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Harnessing the Treaty Power in Support of Environmental Regulation of Activities That Don't "Substantially Affect Interstate Commerce"

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ARTICLE

HARNESSING THE TREATY POWER IN SUPPORT OF ENVIRONMENTAL REGULATION OF ACTIVITIES THAT DON'T "SUBSTANTIALLY AFFECT INTERSTATE COMMERCE": RECOGNIZING THE REALITIES OF THE NEW FEDERALISM

*Katrina L. Fischer**

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I. INTRODUCTION

The Supreme Court issued an abrupt and miserly delineation of the scope of Congress' Article I, Section 8 power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"[1] in *Lopez v. United States*[2] and *United States v. Morrison*.[3] The extension of the Court's holdings in these decisions has not only led to the invalidation of a number of statutes that two decades ago would have rested safely within Article I,

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[1] U.S. CONST. art. I, § 8, cl. 3.

[2] Lopez v. United States, 514 U.S. 549 (1995) (holding that provisions of the Gun Free School Zone Act exceeded Congress' authority to regulate interstate commerce).

[3] United States v. Morrison, 529 U.S. 598 (2000) (holding that provisions of the Violence Against Women Act exceeded Congress' authority to regulate interstate commerce).

Section 8, but has fueled significant scholarly speculation about,[4] as well as lower court challenges to,[5] the continued constitutionality of a host of environmental statutes. A number of appellate courts have upheld constitutional challenges to statutes such as the Endangered Species Act (ESA),[6] the Comprehensive Environmental Resource Conservation Liability Act,[7] the Bald Eagle Protection Act,[8] and the Clean Water Act (CWA),[9] and strong arguments have been constructed tracing the connection between various modes of environmental regulation and interstate commerce.[10]

However, the Supreme Court, post-*Lopez*, has not yet directly addressed whether an existing environmental statute is a valid exercise of Congress' Commerce Clause authority. Recently, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*), the Court discussed, but declined to directly hold upon, whether extending the term "navigable waters" in the CWA to cover isolated, intrastate waters would be a valid assertion of Congress' power under the Commerce Clause, warning:

> These arguments [that the Corps can regulate isolated, intrastate waters] raise significant constitutional questions. For example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam*, focus upon the fact that the regulated activity is petitioner's municipal landfill, which is 'plainly of a commercial nature.' . . . These are significant

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[4] *See, e.g.*, Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetlands Regulation*, 29 ENVTL. L. 1 (1999); J. Blanding Holman, IV, Note, *After* United States v. Lopez*: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L.J. 139 (1996); Lisa Wilson, Note, *Substantial Effect under* Lopez*: Using a Cumulative Impact Analysis for Environmental Regulations*, 11 TUL. ENVTL. L. J. 479 (1998).

[5] *See, e.g.*, United States v. Romano, 929 F. Supp. 502 (D. Mass. 1996) (alleging that the Lacey Act Amendments of 1981 are unconstitutional).

[6] Nat'l Ass'n of Homebuilders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997).

[7] United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997).

[8] United States v. Bramble, 103 F.3d 1475 (9th Cir. 1996) (en banc) (upholding a conviction under the Bald Eagle Protection Act).

[9] Solid Waste Agency, Inc. v. United States Army Corps of Eng'rs, 191 F.3d 845 (7th Cir. 1999), *rev'd in part by*, 531 U.S. 159 (2001).

[10] *Supra* note 4.

> constitutional questions raised by respondents' application of their regulations . . . .[11]

These statements, while technically dicta, sound an ominous tone, especially when considered along with the fact that the Supreme Court's statutory construction of the term "navigable waters" in the CWA was expressly guided by an understanding that the bounds of the CWA were initially indexed to interstate commercial endeavors and the transport of goods.[12]

In addition, not all of the lower court decisions applying a *Lopez* analysis to environmental statutes have held these statutes to be constitutional. In *United States v. Wilson*, the Fourth Circuit, touching on the constitutional question that the Supreme Court avoided in *SWANCC*, held that "33 C.F.R. § 328.3(a)(3) (1993) (defining waters of the United States to include those waters whose degradation 'could affect' interstate commerce) is unauthorized by the Clean Water Act *as limited by the Commerce Clause* and therefore is invalid."[13] Because "Congress has used the commerce power as the basis for regulating air and water pollution, hazardous waste disposal, and a host of other environmental problems,"[14] this state of uncertainty about the bounds of the commerce power is troubling.

Although environmental statutes and regulations rarely address commerce directly[15] and environmental regulation is largely a product of statutory construction, there is no real concern that the entire environmental statutory structure is fissured with constitutional infirmity. *Lopez* and *Morrison* have made clear that the causal chain between a regulated activity and interstate commerce cannot be so attenuated as to destroy "a distinction between what is truly national and what is truly local;"[16] yet, there does not appear to be any doubt, as yet expressed, that the causal link between activities such as the regulation of surface waters physi-

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[11] 531 U.S. 159, 173-74 (2001) (citation omitted).

[12] *Id.* at 172 ("The term 'navigable' had at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.").

[13] 133 F.3d 251, 253-254 (1997) (emphasis added).

[14] Daniel A. Farber, *The Allocation of Government Authority: Environmental Federalism in a Global Economy*, 83 VA. L. REV. 1283, 1311 (1997).

[15] While portions of statutes, such as the ESA or Migratory Bird Treaty Act that bar trade in certain animal parts or regulate the hunting of various bird species, have an easily identifiable commercial component, other provisions of these statutes and of environmental statutes generally, such as provisions providing for habitat protection, do not.

[16] *Lopez*, 514 U.S. at 567-68.

cally connected to navigable waters and the registration of pesticides and interstate commerce is sufficiently close to satisfy the *Lopez-Morrison* standard.

There are, however, two potential impacts of the *Lopez-Morrison* analysis on the capacity of government to undertake environmental governance. First, existing regulatory regimes may be threatened by a general recognition that specific portions of certain environmental statutes, such as Section 9 of the ESA[17] and the scope of "navigable waters" under the CWA,[18] are vulnerable to invalidation.[19] Second, and arguably more serious, the *Lopez-Morrison* analysis may stunt the future development of environmental governance by fostering a narrowly focused parochialism in future environmental statutes and regulatory interpretations.[20] For example, although it is now widely recognized that the protection of habitat on private lands may be the single most important variable in protecting endangered species,[21] it is hard to imagine that the present day interpretation of the scope of Section 9 of the ESA would have been arrived at under the shadow of the *Lopez-Morrison* holdings. Recall that the language of the ESA makes it illegal for anyone, including private individuals on private land, to "take" a species, that the U.S. Fish and Wildlife Service interpreted "take" to include "harm," and that subsequent court cases upheld the proposition that "harm" could include habitat modification.[22]

Many environmental scholars anticipate that we are entering an age (sometimes called the "next generation" of environmental regulation) in which new scientific understandings and technological capacity will render possible regulatory approaches that are

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[17] 16 U.S.C. § 1538 (1994).

[18] 33 U.S.C. § 1362 (1994).

[19] *See supra* note 4 and accompanying text.

[20] Of note, this Article by no means proceeds from the premise that federal regulation, as opposed to state or local regulation, is preferable. As Henry N. Butler & Jonathan R. Macey have explained in their piece, *Externalities and The Case for Reallocating Environmental Regulatory Authority*, 23 YALE L & POL'Y REV. 23 (1996), different levels of government may be better suited to address different types of environmental concerns. The goal driving this Article is merely to preserve a full menu of regulatory options, including federal regulation where appropriate, so as to retain the flexibility to address environmental concerns in the most effective, yet least burdensome, way. As new technology makes cross-jurisdictional ecological connections more transparent, cross-jurisdictional coordination may ultimately serve to prevent the concentration of the burden of addressing environmental issues that now sometimes falls to narrowly defined regulated communities merely because the impacts that they generate are more readily measured.

[21] Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 278, 296-99 (1993).

[22] Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687 (1995).

increasingly indexed to individual, often intrastate, behavior.[23] Ecological connections, such as the impact of the emissions from one individual car's tailpipe on air quality, will become clearer. The menu of regulatory options should not be artificially constrained by requiring that these ecological connections be translated into interstate commerce connections for purposes of constitutional justification.

It should be noted that recognition of the poor fit between effective environmental governance and a constitutional structure premised on federal regulation of interstate trade presages the recent constriction of the Commerce Clause power. The inherent tension that exists between promoting trade and allowing states to regulate the environment has led many scholars to conclude that the constitutional structure frustrates environmental regulation. This tension is created by a constitutional structure based in a federal power to protect unfettered trade between the states.[24] In the case that best demonstrates this tension, *Philadelphia v. New Jersey*, the Supreme Court held that New Jersey could not constitutionally prohibit the importation of waste from other states for disposal in New Jersey because to do so would impermissibly constrain interstate trade.[25] On a more general note, it is widely recognized that when attempts are made to view environmental goods through a commercial lens by assigning to them a price, resultant distortions tend to systematically undervalue environmental goods.[26]

Thus, articulation of an alternative constitutional ground in which to base the federal power to regulate the environment may be necessary to not only preserve portions of existing environmental statutes but also to ensure that future approaches to environmental governance are not unnecessarily constrained. The expressly non-commercial nature of most environmental regulation makes the need for an alternative constitutional ground a distinct concern in the environmental realm. However, it is not just an

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23 Daniel C. Esty, *Next Generation Environmental Law: A Response to Richard Stewart*, 29 CAP. U. L. REV. 183, 193-202 (2001).

24 *See, e.g.*, Farber, *supra* note 14, at 1286-1290. *See also* Daniel C. Esty & Damien Geradin, *Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements*, 21 HARV. ENVTL. L. REV. 265, 281-84 (1997); Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2399-2402 (1996).

25 437 U.S. 617 (1978).

26 DAVID W. PEARCE & R. KERRY TURNER, ECONOMICS OF NATURAL RESOURCES AND THE ENVIRONMENT 141-158 (1990) (attempting to determine the amount that consumers would pay for hard-to-value environmental goods).

"environmental" issue. In the wake of *Lopez* and *Morrison*, many outside of the environmental field have recognized the potential utility of an alternative constitutional grounding for the exercise of federal power. And for many, attention has focused on the treaty power.

Article II, Section 2, of the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties."[27] Article I, Section 8 provides that Congress may make "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States."[28] Together, and as interpreted in the seminal case *Missouri v. Holland*,[29] these powers give rise to the treaty power and ostensibly allow Congress, in conjunction with the President, to enact statutes that give effect to treaties.

These powers are generally recognized to allow Congress to enact a statute that would otherwise exceed the scope of Congress' enumerated powers:

> By Article II, Section 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government.[30]

The treaty power may not be used to cede the territory of any state[31] or violate specific constitutional provisions, such as those contained in the Bill of Rights,[32] but its scope is otherwise without clear limit. As one scholar has observed, "[a]lthough the treaty power is understood as being subject to the individual rights protections of the Constitution, and perhaps also to the separation of powers restrictions, treaties and executive agreements are *not* thought to be limited either by subject matter or by the Tenth Amendment's reservation of power to the states."[33] Historical

27 U.S. CONST. art. II, § 2, cl. 2.
28 U.S. CONST. art. I, § 8, cl. 18.
29 Missouri v. Holland, 252 U.S. 416, 432 (1920).
30 *Id.*
31 Geofroy v. Riggs, 133 U.S. 258, 266-267 (1890).
32 Reid v. Covert, 354 U.S. 1, 16 (1957).
33 Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 393 (1998) [hereinafter *Treaty Power Part I*].

efforts to rein in the scope of the treaty power have been expressly rejected. The failure of Senator Bricker's proposed constitutional amendment to narrow the treaty power to existing spheres of legislative power may be significant for defining in the negative the potential scope of the treaty power.[34]

Given the seemingly boundless scope of the treaty power, it is no surprise that there are attempts from many quarters to ground assertions of federal power rendered questionable and/or infirm under *Lopez*, *Morrison* and other federalism decisions in the treaty power instead. The treaty power has been invoked as a potential source for "overcom[ing] federalism restraints on domestic lawmaking" in a variety of contexts, including those with regard to human rights standards, criminal law and punishment, commerce and trade, and the commandeering of state governments.[35] More specifically, it has been argued that the treaty power provides constitutional authority for Congress to enact statutes such as the Religious Freedom Restoration Act[36] and the Violence Against Women Act[37] where the Fourteenth Amendment or the Commerce Clause do not. It has even been suggested that human rights treaties may compel the United States to maintain affirmative action programs.[38]

The treaty power has likewise been postulated to provide support for various provisions of environmental statutes, the constitutionality of which has come into doubt after *Lopez* and *Morrison.* Although the Supreme Court did not reach the issue, commentators on the *SWANCC* decision have suggested that the treaty power provides a ground independent of the Commerce Clause for upholding the constitutionality of the CWA's reach to include isolated, intrastate water bodies. Gavin R. Villareal and Omar N.

