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## States' Rights and the Scope of the Treaty Power: Could the Patriot Act be Constitutional as a Treaty?

SIMCHA HERZOG\*

### I. INTRODUCTION

“Attorney General John Ashcroft defended the Patriot Act on Tuesday, saying that the anti-terrorism measure passed by Congress after the September 11 attacks has been key to the nation’s efforts to thwart attacks against Americans.”<sup>1</sup> He said: “If we knew then [prior to September 11] what we know now, we would have passed the Patriot Act six months before September 11 rather than six weeks after the attacks . . . .”<sup>2</sup> Furthermore, contrary to the assertions of the Act’s detractors, “the cause we have chosen is just [and] [*t*]he course we have taken is constitutional.”<sup>3</sup>

Conversely, when the “FISA” Court<sup>4</sup> reviewed sections of the Patriot Act, it reached a conclusion at odds with the Attorney General’s blanket assessment.<sup>5</sup> The “FISA” Court held that “the Justice Department and FBI could not [constitutionally] take advantage of several key liberalizations of FISA included in the U.S.A. Patriot Act.”<sup>6</sup> On appeal, however, the “FISA” Court reversed the lower court’s judgment and upheld the constitutionality of the disputed sections of the Patriot Act.<sup>7</sup>

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1. CNN, *Ashcroft Kicks Off Campaign to Defend Patriot Act*, <http://www.cnn.com/2003/LAW/08/19/ashcroft.patriot.act/index.html> (accessed Apr. 24, 2005) [hereinafter CNN, *Ashcroft Defends*]. The *raison d’être* of the Patriot Act is encapsulated in its heading: “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001.” Pub. L. No. 107-56, 115 Stat. 272 (2001).

2. CNN, *Ashcroft Defends*, *supra* n. 1.

3. *Id.* (emphasis added). For a brief overview explaining the rudiments of the Patriot Act, see CNN, *Explaining the U.S.A. Patriot Act*, <http://archives.cnn.com/2002/LAW/08/23/patriot.act.explainer/index.html> (accessed Apr. 24, 2005).

4. “FISA” is an acronym for the Foreign Intelligence Surveillance Act. The “FISA” Court of review is a special federal judicial panel that approves requests for wiretaps and searches in espionage and terrorism cases, to ensure the federal government’s compliance with the “FISA.” CNN, *No Way to Secure a Homeland?*, <http://archives.cnn.com/2002/ALLPOLITICS/08/26/time.homeland/index.html> (accessed Apr. 24, 2005) [hereinafter CNN, *No Way*].

5. *Id.*

6. *Id.* Many of the provisions of the Patriot Act “take the form of amendments to” FISA. *A.C.L.U. v. U.S. Dept. of Just.*, 265 F. Supp. 2d 20, 22 (D.D.C. 2003).

7. *In Re Sealed Case*, 310 F.3d 717, 746 (U.S. For. Intelligence Surveillance Ct. of Rev. 2002). The case lacks a typical party name because the “FISA” Court “usually makes its rulings in secret.”

Consider the following hypothetical scenario: after an appeal by the American Civil Liberties Union, the Supreme Court determines that the Patriot Act is unconstitutional.<sup>8</sup> This decision so infuriates President Bush<sup>9</sup> that he seeks out the advice of his legal counsel in a frantic attempt to bypass the Court's ruling. After some research, President Bush's legal advisors give him two options: he can either attempt to pass an amendment to the constitution or, with the "advice and consent of the Senate,"<sup>10</sup> he can sign the Patriot Act as a treaty with a foreign nation. Either of these measures will evade the severity of the Court's decision. After some reflection, the President chooses the treaty method because the probability of ratification is greater.<sup>11</sup>

This hypothetical is not merely the fruit of an imaginative mind. Rather, it is a reconstruction of an event that actually occurred, albeit in quite a different context.<sup>12</sup> During the early 1900s, the migratory bird population of the United States dwindled to the point of extinction.<sup>13</sup> Congress, in an attempt to forestall this outcome, began efforts to regulate

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CNN, *No Way*, *supra* n. 4. This case only entered the public domain "at the bipartisan behest of the Senate Judiciary Committee, worried about the perceived excesses of Bush's anti-terror campaign." *Id.*

