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62. 2 ELLIOT'S DEBATES, *supra* note 40, at 506–07 (emphases added) (reporting remarks of Wilson at the Pennsylvania convention).

63. THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 241 (Ralph Ketchum ed., 1986).

64. 4 ELLIOT'S DEBATES, *supra* note 40, at 271 (reporting remarks of Rawlins Lowndes at the South Carolina convention).

65. *Id.* at 308 (reporting remarks of Rawlings Lowndes at the South Carolina Convention).

Izard likewise observed that a particular treaty in England had not been ratified because it was “found to clash with some laws in existence[.]”<sup>66</sup> John Julius Pringle stated that “[n]o nations would keep treaties” that “*violate the fundamental laws, and subvert the Constitution, or tend to the destruction of the happiness and liberty of the states[.]*”<sup>67</sup> He said that such treaties would not be made with “good faith . . . but by treachery and a betraying of trust, and by exceeding the powers with which the makers were intrusted[.]”<sup>68</sup>

In the New York ratifying convention, R. R. Livingston characterized treaties as addressing external matters. He stated that Senators

are to form treaties with foreign nations. This requires a comprehensive knowledge of *foreign politics*, and an extensive acquaintance with characters, whom, in this capacity, they have to negotiate with, together with such an intimate conception of *our best interests, relative to foreign powers*, as can only be derived from much experience in this business.<sup>69</sup>

Alexander Hamilton remarked:

I wish the committee to remember that the Constitution under examination is framed upon truly republican principles; and that, as it is expressly designed to provide for the common protection and the general welfare of the United States, *it must be utterly repugnant to this Constitution to subvert the state governments, or oppress the people.*<sup>70</sup>

In Connecticut, Oliver Wolcott observed, “[s]o well guarded is this Constitution throughout, that it seems impossible that the rights either of the states or of the people should be destroyed.”<sup>71</sup> Richard Law remarked:

Some suppose that the general government, which extends over the whole, will annihilate the state

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66. *Id.* at 268 (reporting remarks of Ralph Izard at the South Carolina Convention).

67. *Id.* at 270 (reporting remarks of John Julius Pringle at the South Carolina Convention) (emphasis added).

68. *Id.* (reporting remarks of John Julius Pringle at the South Carolina Convention).

69. 2 ELLIOT’S DEBATES, *supra* note 40, at 291 (emphases added) (reporting remarks of R. R. Livingston at the New York convention).

70. *Id.* at 356 (emphasis added) (reporting remarks of Alexander Hamilton at the New York convention).

71. *Id.* at 202 (reporting remarks of Oliver Wolcott at the Connecticut convention).



governments. But consider that this general government rests upon the state governments for its support. It is like a vast and magnificent bridge, built upon thirteen strong and stately pillars. Now, the rulers, who occupy the bridge, cannot be so beside themselves as to knock away the pillars which support the whole fabric.<sup>72</sup>

Governor Huntingdon stated, “[t]he state governments, I think, will not be endangered by the powers vested by this Constitution in the general government.”<sup>73</sup>

#### D. Other Sources

In addition to the Ratifying Conventions, there is additional evidence from other sources that the treaty power is limited by states’ rights. Joseph Story, Justice of the Supreme Court from 1811 to 1845 and author of *Commentaries on the Constitution of the United States*, wrote therein:

But, though the [treaty] power is thus general and unrestricted, it is not to be so construed, as to destroy the fundamental laws of the state. A power given by the constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it; and cannot supersede, or interfere with any other of its fundamental provisions. Each is equally obligatory, and of paramount authority within its scope; and no one embraces a right to annihilate any other. *A treaty to change the organization of the government, to 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 fulfill, the will of the people.<sup>74</sup>

In the Federalist No. 45, Madison characterized “external” negotiation as part of federal power, whereas the states reserved governance of internal affairs:

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72. *Id.* at 201 (reporting remarks of Richard Law at the Connecticut convention).