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34 Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

35 Bradley, *Treaty Power Part I, supra* note 33, at 402-409.

36 Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 49-53 (1997) (arguing that RFRA can be upheld as a valid implementation of the International Covenant on Civil and Political Rights even if it exceeds domestic lawmaking authority); Jeri Nazary Sute, *Reviving RFRA: Congressional Use of Treaty-Implementing Powers to Protect Religious Exercise Rights*, 12 EMORY INT'L L. REV. 1535, 1535-38 (1998).

37 Brief of Amici Curiae on Behalf of International Law Scholars and Human Rights Experts in Support of Petitioners at 28-30, United States v. Morrison, 529 U.S. 598 (2000) (Nos. 99-0005, 99-00029).

38 Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423 (1997); Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 MICH. J. INT'L L. 659 (1997).

White have evaluated (in separate articles) the possibility of employing the treaty power to support the ESA.[39]

However, none of the discussions about using the treaty power to support environmental legislation have confronted the full import of the Supreme Court's recent federalism decisions. The increasingly narrow conception of the scope of Congress' enumerated power to regulate interstate commerce in *Lopez* and *Morrison* is but one aspect of a revived notion of judicial competence (indeed duty) to enforce the boundary between spheres of state and federal authority.

In addition to its Commerce Clause decisions, the Supreme Court has recently asserted limits on "cooperative federalism" through the development of a robust anti-commandeering jurisprudence,[40] articulated increasingly strong Eleventh Amendment protections for the states,[41] narrowed the scope of Congress' powers under Section 5 of the Fourteenth Amendment,[42] and imposed clear statement rules of statutory construction where federalism boundaries are approached.[43] Thus, the *Lopez* and *Morrison* decisions exist not in a vacuum, but as part of a broader theory of federalism adopted by the Supreme Court that emphasizes both the benefits of strong state governments (including accountability, limited government, participation benefits, experimentation, diversity, and providing a check on the federal government's power) and the need for judicial enforcement of federalism boundaries to ensure that the benefits thereof are achieved.[44]

In light of this background, it seems short-sighted to posit that a treaty power as broad-sweeping as that described above can be unproblematically substituted for the commerce power. Indeed, as new focus has turned to the treaty power as an alternate source of constitutional authority, an entire literature has developed discussing the historical scope of the treaty power and how it will and should be defined given the Supreme Court's new federalism juris-

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[39] Stephen M. Johnson, *Federal Regulation of Isolated Wetlands After* SWANCC, 31 ELR 10669 (June, 2001); Gavin R. Villareal, *Note: One Leg to Stand On: The Treaty Power and Congressional Authority for the Endangered Species Act After* United States v. Lopez, 76 TEX. L. REV. 1125 (1998); Omar N. White, *The Endangered Species Act's Precarious Perch: A Constitutional Analysis Under the Commerce Clause and the Treaty Power*, 27 ECOLOGY L.Q. 215 (2000).

[40] *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997).

[41] *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe v. Florida, 517 U.S. 44 (1996).

[42] *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

[43] Gregory v. Ashcroft, 501 U.S. 452 (1991).

[44] *Id.* at 460-62.

prudence.[45] As new efforts to situate congressional power in the Treaty Clause proceed, the question appears not to be *whether*, upon closer reexamination, the treaty power will be reconceptualized and cabined through limiting principles, but *how* the treaty power will be recast in a manner consistent with the Supreme Court's revitalized approach to federalism.

Herein lies a challenge and an opportunity. While attempts to advance a strong and relatively unlimited theory of the treaty power in order to rehabilitate invalidated or threatened portions of environmental statutes might on its face seems to be in the best interest of advancing the constitutional bases for environmental regulation (proceeding under the assumption that the broader the cast of the treaty power, the more activities that may be regulated pursuant to it), ultimately such a strategy is likely to be founded upon the Court's revived approach to federalism. The broader the scope of the treaty power that is argued for, the more likely that the Court will find that such a conception of the treaty power violates the principles of federalism and the more likely that the Court will search for and impose limiting principles on the treaty power. These Court-adduced limiting principles may or may not be hospitable to the use of the treaty power for environmental regulation.

Alternatively, a more nuanced litigation strategy might be to anticipate that an unbounded treaty power is irreconcilable with the Court's theory of federalism, and offer instead a framework for application of the treaty power that is limited enough to assuage federalism concerns, but still tailored to accommodate future application in the environmental realm. In essence, by arguing for a

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[45] *See* Robert Anderson IV, *"Ascertained in a Different Way": The Treaty Power at the Crossroads of Contract, Compact, and Constitution*, 69 GEO. WASH. L. REV. 189 (2001); Bradley, *Treaty Power Part I, supra* note 33; Curtis A. Bradley, *Correspondence: The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000) [hereinafter *Treaty Power Part II*]; Harvard Law Review Association, Note, *Restructuring the Modern Treaty Power*, 114 HARV. L. REV. 2478 (2001) [hereinafter Note, *Restructuring the Treaty Power*]; Thomas Healy, Note, *Is Missouri v. Holland Still Good Law?*, 98 COLUM. L. REV. 1726 (1998); Virginia H. Johnson, *Application of the Rational Basis Test to Treaty-Implementing Legislation: The Need for a More Stringent Standard of Review*, 23 CARDOZO L. REV. 347, 366-67 (2001) (proposing that higher scrutiny be applied to treaty-implementing legislation and noting that "in light of modern federalism jurisprudence and the Executive's sustained usage of RUDs, it is not unreasonable to ask whether federal courts will—or should—continue to interpret the Necessary and Proper Clause so liberally in evaluating the constitutional validity of treaty-implementing legislation.") [hereinafter *Application of the Rational Basis Test*]; Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003) (arguing for the adoption of a treaty-compact device to assuage federalism concerns in the treaty-making realm); Carlos Manuel Vazquez, *Part II:* Breard, Printz, *and the Treaty Power*, 70 U. COLO. L. REV. 1317 (1999).

more limited conception of the treaty power, it may be possible to gain judicial acceptance of a view of the power that, while limited, still has the potential to support many forms of domestic environmental regulation.

This Article proposes a framework for applying the treaty power that would accomplish these goals. This framework would be applied where the President has signed, and Congress has ratified, a treaty and Congress has enacted domestic legislation in some way satisfying the goals or requirements of the treaty. Under this framework, the inquiry into whether the treaty power could appropriately be used by Congress in excess of its Article I, Commerce Clause powers would be indexed to the strength of (1) the contract-like nexus between the necessarily reciprocal requirements and the goals of the treaty and the specific statutory provisions enacted, and (2) the visibly apparent connection between the treaty and the legislation. Prong one of this framework, while greatly narrowing the extent to which the treaty power could be used to exceed Congress' Commerce Clause authority to effect domestic regulation, would still leave room within the treaty power for the achievement of environmental gains because of the unique interconnectedness of many local and international environmental challenges. Prong two of this framework, by respecting prior expectations about the reach of environmental treaties and statues, avoids creating new reluctance to entering into environmental treaties.

Part II of this Article discusses the reach of the treaty power and reviews various conceptions of how the Supreme Court's recent federalism decisions have limited this power. Part III discusses how a framework for application of the treaty power can be designed that satisfies federalism concerns while still reserving room for use of the treaty power to achieve environmental benefits and supports this proposed framework by looking to the European experience in balancing international treaties and domestic regulation. Part IV analyzes portions of the ESA and the CWA that may be vulnerable to *Lopez-Morrison* challenge and demonstrates how attempts to rehabilitate provisions of these acts would fare under the proposed treaty power framework.

II: THE SCOPE OF THE TREATY POWER EIGHTY YEARS AFTER *MISSOURI V. HOLLAND*—ILL UNDERSTOOD AND RIPE FOR NARROWING

In the words of one scholar, the "appropriate scope" of the treaty power is a "constitutional conundrum."[46] Another scholar has noted that "those who argue for limits on the Treaty Power must generally extrapolate legal principles from ambiguous treaty power dicta."[47] And in *Missouri v. Holland* itself, Justice Holmes noted cryptically that although "[w]e do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way."[48]

Many who advocate the use of the treaty power as an alternative to the commerce power premise their analysis on a treaty power with broad and virtually unlimited scope. Unfortunately, this approach ignores both historical uncertainty about the bounds of the treaty power as well as new legal scholarship questioning the continued vitality of strong versions of the treaty power in light of the Supreme Court's recent federalism jurisprudence. As such, this Part suggests that merely adverting to the treaty power as an alternative to the commerce power may be fruitless because, as with the commerce power, the treaty power is itself the subject of critical reexamination.

Perhaps the best way to understand and summarize the current debate about the proper scope of the treaty power is to describe the "nationalist view" (or broad view) of the treaty power,[49] discuss historical understandings of its scope, and analyze how that scope may be limited by the Supreme Court's recent federalism jurisprudence.

Under the nationalist view, "the national government has the constitutional power to enter into treaties, and thereby create binding national law by virtue of the Supremacy Clause, without regard to either subject matter or federalism limitations."[50] This is the understanding of the scope of the treaty power adopted by the Restatement (Third) of the Foreign Relations Law of the United States, which provides that "subject to constitutional limitations [express constitutional prohibitions] . . . the treaty power may be

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[46] Note, *Restructuring the Treaty Power*, *supra* note 45, at 2479.

[47] Anderson, *supra* note 45, at 190.

[48] Missouri v. Holland, 252 U.S. 416, 433 (1920).

[49] I borrow this term from Curtis A. Bradley. *See generally* Bradley, *Treaty Power Part I*, *supra* note 33; Bradley, *Treaty Power Part II*, *supra* note 45.

[50] Bradley, *Treaty Power II*, *supra* note 45, at 98.

used to make international agreements of the United States on any subject."[51]

Numerous scholars have defended this broad conception of the treaty power, primarily on the ground that to define the treaty power in a more limited fashion would undermine the ability of the President to conduct a coherent and meaningful foreign policy agenda on behalf of the United States, as well as on the basis of a "strong" reading of *Missouri v. Holland*.[52] Most importantly for the purposes of this Article, this is the vision of the treaty power presumed to control by those who have argued that the treaty power provides an additional and independent source of constitutional justification for portions of various environmental laws rendered suspect under the *Lopez-Morrison* analysis.[53]

The support for this view of the treaty power is discussed extensively elsewhere, and there is no need to repeat it here. What does warrant discussion, and indeed is the premise upon which this Article is based, is the historical uncertainty about the scope of the treaty power and the voluble and growing critique of the nationalist view of the treaty power. There are two principal approaches for adducing limitations on the treaty power—a subject matter limitation and an external federalism limitation. The subject matter limitation, with long historical roots, casts doubt on whether the nationalist view of the treaty power is properly considered blackletter law. The external federalism limitation posits that the Supreme Court's recent federalism decisions have imposed new external federalism limitations on the treaty power.