8. This is a serious possibility because the Patriot Act raises challenging constitutional questions. For example, the aforementioned cases and accompanying text raised the issue of whether the Patriot Act's amendments to "FISA" violate the Fourth Amendment. *See supra* nn. 5-7. Another major uncertainty raised by the Patriot Act is its impact on states' rights. Thus far, three states and 181 cities have passed resolutions decrying the Patriot Act. Ryan Geronimo, *USA Patriot Act Lifts Lid Off Library*, [http://www.statehornet.com/vnews/display.v/ART/2003/10/08/3f8403121c1c3?in\\_archive=1](http://www.statehornet.com/vnews/display.v/ART/2003/10/08/3f8403121c1c3?in_archive=1) (accessed Apr. 24, 2005). There are at least two areas where it could be argued that the Patriot Act violates states' rights or the Tenth Amendment. First, the Patriot Act requires state owned libraries to turn over information to the federal government. *Id.* Second, as Senator Patrick Leahy pointed out, the Patriot Act is being used for much broader purposes than merely fighting "terrorism," and may violate a state's right to combat crime as they see fit. Sen. Patrick Leahy, *Hearing On Protecting Our National Security From Terrorist Attacks: A Review of Criminal Terrorism Investigations and Prosecutions*, [http://judiciary.senate.gov/member\\_statement.cfm?id=965&wit\\_id=2629](http://judiciary.senate.gov/member_statement.cfm?id=965&wit_id=2629) (accessed Apr. 24, 2005).

9. CNN, *No Way*, *supra* n. 4. According to CNN, the decision in the "FISA" case "so riled the Bush Administration" that it loudly aired the subsequent appeal.

10. U.S. Const. art. II, § 2, cl. 2. For a more extensive quote of this provision consult *infra* note 78 and accompanying text.

11. The Constitution requires the agreement of either two thirds of both Houses or two thirds of the state legislatures, merely to propose an amendment. Moreover, ratification only occurs if three fourths of the states or their conventions agree to pass the proposed amendment. U.S. Const. art. V. Alternatively, the President's signature and the "advice and consent" of the Senate, "provided two thirds of the Senators present concur," is all that is needed to hand to sign and ratify a treaty. U.S. Const. art. II, § 2, cl. 2. Hence, the speed of enacting a treaty contrasted against the unlikelihood of a unanimous consensus to pass a constitutional amendment, dictate that the President take the treaty path. To illustrate the differences in speed, compare *Hans v. La.*, 134 U.S. 1, 3 (1890) (the Court's decision in *Chisholm* raised such an uproar that the Eleventh Amendment was proposed immediately thereafter and nevertheless took five years to be ratified), with *infra* n. 19 (the treaty was ratified after thirty minutes of debate).

12. For a thorough discussion of the material contained in this paragraph, see David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1246-57 (2000) [hereinafter Golove, *Treaty-Making*].

13. *Id.* at 1255.

these migratory birds.<sup>14</sup> The Court, however, stymied Congress' repeated efforts.<sup>15</sup> According to the Court, Congressional regulation of wild game exceeded Congress' commerce powers and hence infringed on powers reserved to the states.<sup>16</sup> In an attempt to bypass the unconstitutionality inherent in any legislation regulating these birds,<sup>17</sup> Senator Elihu Root suggested that the treaty power be used to create "a situation . . . in which the Government of the United States will have [the] constitutional authority to deal with this subject."<sup>18</sup> This is in fact what occurred. In 1916, the Wilson administration and the necessary majority of the Senate signed and ratified the Migratory Bird Treaty Act with Canada.<sup>19</sup> Congress then enacted legislation regulating these birds to comply with the duties created by the treaty.<sup>20</sup> The Court upheld this renewed attempt at bird regulation in the crucial case of *Missouri v. Holland*.<sup>21</sup>

The Court's holding in *Missouri v. Holland* is relevant today for two interrelated reasons. First, the Court may determine that some sections of the Patriot Act are unconstitutional.<sup>22</sup> If that occurs, under the reasoning in *Missouri v. Holland*, does the Constitution permit the President and the Senate to enact the Patriot Act as a treaty with a foreign country? Second, at present, major human rights treaties languish in the Senate,<sup>23</sup> while other treaties, although ratified, are nevertheless attached with significant reservations,<sup>24</sup> enabling the federal government to avoid changing its policies.<sup>25</sup>

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14. *Id.*

15. *Id.*

16. *E.g. Greer v. Conn.*, 161 U.S. 519, 528 (1896) (holding that wild game within the territory of a state was held by the state in trust for its citizens).

17. Martin S. Flaherty, *Part II: Are We to be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. Colo. L. Rev. 1277, 1297 (1999) (describing the federal government's action as an "end run around this problem").