73. *Id.* at 199 (reporting remarks of Gov. Huntingdon at the Connecticut Convention) (emphasis added).

74. JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 777, at 553 (Boston, Hilliard, Gray & Co. 1833) (emphasis added).

*The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.*<sup>75</sup>

Likewise, in his *Manual of Parliamentary Practice*, Thomas Jefferson set forth prerequisites for a treaty, including that “it must concern the foreign nation party to the contract, or it would be mere nullity, *res inter alios acta*.”<sup>76</sup> He also wrote,

[b]y the general power to make treaties, the Constitution must have intended to comprehend only those subjects which are usually regulated by treaty, and can not be otherwise regulated . . . *It must have meant to except out of these the rights reserved to the States; for surely the President and the Senate can not do by treaty what the whole Government is interdicted from doing in any way.*<sup>77</sup>

Beyond these sources, numerous Founding Fathers wrote and spoke of the limited nature of federal authority generally and the retention of state power in the proposed Constitution. By way of two examples, in *An Examination into the Leading Principles of the Federal Constitution*, Noah Webster wrote with emphasis,

[e]very person, capable of reading, must discover, that the convention have labored to draw the line between the federal and provincial powers—to define the powers of Congress, and limit them to those general concerns which *must* come

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75. THE FEDERALIST NO. 45, at 227 (James Madison) (Terence Ball ed., Cambridge Univ. Press 2003) (emphases added).

76. THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES 310 (1801). Black’s Law Dictionary defines *res inter alios acta alteri nocere non debet* as “[t]hings done between strangers ought not to injure those who are not parties to them.” BLACK’S LAW DICTIONARY 1310 (6th ed. 1990).

77. JEFFERSON, *supra* note 76, at 310 (emphasis added).

under federal jurisdiction, and which *cannot be* managed in the separate legislatures—that in all internal regulations, whether of civil or criminal nature, the states retain their sovereignty, and have it guaranteed to them by this very constitution.<sup>78</sup>

In a letter to Marquis de Lafayette, George Washington wrote,

[t]hat the general Government is not invested with more Powers than are indispensably necessary to perform the functions of a good Government; and, consequently, that no objection ought to be made against the quantity of Power delegated to it[.]

... It will at least be a recommendation to the proposed Constitution that it is provided with more checks and barriers against the introduction of Tyranny, [and] those of a nature less liable to be surmounted, than any Government hitherto instituted among mortals, hath possessed.<sup>79</sup>

### III. IS THERE ANY HOPE AT ALL THAT SOMEONE WILL FINALLY GET IT RIGHT?

While there is a paucity of case law discussing federalist limitations on the treaty-making power, a much deeper history of decision-making exists with the Commerce Clause. Commerce Clause jurisdiction is far more expansive than originally intended but at least in some limited instances the judiciary has taken steps to protect states' rights. By way of example, in *United States v. Lopez*,<sup>80</sup> the Supreme Court determined that the Gun-Free School Zones Act of 1990, which made it a federal offense “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone[.]” exceeds the authority of Congress under the Commerce Clause.<sup>81</sup> The Court observed

78. NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 31 (Pritchard & Hall 1787) (emphases in original).

79. Letter from George Washington to the Marquis de Lafayette (Feb. 7, 1788), in 2 THE DEBATE ON THE CONSTITUTION, at 179 (The Library of America 1993). See also TENCH COXE, AN EXAMINATION, reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, at 152 (Paul L. Ford ed., 1888) (“Besides the securities for the liberties of the people arising out of the federal government, they are guarded by their state constitutions, and by the nature of things in the separate states.”).

80. 514 U.S. 549 (1995).

81. *Id.* at 551 (internal quotation marks omitted).