If encumbered with a subject matter limitation, the treaty power would be limited to certain, prescribed topics deemed appropriate to constitute the basis of a treaty. Often, these topics are those that

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[51] Restatement (Third) Of The Foreign Relations Law Of The United States § 303 cmt. b (1987).

[52] *See, e.g.*, David M. Golove, Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power, 98 Mich. L. Rev. 1075 (2000); Healy, *supra* note 45.

[53] White, *supra* note 39, at 225 ("The conventional view is that the Tenth Amendment's reservation of the states' rights does not limit the treaty power. . . . [Therefore] international treaties arguably convey power to Congress beyond that which would exist absent these international environmental obligations."); Villareal, *supra* note 39, at 1153 ("[U]nder the treaty power, the President and sixty-six senators can approve a treaty which the courts are bound to interpret as the supreme law of the land, subject only to limitations imposed elsewhere in the Constitution. . . . Although there were some early attempts to claim that the states should be exempted from the aegis of approved treaty law under the Tenth Amendment, the Supreme Court has definitively held that treaties are considered to be superior to the laws and constitutionals of the individual states.") (citing Hauenstein v. Lynham, 100 U.S. (10 Otto) 483, 488-90 (1879)).

are of international concern, thereby barring use of the treaty power to achieve domestic, internal regulation. A subject matter limitation was included in the 1965 Restatement (Second) of the Foreign Relations Law of the United States, which provided that the treaty power was limited to matters "of international concern" and "must relate to the external concerns of the nation as distinguished from matters of a purely internal nature."[54] Prior to this codification-of-sorts, there is evidence that the Founders, the Court in *Missouri v. Holland*, and the academic community, all presumed that a subject matter limitation applied.[55]

Although the nationalist view espoused in the Restatement (Third) is generally accepted, it is often criticized as "adopted without authority," and perhaps at odds with contrary historical understandings of the scope of the treaty power.[56] Instead, resting on a well-established and long history of case law and theory, the nationalist view of the treaty power as unconstrained by subject matter limitation can be seen as a relatively recent construct, and perhaps, as many have argued, the result of a desire in the international law community to facilitate the adoption and enforcement of international human rights agreements.[57]

It was not until 1987 that the subject matter limitation was officially refuted in the Restatement: "contrary to what was once suggested, the Constitution does not require that an international agreement deal only with 'matters of international concern.'"[58] As one scholar has observed:

> Human rights treaties are in fact a likely (and understandable) reason for the Restatement (Third)'s rejection of a subject matter limitation. These treaties regulate the relationship between nations and their own citizens, often on subjects that have historically been considered matters of local concern. Moreover, they are not reciprocal in the traditional sense, in that the incentives to comply with them are not substantially dependent on other nations' compliance.[59]

[54] RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 117(1)(a) & cmt. b (1965).

[55] Bradley, *Treaty Power Part I, supra* note 33, at 429.

[56] *Id.* at 433.

[57] Bradley, *Treaty Power Part II, supra* note 45, at 108.

[58] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmt. c (1987).

[59] Bradley, *Treaty Power Part II, supra* note 45, at 108.

Although *Missouri v. Holland* and subsequent cases have expressly held that the treaty power is not subject to Tenth Amendment limitations,[60] these holdings may be called into question by the Supreme Court's new federalism jurisprudence when viewed in light of developments in international law.

A variety of recent proposals have argued that certain federalism-protective limitations should or do adhere to the treaty power. Professor Curtis A. Bradley has proposed and strongly defended the idea that the treaty power should be subject to "the same federalism restrictions that apply to Congress' legislative power," such that the treaty power "could not be used to resurrect legislation determined by the Supreme Court to be beyond Congress' legislative powers."[61] Another author posits that "[t]he most justifiable way to accommodate federalism concerns would be to impose the state sovereignty limits recently recognized by the Court on agreements approved under the congressional-executive procedure, but not on treaties passed by a Senate supermajority pursuant to the treaty power."[62] Robert Anderson argues that "treaties should have domestic legislative effect only to the extent necessary to secure contractual ends" because the treaty power is limited by the good-faith bargaining between parties.[63] Under yet another theory, the treaty power would be limited to the legislative power to define and punish offenses against the law of nations.[64] Others propose heightening the standard of review applied to treaty-implementing legislation, examining whether the legislation is "proper" within an existing enumerated congressional power,[65] or achieving treaty aims through a novel treaty-compact device that would require greater state approval and involvement.[66]

For purposes of this Article, it is not necessary to evaluate the relative merits of these proposals because they are referenced for three distinct purposes independent of their individual persuasiveness. First, through sheer quantity and temporal proximity, they demonstrate the general point that as scholars undertake critical examinations of the treaty power, they will generally agree that *some* type of limitation on the treaty power is imminent and/or

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

61 Bradley, *Treaty Power Part I*, *supra* note 33, at 456.

62 Note: *Restructuring the Treaty Power*, *supra* note 45, at 2495.

63 Anderson, *supra* note 45, at 191.

64 Michael Morley, *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 YALE L. J. 109 (2002).

65 Johnson, *supra* note 45, at 383-85.

66 Swaine, *supra* note 45, at 499-524.

warranted, although they may disagree as to the particular form that that limitation will or should take. Second, these pieces forcefully develop the historical, practical, and doctrinal developments that explain *why* articulation of a limitation on the nationalist view of the treaty power is both inevitable and advisable. Third, these pieces set forth a *menu of specific theoretical options* that may resolve some of the federalism tensions created by the current nationalist view of the treaty power.

This Part will focus on points one and two by discussing the various factors already identified as driving the development of a limitation on the treaty power, adducing some additional driving forces, and generally supporting the proposition that it is more likely than not that the nationalist view of the treaty power will, upon continued examination, be re-conceived to include some type of limitation. Part III will then return to the various options suggested with regard to the type of limitation that might be adduced and will put forth a proposed treaty power framework that, while sufficiently limited to counter federalism tensions, may still be useful in the environmental context.

Several factors indicate that articulation of a limitation on the nationalist view of the treaty power is forthcoming. These include historical ambiguity as to the meaning of "treaty" and the scope of the treaty power, the changing nature of treaty-making and treaty content, the potential unprincipled extension of the treaty power for purposes of "legislative aggrandizement,"[67] and the Supreme Court's revived view of a judicially-enforced federalism. As these factors have been discussed in detail by many of those offering theories for limiting the treaty power,[68] they are summarized here to demonstrate why they are sufficiently persuasive to guide strategies for approaching the treaty power from an environmental perspective. Although it could certainly be argued that the Restatement (Third) expressly disavows a subject matter limitation on the treaty power and is a weighty authority in this regard, and that *Missouri v. Holland's* rejection of Tenth Amendment limitations on the treaty power is still good law, these arguments seem unpersuasive, especially when considered within the entire context of international law-making and Supreme Court jurisprudence.

The Federalist No. 75 explains that laws "prescribe rules for the regulation of the society" and are "rules prescribed by the sover-

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[67] Anderson, *supra* note 45, at 206.

[68] *See, e.g.*, Bradley, *Treaty Power Part I, supra* note 33.

eign to the subject" and treaties "are contracts with foreign nations, which have the force of law, but derive it from the obligations of good faith" and are "agreements between sovereign and sovereign."[69] This tidy distinction between domestic laws and international treaties, however, no longer provides meaningful guidance as international treaties are increasingly drafted in a legislative manner and demand the regulation of domestic activities in a particularly legislative way.

Not only are treaties now negotiated between numerous nations at large, convention-like conferences, but they "resemble and are designed to operate as international 'legislation' binding on much of the world . . . [and] now regulate matters that countries traditionally have considered internal, [creating] an increasing likelihood of overlap, and conflict, with domestic law."[70] As a result, "treaty law today regulates the relations between nations and their citizens, it covers many of the same subjects as domestic law, and it is even made in a kind of legislative way, through mechanisms such as multilateral drafting conferences."[71]

In addition to and compounding these trends is the fact that the basic structure of treaty negotiation and satisfaction, or compliance, has arguably shifted from a contract-like framework to a more aspirational one.[72] Specifically, many treaties now seem focused on stimulating or encouraging progress, both at home and abroad, in an effort to further progressive international norms, as opposed to trading concrete, bounded concessions. Perhaps the best example of this is human rights treaties, which are often driven by countries with markedly few human rights problems. One scholar has disputed the idea that such agreements are properly termed "treaties," arguing instead that "international agreements [with] the purpose of harmonizing laws among different nations or . . . for the purpose of making new domestic law, and not for the purpose of inducing the other party's performance . . . are legislative agreements, which qualify as 'agreements,' or possibly 'compacts,' but not as 'treaties.'"[73]

The changed nature of treaty-making, treaty purposes, and treaty content is significant because external, international expan-

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[69] THE FEDERALIST NO. 75 (Alexander Hamilton) *quoted in* Note: *Restructuring the Treaty Power*, *supra* note 45, at 2482.

[70] Bradley, *Treaty Power Part I*, *supra* note 33, at 396-97.

[71] *Id.* at 456.

[72] *See generally* Anderson, *supra* note 45.

[73] Anderson, *supra* note 45, at 220.

sion of the notion of what and how treaties can and should reach is arguably without a sufficient internal, constitutional check.[74] Congress exercises the treaty power under the Necessary and Proper Clause, which provides that "Congress shall have the power . . . [t]o make all laws necessary and proper for carrying into [e]xecution" the powers of the government.[75] A statute passed as a "necessary and proper" method for enacting a treaty need only be rationally related to achieving a constitutionally permissible end.[76]

Thus, where Congress relies on the treaty power, Congress' action must only bear a rational connection to the treaty that serves as the basis for its authority. Where treaties are designed to achieve broad, aspirational goals instead of to trade concrete reciprocal obligations, the resulting legislative authority granted to Congress may be extremely broad.[77]

> Every treaty made by the President and Senate that goes beyond Congress' legislative powers expands the field of "Necessary and Proper" federal legislative power. Specifically, treaty-makers need only conclude a vague, generalized principle of treaty intent, and the Necessary and Proper Clause would empower Congress to engage in virtually unlimited lawmaking activities under that treaty. As a result, the President and Senate, if they have a legislative agenda beyond the legislative powers of Congress, could bind the United States by treaty merely to federalize a field of legislation. These incentives encourage the President and Senate to 'sell' national sovereignty, both of the federal government and of the states, to accomplish a shift of power to the federal level.[78]

This potential for legislative aggrandizement using the treaty power almost certainly runs afoul of the Supreme Court's current protective posture toward preserving boundaries of state sovereignty from federal incursion. The worst-case-scenario, slippery slope prognostication about the dangers of an unchecked treaty power sounds almost identical to the slippery slope argument driving the Supreme Court's search for a limiting principle in its Com-

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[74] *But see* Morley, *The Law of Nations*, *supra* note 64.

[75] U.S. CONST. art. I, § 8, cl. 18.

[76] United States v. Lue, 134 F.3d 79, 84 (1998) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).

[77] Johnson, *supra* note 45, at 371 (describing the possible use of the treaty power as a "legislative backdoor through which Congress can regulate matters beyond the scope of its enumerated powers.").

[78] Anderson, *supra* note 45, at 233.

merce Clause jurisprudence. In both *Lopez* and *Morrison*, the Court emphasized that failure to articulate limiting principles to guide Commerce Clause analysis would result in use of the Commerce Clause to justify all types of federal regulation, thereby vitiating the concept of enumerated federal powers.[79] Instead of applying the permissive rational basis test, the Court sought to restrain the potential for purposeful legislative aggrandizement, such as that articulated above, by looking within statutes for a jurisdictional element and examining the legislative record and the statute for meaningful congressional findings.

For example, by encouraging incorporation into statutes of a jurisdictional element that would "ensure, through case-by-case inquiry, that [the regulated conduct] . . . affects interstate commerce," the Court seemed to be advocating a structure of statute-drafting that would preserve the opportunity for judicial review of the state-federal boundary. Those subject to regulation pursuant to a statute with a jurisdictional element could argue that their conduct was not within the scope of the statute because it did not substantially affect interstate commerce.[80] The jurisdictional element would, therefore, ensure a method of continued judicial policing of applications of federal statutes to protect against inappropriate regulatory expansion.