18. Golove, *Treaty-Making*, *supra* n. 12, at 1255 (quoting 51 Cong. Rec. 8349 (1913) (Senator Robinson quoting Senator Root)).

19. *Id.* at 1256 ("[T]he Senate approved the treaty after a thirty-minute debate."); *see also supra* n. 11 and accompanying text.

20. Golove, *Treaty-Making*, *supra* n. 12, at 1256.

21. 252 U.S. 416 (1920).

22. *See supra* n. 8. Another relevant example that is currently making headlines is the Massachusetts Supreme Court's ruling enabling gay marriage. CNN, *Massachusetts Court Rules Ban on Gay Marriage Unconstitutional*, <http://www.cnn.com/2003/LAW/11/18/samesex.marriage.ruling/index.html> (accessed Apr. 24, 2005). It is possible that the Supreme Court would agree, especially in light of *Lawrence v. Tex.*, 539 U.S. 558 (2003) (deeming unconstitutional a state law that made it a crime for two persons of the same sex to engage in certain intimate sexual conduct).

23. For a full discussion of these treaties *see* Barry Friedman, *Federalism's Future in the Global Village*, 47 Vand. L. Rev. 1441, 1464-65 (1994) (specifically reference nn. 148-50).

24. *Id.* *See also Foreign Affairs and the U.S. Constitution*, 147 (Louis Henkin, Michael J. Glennon, & William D. Rogers eds., Transnational Publishers 1990) (Richard B. Lillich notes, in his essay entitled "The Constitution and International Human Rights" that "the United States has ratified none of the five major United Nations-sponsored treaties it has signed.").

25. Peter J. Spiro, *Human Rights on the Eve of the Next Century: Aspects of Human Rights Implementation: The States and International Human Rights*, 66 Fordham L. Rev. 567, 572 (1997) (discuss-

The Senate justifies these practices by indicating that it would be unconstitutional to completely ratify the treaties at issue.<sup>26</sup> Is this assessment correct?

This article focuses on these vital questions. Part II of this article analyzes the Court's holdings in *Missouri v. Holland*<sup>27</sup> and *Reid v. Covert*,<sup>28</sup> the other significant case in this area. Part III scrutinizes the scope of the treaty power, based upon analysis of the constitution's text, structure, and selected relevant legislative history. Lastly, Part IV discusses the Court's recent holdings supporting federalism, and analyzes the impact of the Tenth Amendment on the treaty power.

## II. BACKGROUND

Can the United States be a party to a treaty that exceeds Congress' ordinary legislative powers?<sup>29</sup> Is the treaty power a means to bypass the limited, enumerated powers granted to the federal government by the Constitution?<sup>30</sup> The seminal case<sup>31</sup> of *Missouri v. Holland*<sup>32</sup> directly addresses these questions. The issue in *Missouri* was whether the Migratory Bird Treaty Act<sup>33</sup> passed constitutional muster. Congress previously enacted legislation similar to the treaty, in an attempt to confront the migratory bird problem,<sup>34</sup> but two district courts<sup>35</sup> held the statute as "beyond Congress'

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ing the refusal of the federal government "to correct state practices which may violate international human rights").

26. *Id.* at 575.

27. 252 U.S. 416.

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

29. Logistical constraints prevent this article from dealing extensively with "executive/congressional-executive agreements." The discussion herein focuses mostly on treaties. It should be observed that the questions posed by this article apply, with even greater zest, to these agreements. Their constitutionality is based upon the pragmatism of the Court, as opposed to the clear text of the Constitution. *Reid*, 354 U.S. at 18 (noting that "it cannot be contended that . . . an [executive] agreement rises to greater stature than a treaty"). For a full discussion of these agreements and their constitutional implications, see Bruce Ackerman & David Golove, *Is NAFTA Constitutional?* 108 Harv. L. Rev. 799 (1995) [hereinafter Ackerman, *NAFTA*].

30. See e.g. *U.S. v. Harris*, 106 U.S. 629, 635 (1882) (explaining that "the government of the United States is one of delegated, limited, and enumerated powers").

31. Louis Henkin, *Foreign Affairs and the Constitution* ch. V, 144 (The Found. Press, Inc. 1972) [hereinafter Henkin, *Foreign Affairs*]. According to Professor Louis Henkin, this case is "perhaps the most famous and most discussed case in the constitutional law of foreign affairs."

32. 252 U.S. 416.

33. 16 U.S.C. § 703 (2000) (amending the Act to include treaties with Mexico, Japan, and Russia).