“[t]he Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce.”<sup>82</sup> It held that “even . . . modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits.”<sup>83</sup> And, while

[t]he broad language in these opinions has suggested the possibility of additional expansion, . . . we decline here to proceed any further [because t]o do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national what is truly local.<sup>84</sup>

In *California v. Thompson*,<sup>85</sup> the Supreme Court held that a California statute requiring every transportation agent in the state to obtain a license from the State Railroad Commission did not violate the Commerce Clause.<sup>86</sup> The Court stated, “the Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, even though the regulation affects interstate commerce.”<sup>87</sup>

In *Lone Star Gas Co. v. Texas*,<sup>88</sup> the Supreme Court held that the Texas Railroad Commission “did not transcend the limits of the state’s jurisdiction” in fixing the rate for domestic gas supplied to distributing companies in Texas.<sup>89</sup> Similarly, in *South Carolina State Highway Department v. Barnwell Bros.*,<sup>90</sup> the Court stated, “[f]rom the beginning it has been recognized that a state can, if it sees fit, build and maintain its own highways, canals[,] and railroads and that in the absence of Congressional action their regulation is peculiarly within its competence, even though interstate commerce is materially affected.”<sup>91</sup>

Unfortunately, much of constitutional jurisprudence seems driven by politics, judicial activism, and—as the *Missouri* Court stated—the idea that

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82. *Id.*

83. *Id.* at 556–57.

84. *Id.* at 567–68 (internal citations omitted).

85. 313 U.S. 109 (1941).

86. *See id.* at 114.

87. *Id.* at 113.

88. 304 U.S. 224 (1938).

89. *Id.* at 241.

90. 303 U.S. 177 (1938).

91. *Id.* at 187.

the meaning of the Constitution “evolves” over time.<sup>92</sup> Only a few decades before the New Deal *Darby* Court reduced the Tenth Amendment to “but a truism,”<sup>93</sup> the Supreme Court in *Kansas v. Colorado*<sup>94</sup> spoke entirely differently of the Tenth Amendment, and much more consistent with original intent:

Its principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted. . . . The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated.<sup>95</sup>

The *Kansas* Court also cautioned that “[t]his Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning.”<sup>96</sup>

Indeed, just thirty years before *Missouri*, the Supreme Court in *DeGeofrey v. Riggs*<sup>97</sup> adopted a more restrained view of the treaty power, finding that it was in fact constrained by federalism. In that case, the Court held that a treaty with France superseded the common law related to rules of inheritance to allow for French citizens to inherit property.<sup>98</sup> This removal of disability on inheritance was subject in part to federal control, however, because it was limited to “all political communities in the United State where legislation permits aliens to hold real estate[.]”<sup>99</sup> The Court expressed that the treaty power “would not be contended [to] extend[] so far as to authorize

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92. *See Missouri*, 252 U.S. at 433.

93. *Darby*, 312 U.S. at 123–24.

94. 206 U.S. 46 (1907).

95. *Id.* at 90.

96. *Id.* at 90–91.

97. 133 U.S. 258 (1890).

98. *Id.* at 266. A scholar in the early twentieth century observed that “[b]etween 1778 and 1860 the United States became a party to forty-four treaties containing articles governing the acquisition and disposal of real property, situated within its boundaries, by aliens, citizens of other signatories, and vice versa.” Ralston Hayden, *The States’ Rights Doctrine and the Treaty-Making Power*, 22 AM. HIST. REV. 566, 567 (Apr. 1917). Many or most of these treaties recognized state authority in some degree. *Id.* at 569.

99. *DeGeofrey*, 133 U.S. at 272.

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.”<sup>100</sup>

Not long before *Missouri*, two separate federal courts struck down Congressional statutes related to the protection of migratory birds—*United States v. McCullagh*<sup>101</sup> and *United States v. Shauver*.<sup>102</sup> The *McCullagh* court compared the migratory bird statute to other laws, including laws related to marriage and divorce, and stated the federal government has limitations:

*Our national Constitution is one of purely delegated powers.*

. . . .

. . . [N]o matter how laudable the purpose of Congress in the passage of the act in question may have been, or how great the ultimate end sought thereby to be attained for the common good, such end does not justify the means employed, if it be found on examination to lie beyond constitutional bounds. . . .