Similarly, the Court rejected "soft" versions of the rational basis test, whereby the Court would uphold statutes as long as it could conceive of a rational connection between the regulated activity and interstate commerce, in favor of convincing and specific congressional findings sufficient to "enable . . . [the court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye."[81] This shift by the Court seemed to ensure judicial policing of federalism boundaries by no longer deferring certain conclusory language employed by Congress (i.e., an unelaborated statement that a statute would affect interstate commerce). These requirements seem expressly designed to prevent the same type of legislative aggrandizement that unlimited use of the treaty power would render possible and indicate that, in addition to a general concern with preservation of federalist boundaries, the Court is specifically concerned with *intentional* attempts by Congress to expand its reach.

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[79] United States v. Morrison, 529 U.S. 598, 615-16 (2000).

[80] *Id.* at 561.

[81] *Id.* at 563.

To attempt to circumvent the *Lopez* and *Morrison* decisions by avoiding the Commerce Clause entirely, then, ignores the reality that the federalist principles driving those decisions would have direct relevance to the Court's approach to the treaty power. An examination of the Court's decisions in the context of the Fourteenth and Eleventh Amendments, as well as the commandeering realm, indicates that the approach to federalism evinced therein is equally at odds with an unbounded treaty power. These cases not only parallel *Lopez* and *Morrison* in continuing the development of a court-protected, inviolate, and robust sphere of state sovereignty but expressly reject reasoning that has often been used to argue that the treaty power is subject to constitutional limitations sufficient to protect federalist principles.

Specifically, these cases challenge the utility of Senate approval as a mechanism for the protection of state interests.[82] It is generally accepted as historical fact that the apportionment of representation in the Senate (two Senators per state regardless of size) is the product of the Founders' concern with insuring that states of all sizes had sufficient influence in the federal scheme and was designed expressly to protect states' rights. Seminal works on federalist theory have often referenced the representation structure of the Senate as evidence of internal, constitutional protections of states' rights that render judicial enforcement of federalism principles largely unnecessary.[83] Present day defenders of strong versions of the treaty power almost invariably reference the two-thirds Senate vote required to ratify a treaty as a meaningful, and states' rights protective, limitation on the treaty power.[84]

On the other hand, many modern constitutional scholars, as well as those who argue for limits on the treaty power, have made persuasive arguments that the Senate's role as a body protective of states' rights has been greatly undermined by the passage of the

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[82] The New Federalism cases, by insisting on judicial enforcement of federalism boundaries, suggest strongly that the Court rejects the view that such boundaries are adequately protected by the political composition of Congress. *See generally* Alden v. Maine, 527 U.S. 706 (1999); Printz v. United States, 521 U.S. 898 (1997); City of Boerne v. Flores, 521 U.S. 507 (1997); Seminole Tribe v. Florida, 517 U.S. 44 (1996); Gregory v. Ashcroft, 501 U.S. 452 (1991).

[83] *See generally* HERBERT WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW: SELECTED ESSAYS (1961).

[84] *See, e.g.*, Vazquez, *supra* note 45, at 1339, n. 76 (asserting that treaty makers would "arguably be circumventing these limits [on the federal legislative power] if they concluded the treaty solely or primarily to evade the constitutional limits on the federal legislative power. If this is the nature of the circumvention claim, however, I think the requirement that treaties be approved by two-thirds of the Senate affords adequate protection.").

Seventeenth Amendment. These scholars claim that the direct election of Senators has transformed them from actors principally motivated to advance state interests into actors motivated by a more diverse set of interests, including those of national parties, the federal government generally, and interest groups.[85] Others have even argued that "there is no significant difference between the legal effect of a congressional-executive agreement [requiring a majority vote in the Senate] and the classical treaty approved by two-thirds of the Senate," thereby raising the possibility that the treaty power can be invoked with a two-thirds Senate vote and raising further questions as to the continuing states' rights protective role of Senate approval.[86]

More importantly, the Supreme Court has adopted a similar view of the limited capacity of the Senate to provide a meaningful structural protection of federalism boundaries. Not only does the Supreme Court's increasing willingness to judicially enforce the state-federal boundary implicitly indicate that it finds the Senate's structural role in doing so lacking, but the Supreme Court has discredited the argument that the Senate provides a meaningful state check to encroaching federalization by consistently holding that judicial enforcement of federalism boundaries is necessary.

When all of these various observations and arguments are presented together, a clear case is made that the expansive, nationalist view of the treaty power is unlikely to survive sustained analysis intact and will likely be cabined by some type of limiting principle. When presented with arguments that the treaty power justifies congressional power to act in an area outside of the bounds of the Commerce Clause and other enumerated powers, the Supreme Court will be forced to reexamine in a serious way, for the first time in nearly eighty years, an ill-defined, poorly understood constitutional doctrine (the nationalist view), the wholesale adoption of which could easily be argued to undermine the concept of enumerated powers so recently embraced by the Court in its Commerce Clause, Eleventh Amendment, Tenth Amendment, and anti-commandeering decisions. It only seems prudent to anticipate that instead of feeling inexorably bound by relatively moribund precedent, the Court will instead endeavor to assimilate the treaty power into the revived federalism that it has put forward with such frequency. And as the Court undertakes this

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[85] *See, e.g.*, Bradley, *Treaty Power Part I*, *supra* note 33, at 412.

[86] Bruce Ackerman and David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801, 805 (1995).

project, it would seem an advisable strategy to articulate theories of the treaty power that are consistent with the Supreme Court's view of enumerated powers and appropriate state/federal boundaries, yet provide support for environmental legislation.

III: Adducing a Limiting Principle—A Treaty Power Framework that Accommodates the Environment

It has been noted that "[a]ny suggestion that the treaty power authorizes only such treaties as would fall within the commerce power if enacted by Congress would be doctrinally implausible, as it would call into question the validity of treaties which, like the Vienna Convention, impose certain requirements regarding the treatment of aliens."[87] As noted above, however, some limitation on the treaty power seems inevitable. Those who have critiqued the nationalist view of the treaty power have also suggested various ideas about how the treaty power is, should or will be limited.[88] Taken together, these proposals provide a menu of specific theoretical options for shaping the treaty power to make it more consistent with federalism principles.

Borrowing piecemeal from these various options, it is possible to construct a treaty power framework that would likely avoid offending the Supreme Court's strand of federalism jurisprudence, yet work successfully to preserve use of the treaty power to justify domestic environmental regulation. Thus, not only will some existing statutes vulnerable to a *Lopez-Morrison* challenge be rehabilitated (by relying on the treaty power as opposed to commerce power grounds), but the constitutionality of environmental policy generally and global environmental policy specifically will no longer hinge upon Commerce Clause analysis.

The first prong of this treaty power framework would require a contract-like nexus between the necessarily reciprocal requirements and goals of the treaty and the specific statutory provisions enacted. The use of the terms "contract-like" and "necessarily reciprocal" is meant to capture two broad principles: first, that some type of action by both parties in accordance with treaty-created obligations is anticipated and, second, that cooperation by numerous parties is necessary to address the problem addressed by the treaty. This prong reflects the principle that the treaty power

[87] Vazquez, *supra* note 45, at 1339-1340.
[88] *See supra* note 45 and accompanying text.

be reserved for instances where a treaty is contractual in the sense that its object must be "to induce the performance of a desired contractual obligation by a party external to the United States," in order to better approximate original understandings of the definition of "treaty" and function as a subject-matter type limitation.[89] Additionally, this prong draws upon proposals to read a subject matter limitation into the treaty power by confining it to matters of international concern. By reserving use of the treaty power to coordinate action by two or more (international) sovereigns, this prong justifies domestic, internal regulation only to the extent necessary to fulfill an international obligation.

It should be noted, however, that neither the contract nor the international concern proposals are wholly incorporated into the treaty power framework. For example, the contract proposal specifies that "[t]reaties permit internal lawmaking because that legislative power is the necessary instrument for attaining contractual ends . . . [and] the change in internal law is necessary to secure the other party's valuable performance . . . Thus, the internal legislative effect of treaties turns on one simple consideration: whether the foreign party to the contract actually demanded the internal legislative action in exchange for its performance under the treaty."[90]

Use of the term "contract-like" to describe the first prong of the treaty power framework describes a loose need for and expectation of reciprocal action and is not meant to invoke the type of tight, contractual reciprocity focused on specific and individual tit-for-tat concessions set forth in the contract proposal. Similarly, although strong versions of the "international concern" subject matter limitation would have posited that the treaty power does not allow for regulation of subjects "which normally and appropriately were within the local jurisdiction of the States,"[91] the "necessarily reciprocal" descriptor may include agreements requiring internal regulation that is distinctly domestic in type and focus in order to achieve broader ends.

The second prong of the treaty power framework would require a visibly apparent connection between the treaty and the statute justified by this treaty. The terminology "visibly apparent connec-

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[89] Anderson, *supra* note 45, at 208.

[90] Anderson, *supra* note 45, at 212.

[91] Judge Charles Evans Hughes, Address at the Meeting of the American Society of International Law (1929), *in* 1929 Am. Socy. Intl. L. Proc. 194, 194-96, *quoted in* Bradley, *Treaty Power Part I*, *supra* note 33, at 429-30.

tion" is meant to convey the idea that there must be some official record indicating that Congress was motivated to achieve the goals of a specific treaty by enacting the given statute. Such a record could include contemporaneous legislative history, including floor statements, committee reports, "dear colleague" circulars, hearing testimony, and presidential signing statements, as well as statutory text. However, statements made by subsequent Congresses, or by the same Congress after passage of the statute by way of clarification, would not constitute a part of the record examined for purposes of considering whether there was a visibly apparent connection.[92]

This prong draws upon the proposal to index the appropriateness of using the treaty power to political process factors—i.e., whether the treaty was ratified by the Senate (thereby requiring a two-thirds vote in the Senate), or took the form of an executive-congressional agreement (thereby requiring only a majority vote of both Houses). It focuses not just on political process from the perspective of vote count but seeks a more refined analysis by examining factors such as the transparency and relevance of the treaty power issue to the vote. This prong is also influenced by proposals, such as that set forth by Virginia Johnson in *Application of the Rational Basis Test*, to require a tighter "fit" than the rational basis test between a treaty and its implementing legislation.[93]

Thus, under the proposed treaty power framework, a court deciding whether the treaty power could justify congressional action outside of its enumerated power to regulate commerce would engage in a two-part inquiry: first, it would evaluate whether the treaty and statute subject matter are both reciprocal and necessary, then it would compare the statute and legislative history with the treaty to determine if a connection is present. This framework is useful, however, only if it can survive critical examination from a federalism angle and be of use from an environmental perspective. Therefore, the balance of this Part identifies ways in which the treaty power framework builds on preexisting doctrine, explains how the treaty power framework provides a sufficient limiting principle to the expansive, nationalist view of the treaty power and thereby satisfies federalism concerns, demonstrates how the treaty power framework is designed to take advantage of the particular

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92 This is, therefore, a departure from instances where courts have credited ex post congressional explanations of the meaning of prior legislation. *See, e.g.*, Mont. Wilderness Ass'n v. U.S.F.S., 655 F.2d 951 (9th Cir. 1981).

93 Johnson, *supra* note 45.

nature of environmental problems, and discusses external, comparative support from the European Union (EU) for adopting this type of approach.

The proposed treaty power framework does not depend solely on prudential justification. Both a close and narrow reading of *Missouri v. Holland* [94] and some examples of current "necessary and proper" case law support the two proposed prongs. Thus, the proposed framework does not challenge the status quo as much as refine it in a manner consistent with the Court's current federalist view of constitutional structure, thereby making it an attractive theory for court adoption.