34. The problem was that these birds were of "great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection." *Missouri*, 252 U.S. at 431.

35. *U.S. v. Shauver*, 214 F. 154 (E.D. Ark. 1914); *U.S. v. McCullagh*, 221 F. 288 (D. Kan. 1915).

commerce powers.”<sup>36</sup> The question before the Court therefore, was whether the President could, with the “advice and consent of the Senate,”<sup>37</sup> sign a treaty that would not be constrained by the limits of the commerce clause.<sup>38</sup>

Missouri argued that the treaty<sup>39</sup> unconstitutionally impeded on states’ rights guaranteed by the Tenth Amendment.<sup>40</sup> Furthermore, Missouri contended that treaties cannot expand Congress’ constitutional powers, meaning that the treaty power of the United States must be limited to Congress’ legislative powers.<sup>41</sup> The Court, however, speaking through Justice Holmes, strongly disagreed with Missouri’s assertions. Holmes explained:

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 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.<sup>42</sup> *Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States.*<sup>43</sup>

This line of reasoning ostensibly eviscerated both of Missouri’s arguments. First, the treaty power is entirely delegated to the federal government. Accordingly, the Tenth Amendment only reserves non-delegated powers to the states<sup>44</sup> and cannot substantially limit the federal government’s treaty power. Consequently, the United States can sign a treaty that limits the rights of states, even though the treaty would be an unconstitu-

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36. Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 423 (1998) [hereinafter Bradley, *Treaty Power*].

37. U.S. Const. art. II, § 2, cl. 2.

38. James A. Deeken, *A New Miranda for Foreign Nationals? The Impact of Federalism on International Treaties that Place Affirmative Obligations on State Governments in the Wake of Printz v. United States*, 31 Vand. J. Transnatl L. 997, 1009 (1998) (noting that *Missouri* “raised the question of whether the federal government can act outside its Article I powers via international treaty”).

39. *Missouri*, 252 U.S. at 432 (Actually the treaty in question was “non-self executing,” meaning that the question presented to the Court also addressed the constitutionality of the statute passed in accordance with the treaty.).

40. *Id.* For the full text of the Tenth Amendment see *infra* note 119 and accompanying text.

41. *Missouri*, 252 U.S. at 432.

42. *Id.* (The Court noted that if a treaty is constitutional then “there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the government.” Seemingly, the validity of a treaty determines the constitutionality of a statute made in accordance with that treaty.).

43. *Id.* at 432-33 (emphasis added).

44. See *infra* n. 119 and accompanying text (full text of the Tenth Amendment).

tional violation of the Tenth Amendment if legislated by Congress.<sup>45</sup> Second, a treaty—as opposed to legislation—is valid, assuming it is made under the authority of the United States. Therefore, the allowable scope of a treaty is broader than the permitted scope of legislation, as the latter is further limited by the Constitution.<sup>46</sup>

Since the treaty power is both delegated and not bound by normative constitutional constraints, issues arise regarding whether *any* limits exist on the treaty making power.<sup>47</sup> Justice Holmes did nothing to alleviate these concerns and insinuated that the only limits on the treaty making power are procedural; that is, it only requires the President’s signature and ratification by two thirds of the Senate.<sup>48</sup> Even though Holmes did not explicitly say that there are no qualifications on the treaty making power,<sup>49</sup> he did indicate that such qualifications “must be ascertained in a different way.”<sup>50</sup> Thus, *Missouri* stands for two propositions: (1) the Tenth Amendment, or

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45. See e.g. Lori Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 Chi.-Kent L. Rev. 515, 530 (1991) (arguing that “our constitutional law is clear: the treaty-makers may make supreme law binding on the states as to any subject, and notions of states’ rights should not be asserted as impediments to the full implementation of treaty obligations”); Henkin, *Foreign Affairs*, *supra* n. 31, at 147 (contending that the Tenth Amendment does not provide any limits on the treaty power). It should be noted that the Court took the Tenth Amendment seriously in *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (holding that the Tenth Amendment prevented Congress from using the Commerce Clause to enact child labor prevention laws). Hence, the *Missouri* decision was not based upon the impotence of the Tenth Amendment, but rather its inapplicability.

46. Jay Loyd Jackson, *The Tenth Amendment Versus the Treaty Making Power Under the Constitution of the United States*, 14 Va. L. Rev. 441, 442 (1927-1928) (stating that *Missouri* “leaves the way clear for the courts to reach an unconstitutional result . . . through the colorable exercise of the treaty-making powers”).