There can be no doubt but that a uniform system of laws on the subjects of marriage and divorce in this country would terminate many serious evils and accomplish inestimable good. Had Congress the power to so legislate a few comparatively simple provisions would accomplish this much desired result. However, this has been neither done nor attempted by Congress. The same may be said of many subject-matters of legislation under our system of government lodged in the state, but denied to the nation. As, then, the will of Congress to accomplish the much-desired result, without the power of accomplishment, will not suffice, no matter how great the exigencies of the case, or how impotent the powers of the states to protect may be[.]<sup>103</sup>

The *Shauver* court stated:

It may be, as contended on behalf of the government, that only by national legislation can migratory wild game and fish be preserved to the people, but that is not a matter for the courts. It is the people who alone can amend the

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100. *Id.* at 267.

101. 221 F. 288 (D. Kan. 1915).

102. 214 F. 154 (E.D. Ark. 1914).

103. *McCullagh*, 221 F. at 290–91 (emphasis added).

Constitution to grant Congress the power to enact such legislation as they deem necessary. All the courts are authorized to do when the constitutionality of a legislative act is questioned is to determine whether Congress, under the Constitution as it is, possesses the power to enact the legislation in controversy; their power does not extend to the matter of expediency. If Congress has not the power, the duty of the court is to declare the act void.<sup>104</sup>

The *Shauver* Court was “unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game when in a state, and is therefore forced to the conclusion that the act is unconstitutional.”<sup>105</sup>

#### IV. GOING FORWARD

Perhaps very soon our federal government will again test the limits of the treaty power, and our Supreme Court will once again have a choice whether to adjudicate by original intent—or something else. Whether it is the International Criminal Court, the U.N. Arms Trade Treaty, treaties pursuant to U.N. Agenda 21, European and international speech laws that would infringe on free expression and religious freedom in the United States, or something else, that day of decision-making will soon be upon us. And, I am not optimistic.

Whenever the judiciary steps away from original intent, as it has done in so many cases, each is judicial activism and an erosion of the system of governance intended by our Founding Fathers. Each misplaced decision is a new “precedential” foundation for another decision even farther askew. Only time will tell how much farther we can go until our government and our way of life is unrecognizable in our age or any other of the past.

But there is hope, at least in theory. No matter how many steps we take away from the Constitution, it is only one step to return. Ten thousand instances of precedent matter not if not one of them has any basis in constitutional authority. They are bursts of air that stand upright really on nothing at all.

The maxim of “limited, enumerated powers” is today but a platitude, a cursory preamble to a commonplace judicial rationale entirely devoid of any meaningful analysis of original intent and hunched over backward to find

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104. *Shauver*, 214 F. at 160.

105. *Id.* at 160. See also *Hughes v. Oklahoma*, 441 U.S. 322, 342 (1979) (Rehnquist, J., dissenting) (“[T]he [individual] State is accorded wide latitude in fashioning regulations appropriate for protection of its wildlife.”).

some way to justify expanding federal authority. The presumption has been for a long time to justify big government somehow, some way, rather than to place the onus on the federal government to prove to the people and the states that the power it claims to have it actually holds.

May we remember the words of Governor Huntingdon in the Connecticut Ratifying Convention:

I infer that the general government will not have the disposition to encroach upon the states. But still the people themselves must be the chief support of liberty. While the great body of freeholders are acquainted with the duties which they owe to their God, to themselves, and to men, they will remain free. But if ignorance and depravity should prevail, they will inevitably lead to slavery and ruin.<sup>106</sup>

Remember that our Founding Fathers wisely included in the Constitution a means to expand federal authority—and it was not the judiciary. It was through constitutional amendment. I fear the treaty power is just the next in a long line of constitutional principles that will be abused to justify authority that quite simply does not exist.

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106. 2 ELLIOT'S DEBATES, *supra* note 40, at 199–200 (reporting remarks of Gov. Huntingdon at the Connecticut Convention).