The "visibly apparent connection" and the "necessarily reciprocal" prongs are both major driving rationales at work in *Missouri v. Holland.* They are aptly illustrated by a brief recitation of the sequence of events preceding the case and a review of the Court's decision, although the connection prong is adducible more through circumstance than overt discussion.

Indeed, it may be that the connection prong gained no express mention because it was manifest in the facts of the case. In 1913, Congress included in the appropriations bill of the Department of Agriculture a provision that regulated the hunting of various migratory bird species (which traveled regularly through Canada, Mexico, and numerous states) in order to protect the bird populations from decimation.[95] This provision was invalidated as exceeding Congress' power under the Commerce Clause in *United States v. Shauver*, which reasoned that "the national Constitution is an enabling instrument, and therefore Congress possesses only such powers as are expressly or by necessary implication granted by that instrument," and the Tenth Amendment therefore rendered the provision unconstitutional.[96] In response to this decision, the Migratory Bird Treaty was negotiated with Canada and a second act, the Migratory Bird Treaty Act, was passed pursuant to the Treaty.[97] It was this Act that the Supreme Court upheld as a valid exercise of the treaty power in *Missouri v. Holland.*

For purposes of present analysis, it is significant to recognize that these circumstances made the connection between the Act and the Treaty unmistakable. Not only did the text of the Act specifically state that it was aimed to "give effect to the convention between

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94 Missouri v. Holland, 252 U.S. 416 (1920).
95 37 Stat. 828, 847, c. 145 (1913).
96 United States v. Shauver, 214 F. 154, 156 (E.D. Ark. 1914).
97 Migratory Bird Treaty Act, Pub. L. No. 65-186, 40 Stat. 755 (1918).

the United States and Great Britain for the protection of migratory birds,"[98] but the Court, in reviewing the history of events, emphasized in its opinion that the Act was "entitled an act to give effect to the convention."[99] And it was this connection that drove the Court's conclusion that "there can be no dispute about the validity of the statute [implementing the treaty] under Article I, Section 8, as a necessary and proper means to execute the powers of the Government."[100] Thus, not only was a "visibly apparent connection" present in *Missouri v. Holland*, but it was incorporated inextricably into the case.

The "necessarily reciprocal" prong likewise finds support in *Missouri v. Holland.* As the following excerpt demonstrates, the Court's driving rationale in recognizing the federal government's power to encroach upon a subject matter traditionally regulated by state governments and wholly intrastate in regulatory scope was the fact that the nature of migratory bird preservation made international agreement necessary.

> It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. . . . Here a national interest of very nearly the first magnitude is involved. *It can be protected only by national action in concert with that of another power.* . . . But for the treaty and the statute there soon might be no birds for any powers to deal with.[101]

Here, federal intervention was justified where reciprocal action was necessary to achieve the purpose for which both the treaty and the act were conceived. As explained further:

> The essence of the Holland rule is that a treaty is appropriate where the whole is greater than the sum of the individual parts. The effect of Canada and the United States both protecting the birds is greater than the effect possible if Canada alone protected the birds plus the effect if the United States alone protected the birds. And, if the states alone regulated the killing of the birds, such regulation would have virtually

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98 *Id.*

99 Missouri v. Holland, 252 U.S. 416, 431 (1920).

100 *Id.* at 432.

101 *Id.* at 433-35 (citation omitted) (emphasis added).

> no effect, for if any one state, here Missouri, could opt out, it could individually frustrate the policy of the whole.[102]

Thus, the proposed treaty power framework can be seen as a crystallization or distillation of the most relevant factors at work in *Missouri v. Holland*, and acceptance of the framework would require only a recasting of prior readings of the decision, not a wholesale overturning of the decision subject to the heightened standard of stare decisis.

The "visibly apparent connection" prong also finds some precedential support in cases that have examined whether certain statutes are "necessary and proper" to the effectuation of certain treaties. The generic "necessary and proper" standard announced in *McCulloch v. Maryland* is permissive, requiring only (as noted previously) that a statute be rationally related to a constitutionally permissible end.[103] However, when examining whether implementing legislation supports the invocation of the treaty power, courts have sometimes required a relatively close nexus between the statute, the regulation, and the language of the treaty.

In *United States v. Lue*, for example, the Second Circuit held that the enactment of the Hostage Taking Act constituted a proper exercise of Congress' treaty power because it "tracks the language of the Convention [Against the Taking of Hostages] *in all material respects*."[104] Similarly, in *Palila v. Hawaii Department of Land and Natural Resources*, a federal district court upheld federal regulation of the Palila bird, an intrastate species, under the treaty power where the Migratory and Endangered Bird Treaty with Japan *specifically referenced* protection of the Palila bird, the ESA *specifically referenced* and enacted this portion of the treaty, and regulations promulgated under the ESA *specifically provided for* protection of the Palila species.[105] And in *Cerritos Gun Club v. Hall*, the Ninth Circuit held that the Washington Convention gave Congress the authority to invoke the treaty power to justify certain regulations regarding the appropriate season for the hunting of migratory birds because the Convention's text specified the regulation of "seasons," which the court argued could be interpreted to comprise both duration and scope (i.e., number of permits

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[102] Anderson, *supra* note 45, at 228. Anderson suggests this analysis for approaching what he terms "mixed-motivation" treaties through his contract theory lens. *Id.*

[103] 17 U.S. (4 Wheat.) 316 (1819).

[104] 134 F.3d 79, 84 (2d Cir. 1998) (emphasis added).

[105] 471 F.Supp. 985, 993 (D. Haw. 1979), *aff'd,* 639 F.2d 495 (9th Cir. 1981).

issued).[106] One scholar has observed that while "courts construe treaties liberally when interpreting whether regulations and legislation enacted in accord with their purposes are proper," some "courts have defined some restrictions for [the treaty power's] proper use. For instance, when legislation claims to be implementing a treaty, there must generally be some mention of that treaty in the legislative history of the act for the courts to uphold it."[107]

In the aforementioned cases, the reviewing courts essentially applied the "visibly apparent connection" prong by indexing the appropriateness of reliance on the treaty power to the textual connection between the statute and the underlying treaty. Although these cases do not arise from the Supreme Court, there is some indication that the Court might be receptive to a stricter approach to the "necessary and proper" analysis. Namely, the Court's receptivity to this view is perhaps indicated by dicta in *Printz v. United States.* where the majority referred to the Necessary and Proper Clause as "the last, best hope of those who defend *ultra vires* congressional action."[108]

The foregoing analyses demonstrate that there is, if not express doctrinal support, then at least implicit doctrinal amenability to understanding the treaty power in terms of the proposed treaty power framework.

The Supreme Court's recent federalism jurisprudence is another source of implicit doctrinal support for the proposed treaty power framework. This analysis imposes limits on application of the treaty power through a loose subject matter limitation (in the sense that only problems where international reciprocal action is necessary to reach a solution are deemed "necessarily reciprocal") and a requirement for evidence of a contemporaneously-recognized connection between the statute and the treaty that effectively limits the ex post applicability of the treaty power to existing statutes and ensures that certain political process safeguards are observed with regard to new treaties and/or statutes.

Together, these limiting elements effectively rebut the slippery-slope argument that the treaty power could ultimately be used to justify any type of domestic regulation by the federal government. Furthermore, to prevent the use of the treaty power for legislative aggrandizement, they provide political process checks with regard

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106 96 F.2d 620, 628-29 (9th Cir. 1938).

107 Villareal, *supra* note 39, at 1156-1157 (citing United States v. Bair, 488 F. Supp. 22, 24 & n. 2 (D. Neb. 1979)).

108 521 U.S. 898, 923 (1997).

to new statutes and external, doctrinal checks with regard to existing statutes. Finally, these limiting elements respect the constitutional structure of enumerated powers and bring the treaty power framework safely within the bounds of the principles of federalism as recognized by the Supreme Court.

The loose subject matter limitation created by the "necessarily reciprocal," "contract-like" prong addresses the slippery slope concern by narrowing the universe of potential problems upon which the treaty power can be brought to bear, further requiring that the relevant international agreement evince some expectation of concrete, reciprocal action. Basically, what this boils down to is that the treaty power can only be used when the United States confronts a problem co-dependent upon other international actors and the approach used to address the problem incorporates an expectation for multiple action of the type undertaken in the statute.

One advantage of this approach is that the substantive, subject-matter sensitive portion of prong one is context-dependent and subject to reevaluation based on changed circumstance, but the procedural portion is fixed and absolute, providing consistency. Thus, while new problems may emerge that require international attention, the procedure for using the treaty power framework remains static.

The combination of the "contract-like" and "visibly apparent connection" prongs also provides an intra-textual limitation on the types of treaty provisions that can properly be invoked as a basis for asserting the treaty power. Taken together, these prongs require a nexus between the treaty and the statute justifying the treaty power. The nexus must be marked by reciprocity and express connection between the respective treaty and statutory provisions. These prongs would achieve the remedy suggested by one author to the problem posed by the potentially vast legislative authority that could be adduced from vague or purely optimistic treaty preambles:

> [O]ften treaties express broad aspirations in precatory terms. To hold that such broad, precatory provisions may support congressional legislation that would not be within Congress' legislative power in the absence of the treaty seems potentially problematic. But a response better tailored to this concern than . . . [imposing federalism limitations on the treaty power] would simply hold that Congress' power to implement treaties does not encompass the power

> to enact legislation to implement clearly aspirational or precatory treaty provisions.[109]

In addition, as discussed further below with regard to the CWA, this same type of analysis could be applied to statutory preambles and goal statements. Another result protective of federalism would be to limit the portions and types of statutory or treaty commands that could form the basis for assertion of the treaty power.

Finally, the "visibly apparent connection" approach of the proposed treaty power framework institutes political process checks that would discourage legislative aggrandizement. In the context of already-ratified treaties and already-ratified statutes, the concern with regard to legislative aggrandizement would be that, in an attempt to rehabilitate statutory provisions held to be outside of the scope of a given enumerated power, unrelated treaty and statutory provisions would be strategically and artificially linked in order to expand the menu of powers available to justify Congress' enactment of the affected statutory provision. By requiring a contemporaneous legislative record connecting the treaty and the statute, the "visibly apparent connection" approach effectively moots this potential source of legislative aggrandizement.

In the context of future treaties and statutes, the concern with regard to legislative aggrandizement is that treaties will be made solely for the purpose of expanding federal power into a given domestic, regulatory field.[110] While the loose subject matter limitation of prong one addresses this issue, the "visibly apparent connection" prong likewise tempers this concern by forcing a certain transparency into the process in order to successfully invoke the treaty power. By forcing Congress to make its intention to rely on a given treaty and invoke the treaty power in support of a statute express, this type of gaming by the President and Congress would be subject to public scrutiny and, ostensibly, organized opposition. It is worthwhile to mention that since, as a rule of thumb, most regulated communities find federal regulation less friendly than state regulation, it would seem that those groups likely to oppose federal regulatory intervention are also likely to be the most politi-

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109 Vazquez, *supra* note 45, at 1339, n. 75.

110 It is interesting to note that this conception of purposeful executive-congressional cooperation to expand the scope of federal power is directly at odds with the conventionally accepted notion that treaties are made non-self-executing (thereby requiring the passage of enacting legislation by Congress) for the express purpose of tempering the reach of national obligations under international treaties.

cally organized and, therefore, the most effective public agents to police against undue legislative aggrandizement.[111]

Most importantly, however, the proposed treaty power framework, besides growing naturally out of preexisting doctrine and imposing limiting principles on the use of the treaty power sufficient to quiet federalism concerns, is especially suited to capitalize on the nature of environmental problems and create a foundation for use of the treaty power to support environmental legislation. This not only has the potential to protect portions of existing statutes and regulations vulnerable to a *Lopez-Morrison* challenge but will allow environmental policy makers to embrace a new age of global environmentalism both at home and abroad without worrying about the need to gerrymander environmental policies to satisfy a Commerce Clause test where a relevant treaty is in operation.

Specifically, the first prong of the proposed treaty power framework embraces problems that are inherently connected and require inter-sovereign cooperation. As new technologies exist to monitor and track environmental health and harms, many environmental problems satisfy these criteria and are increasingly the subject of international agreements. Additionally, the second prong of the proposed treaty power framework wards off alarmist reactions that the treaty power could be used to greatly expand the reach of all environmental legislation and treaties and ensures that proceeding under the proposed treaty power framework will not make more difficult the process of generating political will to sign, ratify, and implement international environmental agreements.

There are many ways in which environmental problems are increasingly recognized to transcend political boundaries and demand global action. The scientific mechanisms for understanding connections between environmental problems and localized actions are rapidly advancing, connecting rainforest destruction in remote portions of Brazil with the greenhouse effect, sulfur dioxide emissions in Iowa with acid rain in Canada, and desertification in China with reduced air quality in Korea.[112] The way in which bird hunting in Canada, the United States, and Mexico was understood to be connected to the environmental harm of reduced bird popu-

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111 William N. Eskridge, Jr., *Symposium on the Theory of Public Choice: Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285, 286-87 (1988) (discussing the dynamics of interest groups seeking legislation).

112 Howard W. French, *China's Growing Deserts are Suffocating Korea*, N.Y. TIMES, Apr. 14, 2002, at A3.

lations in *Missouri v. Holland*, as a co-dependent connection sufficient to demand international cooperation, appears simplistic when compared to current understandings of the ways in which the use of deodorant spray cans can affect the ozone and emissions from barbecues and lawnmowers can affect air quality.[113]

Thus, many environmental problems (and as a result the solutions thereto) already satisfy the "necessarily reciprocal" prong of the proposed treaty power framework.[114] And there is every reason to expect that the class of environmental problems that qualify as "necessarily reciprocal" will expand further as scientific advances adduce even more fine-tuned relationships between local, individual actions and international environmental harms.

Indeed, in subtle but important ways, various courts have recognized the increasing irrelevance of political boundaries when environmental harms are at issue. For example, in *Dow Chemical Co. v. Alfaro*, the Texas Supreme Court, en route to overturning the doctrine of forum non conveniens and allowing banana workers in Costa Rica to bring tort suits against an American company based on exposure to a chemical pesticide banned in the United States under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), observed:

> The doctrine of forum non conveniens is obsolete in a world in which markets are global and in which ecologists have documented the delicate balance of all life on this planet. The parochial perspective embodied in the doctrine of forum non conveniens enables corporations to evade legal control merely because they are transnational. . . . In the absence of meaningful tort liability in the United States for their actions, some multinational corporations will continue to operate without regard for the human and environmental costs of their actions.[115]

In addition, better understandings of the transboundary nature of environmental harms and their causes has led to what has been termed a "globalization of environmental concern."[116] Between

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[113] ENVIRONMENTAL PROTECTION AGENCY, YOUR YARD AND CLEAN AIR, *available at* http://www.epa.gov/otaq/consumer/19-yard.htm (last visited March 15, 2004).

[114] Although it may be assumed that most international agreements designed to address a "necessarily reciprocal" environmental problem would also satisfy the "contract-like" mutual action requirement, a question may be raised on this point about agreements that call for actions by the North, but no real action by the South, such as the Kyoto Protocol.

[115] 786 S.W.2d 674, 689 (Tex. 1990) (Doggett, J., concurring).

[116] ENVIRONMENTAL REGULATION, LAW, SCIENCE, AND POLICY 1097 (Percival et al. eds., 2000) [hereinafter PERCIVAL].

1970 and 1999, the number of environment-related treaties expanded from fifty-two to 215, and estimates reveal that over 1,000 international agreements contain at least one environmental component.[117] Some have suggested that "[t]here is . . . reason to think that we may be in the early stages of the development of a genuine regime of international environmental protection,"[118] and others have noted that "[i]nternational environmental law is growing and will likely play a significant role in the development of U.S. environmental law."[119]

The participation of the United States in the global environmental arena is crucial to effectively address pressing, global environmental problems. In many cases, such as greenhouse gas emissions, the United States is a major emitter, and therefore action by the United States is a necessary part of any meaningful solution. Although the "visibly apparent connection" prong of the proposed treaty framework could pose a hurdle to the rehabilitation of provisions of environmental statutes found to be outside of the scope of Congress' Commerce Clause power, ultimately this prong will contribute to the use of the treaty power by assuaging concerns regarding the domestic ramifications of international environment agreements, thereby encouraging a United States presence on the international environmental stage.

First, it is useful to illustrate the way in which the treaty power framework without the "visibly apparent connection" requirement might be perceived. A treaty is signed, ratified, and implemented through enacting legislation. Twenty years later, a provision or regulatory interpretation of a statute dealing with similar types of issues is held unconstitutional as exceeding Congress' Commerce Clause authority. However, the government argues that, although the statute does not reference the treaty in question, the treaty can be construed to touch upon the same subject and thus justify federal regulation.[120] In this instance, the treaty may have had domestic application far beyond that anticipated by its signers. Present day politicians might, then, shy away from endorsing a treaty for fear that it might someday be applied domestically, without congressional agreement, in a similarly unanticipated manner.

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[117] *Id.* at 1098.

[118] Farber, *supra* note 14, at 1316.

[119] Mitchell F. Crusto, *All That Glitters Is Not Gold: A Congressionally-Driven Global Environmental Policy*, 11 GEO. INT'L ENVTL. L. REV. 499, 510 (1999).

[120] Note the similarities between this hypothetical and the discussion of the Migratory Bird Rule that follows in Part IV.

The concern that application of the treaty power without the "visibly apparent connection" prong might result in a reluctance by the United States to sign, ratify, and pass enacting legislation in support of international environmental agreements is pragmatic when considered in light of the United States' historical, and continuing, cautious resistance towards international environmental obligations. Although the United States has been a leader in pushing for some very successful international environmental agreements, such as the Montreal Protocol,[121] the United States is currently a party to only one-third of existing multilateral environmental agreements, and has declined to sign, ratify, or implement many high-profile international environmental instruments.[122]

For example, the Kyoto Protocol was signed by the United States but declared "dead on arrival" in the Senate and has yet to be ratified.[123] Similarly, the United States has signed the Basel Convention but has not yet enacted the implementing legislation required to become a member, even though there have been at least three separate attempts to pass such legislation.[124] And, although the United States has stated that it will abide by the provisions of the Biosafety Protocol to the Convention on Biological Diversity, it has not ratified the convention.[125]

These examples indicate that sufficient obstacles (including, among other concerns, the relative competitive advantage of various industries) exist to inhibit participation by the United States and that it would be unwise to create an additional obstacle. In addition, it is worth noting that some of the most strenuous opposition to ratification of the Kyoto Protocol centered on the fear that the United States would be forced to take, and be bound to, drastic, domestic measures to achieve limits on emissions.[126] This fear seems similar to the types of concerns that a treaty power framework without prong two might evoke.

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[121] PERCIVAL, *supra* note 116, at 1115 (noting that "the United States . . . is virtually the only major country actively seeking CFC reductions" at the outset of the negotiations that culminated in the Montreal Protocol).

[122] *Id.* at 1101.

[123] *Id.* at 1135.

[124] *See, e.g.*, H.R. 3965, 103d Cong. (2d Sess. 1994); H.R. 2580, 102d Cong. (1st Sess. 1991); S. 1082, 102d Cong. (1st Sess. 1991).

[125] PERCIVAL, *supra* note 116, at 1101.

[126] John H. Cushman, Jr., *Washington Skirmishes over Treaty on Warming*, N.Y. TIMES, Nov. 11, 1998, at A11 (quoting Representative F. James Sensenbrenner Jr. as stating that "[a]ny global warming treaty devoid of developing country participation and credible evidence that America will maintain its economic health and vitality will be dead on arrival.").

A final consideration that supports the proposed treaty framework is that it is based on theoretical principles that have proven workable in the EU. Because the political structure of the EU can be likened to the federalist structure in the United States, the lessons derived from the EU are very relevant to analysis of the federalism tensions to which the treaty power gives rise in the United States. As one scholar has observed, "[t]he European Union, with its system of dual sovereignty and Treaty supremacy, is very similar in structure to the United States when formulating basic principles of government and when dealing with the conflicts that arise in a federal system."[127] In the EU, environmental policy is created through centrally-devised directives, which are binding on member states who must incorporate the directives into their domestic regulatory regimes.[128] Thus, the EU, equivalent to the federal government, devises environmental policy pursuant to the bounds of the EU Treaty, a Constitution-like document, and imposes this policy upon the sovereign member states, like U.S. states.

The interesting aspect of this arrangement, however, is that the EU must adhere to the principle of subsidiarity and is therefore limited under the Treaty to imposing environmental mandates upon the sovereign member states only when it is necessary to do so to solve the relevant environmental problem. Subsidiarity "authorizes Union action "only if and in so far as the states can therefore, by reason of the scale or effects of the proposed action, be better achieved by the [Union]."[129]

The relevance of the subsidiarity principle is that it closely resembles the reasoning employed in *Missouri v. Holland* and incorporated in prong one of the proposed treaty framework. As one scholar has observed, the "reasoning in *Holland* suggests a "subsidiarity"-type approach to internal enforceability [of certain] treaties,"[130] and this reasoning is captured by the prong one requirement that a treaty address a problem that is "necessarily

[127] Erin A. Walter, *The Supreme Court Goes Dormant When Desperate Times Call for Desperate Measures: Looking to the European Union for a Lesson in Environmental Protection*, 65 Fordham L. Rev. 1161, 1164 (1996).

[128] Cliona J. M. Kimber, *Environmental Federalism: A Comparison of Environmental Federalism in the United States and the European Union*, 54 Md. L. Rev. 1658, 1676-77 (1995) ("[T]he main instrument of environmental policy in the E.U. is the directive. Article 189(3) of the EC Treaty provides that a directive is binding only upon member states, which are then required to implement that directive in their national laws.").

[129] Anderson, *supra* note 45, at 226.

[130] *Id.* Anderson goes on to note that *Missouri v. Holland* illustrates "the subsidiarity rationale for enforcing a treaty domestically. The action cannot be taken at a lower level, not merely because of the component parts' unwillingness to legislate, but because the

reciprocal." At least one theoretical basis of the proposed treaty framework has already been adopted by the EU as a measure appropriate to address environmental problems while respecting dual sovereignty. With regard to application of the "necessarily reciprocal" and subsidiarity theories, seminal works of environmental theory suggest that it may be best to "match" the governmental body with the scope and type of environmental harm being regulated[131] and that it may be more efficient and effective to have a multi-tiered division of environmental authority.[132]

The foregoing analysis demonstrates that the proposed treaty framework is a pragmatic, beneficial, and workable route for structuring the treaty power in the best way possible to support federal pursuit of environmental goals. The framework flows naturally from existing case law, including *Missouri v. Holland* and cases that examine the bounds of "necessary and proper" legislation to enact a treaty. It imposes limiting principles sufficient to comply with the Supreme Court's robust concept of federalism by incorporating a loose, subject matter limitation, an intra-textual narrowing of the treaty and statutory language to support use of the treaty power, and various political process checks. It supports environmental objectives by emphasizing the centrality of transboundary effects and the necessity of multi-party resolutions in a treaty power inquiry and by averting a reactionary, isolationist response through cautious procedural application. And it is guided by the subsidiarity principle, which has proven workable in a system with a federal structure similar to our own.

IV: Applying the Proposed Treaty Power Framework

Thus far, the proposed treaty framework has been presented and evaluated as a theoretical approach. However, without actually applying the framework to a tangible set of facts, it is difficult to envision the exact meaning and scope of the two prongs. For example, what kind of "contract-like" reciprocity is sufficient? Is it enough for two sovereigns to generally agree to work toward a broad goal with no further refinement of how this goal is to be

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interests of the majority of the component parts could always be frustrated by the minority." *Id.* at 228.

131 Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 Yale L. & Pol'y Rev. 23 (1996).

132 Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. Rev. 1495 (1999).

achieved? The answer to the latter question is likely not, but unfortunately, it is difficult to adduce with particularity what the proper result would be under the framework without reference to the specific facts of an individual case.

There are some "easy" cases. The Stockholm Declaration on the Human Environment and the Rio Declaration, both of which announce environmental principles and responsibilities in a highly generalized fashion (the Stockholm Declaration makes the general assertion that nations have a responsibility to protect the environment for present and future generations),[133] clearly do not satisfy the "contract-like" reciprocity requirement. But there are many more "hard" cases where the method and result of applying the framework would not be so straightforward. To some extent, this is a result of the fact that the factors that make up the two prongs are meant to be considered together and, though perhaps singly dispositive in extreme cases, more often will function together to provide an organized set of information that will form the basis of a holistic evaluation of the propriety of invoking the treaty power in a given instance.

In order to bring the mechanics of the proposed treaty framework into focus, this Part applies the framework to two specific hypotheticals. First, this Part posits that certain iterations of Section 9 of the ESA are vulnerable to invalidation under a *Lopez-Morrison* analysis and then applies the treaty power framework to evaluate whether the Western Convention can be used as an alternate constitutional ground for upholding Section 9 of the ESA. Then, this Part hypothesizes about whether various conceptions of the EPA and U.S. Army Corps of Engineers definition of the reach of "navigable waters" or "waters of the United States" under the CWA would, if invalidated under a Commerce Clause analysis, be justified by way of reference to various Migratory Bird Treaties.[134]

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[133] PERCIVAL, *supra* note 116, at 1102 (citing Stockholm Declaration on the Human Environment, Principle 21, and noting that the Declaration "outlined international environmental rights and responsibilities in strong, but highly general, language.").

[134] The term "migratory bird treaties" is used to refer collectively to the Convention between the United States and Great Britain for the Protection of Migratory Birds in the United States and Canada, Aug. 16, 1916, U.S.-U.K., 39 Stat. 1702; The Convention between the United States and Mexico for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, U.S.-Mex., 50 Stat. 131; The Convention Between the United Sates of America and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction, and their Environment, Mar. 4, 1972, U.S.-Japan, 25 U.S.T. 3329, 3335; The Convention Between the United Sates of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and their Environment, Mar. 4, 1972, U.S.-U.S.S.R., 29 U.S.T. 4647, 4653-4654.

The process of applying the prongs of the treaty power framework in these specific contexts reveals with greater clarity and concreteness the meaning and scope of the various factors and prongs.

Section 9 of the ESA makes it unlawful to "take" any endangered animal species.[135] The term "take" is defined to include harrassing, harming, killing, capturing, or collecting a species, and "harming" can include carrying out significant modification to a species critical habitat.[136] Under this regulatory scheme, private landowners may be prohibited from undertaking a variety of land use activities on purely intrastate plots in order to protect species whose habitat is, likewise, wholly intrastate.

This is the iteration of Section 9 that is most likely to fail to meet the *Lopez-Morrison* test. Presented with this factual situation, the D.C. Circuit Court of Appeals upheld Section 9 as within Congress' Commerce Clause power in *National Association of Home Builders v. Babbitt.*[137] However, this issue is far from definitively resolved. Not only was this an extremely divided opinion (a 2-1 decision with three separate opinions penned), but a significant volume of academic scholarship suggests that Section 9 may fail the *Lopez-Morrison* test.[138] Also, a close reading of *Lopez* and *Morrison* suggests that some of the analysis employed in *National Association of Homebuilders v. Babbitt* is misguided.

Specifically, Judge Wald based her decision in part on the determination that "the power of Congress to regulate the channels of interstate commerce provides a justification for section 9(a)(1) of the ESA" because the power to regulate channels of interstate commerce is not limited to "uphold[ing] regulations of interstate transport of persons or goods."[139] However, the *Lopez* Court referenced two specific passages as representative of what constitutes regulation of a channel of commerce, and neither of these supports Judge Wald's reading.[140]

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135 § 9(a)(1)(B) & (C) (codified at 16 U.S.C. § 1538 (1994)).

136 Babbitt v. Sweet Home, 515 U.S. 687 (1995).

137 130 F.3d 1041 (D.C. Cir. 1997).

138 *See, e.g.*, Stephen M. Johnson, United States v. Lopez*: A Misstep, but Hardly Epochal for Federal Environmental Regulation*, 5 N.Y.U. ENVTL. L. J. 33, 79-82 (1996); David A. Linehan, Note, *Endangered Regulation: Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365, 419 (1998); John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998); Villareal, *supra* note 39; White, *supra* note 39.

139 130 F.3d 1041, 1046 (D.C. Cir. 1997).

140 Lopez v. United States, 514 U.S. 549, 558 (1995).

The first passage, in *United States v. Darby*, recognized that Congress may "exclude from the [interstate] commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare."[141] The second passage, from *Heart of Atlanta Motel v. United States*, describes Congress' power to regulate channels of interstate commerce as the power to regulate "'intercourse and traffic between their [the States'] citizens, and includes the transportation of persons and property.'"[142] However, as Judge Henderson noted in her concurrence in *National Association of Homebuilders v. Babbitt*, intrastate species do not move among states and, therefore, are not "necessarily connected to movement of persons or things interstate . . . [that] could . . . be characterized as regulation of the channels of commerce."[143]

Thus, the "channel of commerce" ground is very weak. The remaining ground upon which the Court may rely is dependent upon a finding that the regulation of intrastate species substantially affects interstate commerce. This ground is not only subjective, but questionably applicable in instances where the demonstration that the regulated activity would have substantial affect is predicated on considering the aggregate effects of a non-economic activity. Essentially, the argument is that, in the aggregate, individual instances of the regulation of local land use (a non-economic activity) to protect intrastate species substantially affects interstate commerce. However, in *Morrison* the Supreme Court noted that "in every case where this Court has sustained federal regulation under *Wickard's* aggregation principle, the regulated activity was of an apparent commercial character."[144] The "substantially affects interstate commerce" ground for upholding Section 9 is, therefore, equally uncertain.

Although a thorough analysis of whether Section 9 satisfies the *Lopez-Morrison* test would be much more detailed, the issue has been analyzed extensively elsewhere and it is sufficient to note for purposes of this Article that there is substantial doubt that the Supreme Court would find Section 9 to fall within Congress' Commerce Clause power. Therefore, the question of whether the treaty

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[141] 312 U.S. 100, 114 (1941).

[142] 379 U.S. 241, 256 (1964) (citing Hoke v. United States, 227 U.S. 308, 320 (1913)).

[143] 130 F.3d 1041, 1058 (D.C. Cir. 1997).

[144] U.S. v. Morrison, 529 U.S. 598, 611 n.4 (2000). *See also Lopez*, 514 U.S. at 560 ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity. . ..").

power could properly be invoked to support Section 9 is both timely and important.

The most likely source of treaty power authority for Section 9 is the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (Western Convention).[145] Before applying the proposed treaty power framework to the Western Convention and Section 9, relevant sections of both documents are reviewed, as well as two prior works that have discussed application of the treaty power in this context.

The preamble to the Western Convention states that the Convention is designed to provide for the "protection of nature and the preservation of flora and fauna" in order to "protect and preserve in their natural habitat representatives of all species and genera of their native flora and fauna . . . in sufficient numbers and over areas extensive enough to assure them from becoming extinct through any agency within man's control."[146] Article V of the Western Convention provides:

> The Contracting Governments agree to adopt, or to propose such adoption to their respective appropriate law-making bodies, *suitable laws and regulations for the protection and preservation of flora and fauna* within their national boundaries, but not included in the . . . [public lands]. . . . Such regulations shall contain proper provisions for the taking of specimens of flora and fauna for scientific study and investigation . . . . [147]

Finally, Article VIII provides:

> The protection of the species mentioned in the Annex to the present Convention, is declared to be of special urgency and importance. *Species included therein shall be protected as completely as possible, and their hunting, killing, capturing, or taking, shall be allowed only with the permission of the appropriate government in the country.* Such permission shall be granted only under special circumstances, in order to further scientific purposes, or when essential for the administration of the area in which the animal or plant is found.[148]

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[145] Oct. 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193 (entered into force Apr. 30, 1942) [hereinafter Western Convention].

[146] *Id.* at 1356.

[147] *Id.* at 1362-64 (emphasis added).

[148] *Id.* at 1366 (emphasis added).

The list of species included in the Annex, although subject to update by participating countries, has not been updated to include species listed as endangered under the ESA.[149]

For purposes of comparative reference, the Findings and Purpose of the ESA read:

> The Congress finds and declares that various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation; . . . these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people; *the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to . . . the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere. . . .* The purposes of this Chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to *take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in . . . this section.*[150]

Section 9 of the ESA provides that "it is unlawful for any person subject to the jurisdiction of the United States to . . . take any . . . [endangered] species within the United States"[151] and federal regulation specifies that "significant habitat modification or degradation where it actually kills or injures wildlife" is forbidden.[152]

Omar White and Gavin Villareal have undertaken prior and independent studies analyzing whether Section 9 of the ESA could be justified as an expression of the treaty power by way of reference to the Western Convention.[153] White concludes that the Western Convention would support Section 9 only if the annex to

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[149] White, *supra* note 39, at 231-32.

[150] 16 U.S.C. § 1531 (West 2002) (emphasis added).

[151] 16 U.S.C. § 1538 (West 2002).

[152] 50 C.F.R. 17.3 (1998).

[153] Villareal, *supra* note 39, at 1153; White, *supra* note 39, at 224. Of note, in his article *Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack*, Blanding Holman IV briefly discusses and dismisses use of the Western Convention to support the ESA on the ground that the habitat-modification provisions of the ESA are not reasonably related to the Convention, Section 9 of the ESA does not directly reference

the Convention was updated to include the specific species being regulated. His conclusion rests, first, on a determination that Article V of the Convention cannot be used as a basis for asserting the treaty power because it states that governments must consult the appropriate law-making body. White reasons: "[i]f the appropriate bodies for adopting endangered species laws reside in the state governments, then the ESA would not be an appropriate use of congressional authority because of the Tenth Amendment's reservation of power to the states."[154] He then argues that Article VIII "only applies to the ten species listed in the annex."[155]

Villareal, however, argues that Article V's "broad grant of authority for species and habitat protection" would be a sufficient basis for invoking the treaty power and cites to a report issued by the Environmental Law Institute in 1977 which proclaimed that the Western Convention "provides a basis, wholly independent of any Commerce Clause or Property Clause power, for federal regulation of all forms of wildlife, including 'resident' wildlife traditionally managed by the states."[156]

Neither of these analyses proceeds in the manner suggested by the proposed treaty framework, although White's insistence on a close nexus between the treaty provisions and the statute seems motivated by reasoning similar to that underlying the "contract-like" factor of the first prong by trying to limit the treaty power to those actions specifically committed to reciprocal action. Both authors, faced with a dearth of established case law, provide explanations for their decisions about whether and/or how the treaty power can be invoked with regard to particular Articles but do not provide a unified theory or much support for why their particular view of how the treaty power is to be applied is correct.

Applying the treaty power framework to the same question, it seems clear that the "visibly apparent connection" prong is met in this instance. The Convention anticipates the enactment of implementing legislation. The ESA specifically references the Western

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the Convention, and use of the treaty power would violate state sovereignty. Holman, *supra* note 4, at 192. His treatment is, however, focused on a Commerce Clause analysis.

[154] White, *supra* note 39, at 229-32. This argument seems somewhat specious, however, because the treaty power is a legitimate source of congressional authority and, therefore, could render Congress the "appropriate law-making body."

[155] *Id.* at 230.

[156] Environmental Law Institute, The Evolution Of National Wildlife Law 317 (1977), *quoted in* Villareal, *supra* note 39, at 1159. Villareal also cites to the "national monument" provisions in the Western Convention as providing support for the ESA, but this provision is not discussed here.

Convention in strong terms by stating that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to . . . the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere" and pledging to "take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in . . . this section."[157] The Convention and the ESA are designed to address an identical problem; thus, the "visibly apparent connection" is unquestionably satisfied.

There is more question as to whether the "contract-like" and "necessarily reciprocal" factors of the first prong are met. Are the reciprocal expectations outlined in the Convention sufficiently specific to support the regulation of habitat modification in Section 9? Is the protection of wholly intrastate endangered species necessarily reciprocal? The following analysis concludes that both questions are to be answered in the affirmative and in the process demonstrates with more specificity the scope and shape of these factors.

There is a colorable argument that there is not sufficient contract-like reciprocity incorporated into the Convention or, seen from another perspective, that the habitat modification provisions of Section 9 are outside the scope of the reciprocal obligations that are provided for in the Convention. Article V requires only that parties *propose* law for the protection of species and does not detail with specificity the type of law to be proposed. Article VIII, while stating with specificity that species "shall be protected as completely as possible, and their hunting, killing, capturing, or taking, shall be allowed only with the permission of the appropriate government in the country,"[158] (which is not only specific, but seems to mirror almost exactly the Section 9 take prohibition), is expressly limited to species listed in a now-outdated annex.

Thus, it could be argued that there is reciprocity only with regard to the particular species that the parties have agreed to protect and are included in the annex because the parties are essentially engaged in a tit-for-tat bartering process wherein one party's agreement to protect a given species is "traded" for another party's agreement to protect a different species. Or, if this construction of the agreement is rejected as nonsensical, it could be argued that

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[157] 16 U.S.C. § 1531 (West 2002).

[158] Western Convention at 1366.

without such specific horse trading, the parties have only traded general obligations that do not amount to contract-like reciprocity.

However, the contract-like reciprocity factor does not require such tit-for-tat bargaining. Although specific, hard-fought concessions, such as the specification of emission reduction amounts in the Kyoto Protocol, may be the paradigmatic example of contract-like reciprocity, there are also softer versions of reciprocity that will suffice in the treaty power framework. In this instance, the formal defect (the failure to name specific species in the annex) does not defeat a finding that the Convention is infused with contract-like reciprocity and that Section 9 is a proper expression of this reciprocity. The Convention clearly creates a reciprocal expectation that parties will craft legislation to protect species and adds to this a reciprocal expectation that parties are to provide a specific level of protection to certain particularly vulnerable species listed in the annex. The ESA fulfills the United States' obligation to propose legislation and does so in a manner consistent not just with the general goals of the Convention but with its particular framework for protecting endangered species through take prohibitions. The tight similarity in language and approach between Article XIII and Section 9 supports the determination that Section 9 is well within the bounds of the reciprocal action anticipated by the Convention.

The inquiry into the "necessarily reciprocal" factor is likewise more difficult. Compared to the "easy" case of keeping migratory birds from being shot in Canada to make sure that some make it to the United States, less obvious is the reciprocal connection between ensuring the continued survival of an intrastate species in the United States and the continued survival of a species in a foreign country whose range is similarly geographically-confined. However, the scope of the inquiry into necessary reciprocity is appropriately situated at a higher level of generality. Instead of asking whether the preservation of a given individual species is necessarily reciprocal, the question should be framed as whether the preservation biodiversity, requiring the protection of as many species as possible, is necessarily reciprocal.

The Convention states that one of its purposes is to "assure . . . [that species don't] becom[e] extinct,"[159] and the ESA states that it seeks to preserve the "esthetic, ecological, educational, historical, recreational, and scientific value" of endangered

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[159] Western Convention at 1356.

species.[160] From these assertions, it is reasonably extrapolated that both documents are focused on more than just the preservation of an individual set of species and intend to ensure the general protection of species and the preservation of biodiversity. Clearly, it is not possible to preserve biodiversity and its benefits by protecting species in one country and not the next. The participation of as many countries as possible is necessary to protect biodiversity. In *National Association of Homebuilders v. Babbitt*, the D.C. Circuit agreed that the ESA is designed to protect biodiversity and discussed the various benefits of biodiversity at length, referencing the use of species for medicinal purposes, as a genetic resource, to further future discovery and research.[161] The D.C. Circuit was compelled to mold this argument uncomfortably to fit a commerce-oriented lens. This same argument, however, works to establish the "necessary reciprocity" of biodiversity and endangered species protection but without the artificial commercial posturing.

Thus, all factors and both prongs of the proposed treaty framework are satisfied when looking at the use of the Western Convention to support use of the treaty power to uphold Section 9 of the ESA. A second case study, however, provides an example of how the treaty framework's limiting principles can come to bear. Specifically, under the proposed treaty framework, the Migratory Bird Treaties cannot be invoked as a basis for using the treaty power to support federal regulation of wholly intrastate, isolated waters under the CWA.

The CWA provides for federal regulation of "navigable waters," which is defined in the Act as "waters of the United States."[162] The Corps of Engineers has generated a regulatory definition of "waters of the United States" that includes "waters such as intrastate lakes, rivers, streams . . . the use, degradation or destruction of which could affect interstate or foreign commerce . . .."[163] In addition, the Corps clarified in what is commonly known as the Migratory Bird Rule that this definition also included waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties."[164]

160 16 U.S.C. § 1531 (West 2002).

161 130 F.3d 1041, 1050-55 (D.C. Cir. 1997).

162 33 U.S.C. § 1362 (1994).

163 33 C.F.R. § 328.3 (2004).

164 Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

In *SWANCC*, parties challenged the Corps' determination that a wholly intrastate pond was subject to regulation under section 404 of the CWA where the sole ground for asserting jurisdiction was use of the pond by various migratory birds, arguing that the Migratory Bird Rule exceeded the bounds of "waters of the United States" as a matter of statutory construction and, additionally, regulation of the pond exceeded Congress' Commerce Clause power.[165] The Supreme Court, although indicating that the Commerce Clause inquiry would be a close one in dicta,[166] held narrowly that the Migratory Bird Rule exceeded the statutory definition of "waters of the United States" and invalidated it on statutory grounds.

While this would seem to moot the potential to use the Migratory Bird Treaties to support the regulation of intrastate water bodies (if they do not fall within the statutory definition, then there is no constitutional question), that is not necessarily the case. The Migratory Bird Rule had not undergone official notice and comment process and was not afforded *Chevron* deference.[167] As such, it seems less likely that, observing the principle of deference, the Court would be able to invalidate those portions of the definition of "waters of the United States" that reach intrastate, isolated waters, and have been promulgated pursuant to notice and comment procedure, on statutory grounds. Thus, it becomes more likely that if these regulations are challenged, the constitutional issue will be reached.

In addition, it can be argued that the Migratory Bird Treaties call for the preservation of migratory bird habitat and that even though the regulations that are still valid do not specifically reference migratory birds, they implement the Migratory Bird Treaties by substantively protecting migratory bird habitat. The CWA not only protects wetland habitat, but it was enacted to achieve a national goal of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife. . .."[168] Thus, it seems to advance the directive of a recent Protocol amending the Migratory Bird Treaty that each government "use its authority to protect and

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[165] Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001).

[166] *See supra* note 11 and accompanying text. The Court did not reach the issue of whether Congress had the *constitutional* authority under the Commerce Clause to reach isolated, intrastate ponds, holding only that it did not have *statutory* authority under the Clean Water Act to reach such ponds.

[167] *Id.* at 172.

[168] 33 U.S.C. § 1251(a)(2) (1994).

conserve habitats essential to migratory bird populations (including protection from pollution and from alien or exotic species)."[169]

However, although there is overlap in subject matter between the CWA and the Migratory Bird Treaties with regard to the protection of wetlands, and it was clearly established in *Missouri v. Holland* that the regulation of migratory birds is "necessarily reciprocal," there is no need to analyze these issues because prong two of the proposed treaty framework is individually dispositive in this instance. There is absolutely no "visibly apparent connection" between the CWA and the Migratory Bird Treaties. The CWA does not purport to enact a treaty, invoke the treaty power, or reference a single international agreement. Indeed, far from seeking to import or effect any international agreement into or through the Act, the Act expresses a Congressional policy that the provisions of the Act should serve as a model for other countries.[170]

Additionally, those statutes that have been expressly enacted to implement the Migratory Bird Treaties do not reach habitat modification. Private land use, and in particular, the filling of temporary, intrastate water bodies, is not addressed or otherwise regulated under either of the statutes enacting migratory bird agreements, the Migratory Bird Treaty Act[171] and the Migratory Bird Conservation Act.[172] Specifically, the Migratory Bird Treaty Act makes it unlawful to "pursue, hunt, take, capture, kill, [or] attempt to take, capture, or kill" a migratory bird, where "take" is defined as "pursue, hunt, shoot, capture, collect, kill,"[173] and the Migratory Bird Conservation Act authorizes the Secretary of the Interior to purchase migratory bird habitat.[174] In accordance with this straightforward statutory language,[175] courts have held that

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169 Message from the President of the United States Transmitting a Protocol Amending the 1916 Convention for the Protection of Migratory Birds (Dec. 14, 1995), *available at* http://alaska.fws.gov/ambcc/ambcc/1996_canada_treaty_protocol.pdf (last visited April 13, 2004). .

170 The CWA advises that the President should encourage foreign countries to improve water quality "to at least the same extent as the United States does under its laws." 33 U.S.C. § 1251(c) (1994).

171 16 U.S.C.A. §§ 701-712 (West 2000).

172 16 U.S.C.A. § 715 (West 2000).

173 16 U.S.C.A. §§ 703, 715n (West 2000).

174 16 U.S.C.A. § 715d (West 2000).

175 Section 712 also provides that the Secretary is authorized, in accordance with various migratory bird treaties, to "issue such regulations as may be necessary to implement the provisions" of these conventions. However, no specific regulations have been promulgated with reference to this general provision that relate to the conduct considered here.

simple habitat destruction or modification does not violate the provisions of these sections.[176]

Thus, the legislation enacted with express reference to migratory bird agreements that does invoke the treaty authority clearly does not extend to habitat modification and, indeed, seems to evince a congressional policy that habitat conservation should be effected by government land purchase programs and not by regulation of private land use activities.

The proposed treaty framework would not, therefore, allow the Migratory Bird Treaties to be bootstrapped onto the CWA. Although this might seem to frustrate environmental objectives for use of the treaty power, as explained above, restraint in application of the treaty power that respects the role of Congress will ensure that politicians do not shy away from environmental treaties out of fear of their unprincipled expansion.

V. Conclusion

Increasingly, the enforcement and interpretation of environmental statutes will intersect with ongoing debates about the constitutional structure. This intersection provides an opportunity to shape constitutional understandings and doctrines to preserve a full menu of regulatory options. The treaty power framework proposed in this Article takes advantage of such an opportunity by providing a workable and doctrinally attractive theory of constitutional construction that is amenable to "next generation" environmental regulation. As technology and science advance, fine tune, and sharpen understandings of the interconnections between local, individual actions and larger, sometimes global problems, regulation of local, individual actions will increasingly become an obvious and necessary focus of national and international environmental problem solving. The increasing transparency of ecological connections will not likely be complemented, however, by a corresponding recognition of commercial connection. Activities shown to be ecologically connected may often have little or no connection to interstate commerce. Through the proposed treaty power framework, ecological connections could become a basis for regulation in many instances, thereby freeing environmental regulators

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[176] Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 303 (9th Cir. 1991) ("Habitat destruction . . . does not "take" [spotted owls] within the meaning of the MBTA.").

from the burden of demonstrating in an artificial and attenuated fashion the connection between regulated conduct and interstate commerce.