47. This question is comprised of two elements: First, can a treaty be made on any subject, that is, is there a limited scope inherent in the treaty power? Second, does the Tenth Amendment or “states’ rights” have an impact on the treaty power? See *supra* nn. 45-46 and accompanying text. Although these elements are certainly related, Professor Bradley correctly notes that they are analytically distinct. It is possible that, even when the Tenth Amendment does not play a limiting role, the scope or subject matter of a treaty may be limited its wording. Bradley, *Treaty Power*, *supra* n. 36, at 393. Part III of this article focuses on the scope or subject matter aspect, while Part IV will address the “states’ rights” or Tenth Amendment facet. It should be noted that these questions can be “mirror images of each other,” though not analytically and not in a practical sense in the treaty scenario. *N.Y. v. U.S.*, 505 U.S. 144, 156 (1992) (explaining that “[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; [whereas] if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress”). See Bradley, *Treaty Power*, *supra* n. 36, at 393; Flaherty, *supra* n. 17, at 1282-85.

48. *Missouri*, 252 U.S. at 433 (opining that a valid treaty may not require “more than [adherence to] the formal acts prescribed to make the convention”).

49. Before *Missouri*, the Court clearly held that the treaty power does not extend “to authorize what the Constitution forbids.” *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890). Justice Holmes backed away from that position by offhandedly noting that the “treaty in question does not contravene any prohibitory words to be found in the Constitution,” which indicates treaties are only limited procedurally. *Missouri*, 252 U.S. at 433.

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

“states’ rights,” does not affect the treaty making power; and (2) the legitimate scope or subject matter of a treaty is enormous. Therefore, after *Missouri*, unconstitutional legislation would likely pass muster under the rubric of the United States’ treaty making power.<sup>51</sup>

Nevertheless, this colossal loophole was not used to bypass the archetypal limits of the Constitution and, by the early 1940s, “*Missouri* had been reduced to a[] historical footnote.”<sup>52</sup> The Court’s upholding of New Deal legislation was a major factor in *Missouri*’s descent into obscurity.<sup>53</sup> Since Congress could compel the states via the commerce clause, the treaty making power became superfluous.<sup>54</sup>

*Missouri* again rose to controversial prominence during the 1950s.<sup>55</sup> The United States began signing treaties<sup>56</sup> that, under the authority articulated in *Missouri*, were used to override inconsistent state laws.<sup>57</sup> This concern prompted Senator Bricker to engage in a tumultuous seven-year crusade to overrule *Missouri* and limit the treaty power through constitutional amendment.<sup>58</sup> One reason the Bricker Amendment was not adopted<sup>59</sup> was the Supreme Court’s decision in *Reid v. Covert*.<sup>60</sup> Justice

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51. The commentators disagree as to whether *Missouri* sets any serious limits on the treaty making power. See Flaherty, *supra* n. 17, at 1298 (agreeing that after *Missouri*, “treaties need only comport with the Constitution’s procedural rather than substantive requirements”); Jackson, *supra* n. 46 at 442 (*Missouri* “leaves the way clear for the courts to reach an unconstitutional result . . . through the colorable exercise of the treaty-making powers”); Carlos Manuel Vazquez, *Part II: Beard, Printz, and the Treaty Power*, 70 U. Colo. L. Rev. 1317, 1337 (1999) (arguing that *Missouri* suggests “that there might not be any substantive limits to the treaty power”); see also Golove, *Treaty-Making*, *supra* n. 12, at 1083 (arguing that *Missouri* held “that treaties, like all other governmental acts, must be subject to the Constitution”).

52. Ackerman, *NAFTA*, *supra* n. 29, at 857.

53. Bradley, *Treaty Power*, *supra* n. 36, at 399 (explaining that “[o]nce it became understood that the federal government had almost unlimited domestic lawmaking powers, the particular scope of the treaty power . . . became less relevant”); Ackerman, *NAFTA*, *supra* n. 29, at 857 (“[T]he New Deal revolution had swept away the principles of limited government that made *Missouri* seem important.”).

54. See Bradley, *Treaty Power*, *supra* n. 36, at 399. Furthermore, the scope of the treaty power became less relevant, since the Court had held the “executive/congressional-executive agreements” to be constitutional, see e.g. *U.S. v. Belmont*, 301 U.S. 324, 330-31 (1937), and as such the more cumbersome treaty power was no longer necessary.

55. Golove, *Treaty-Making*, *supra* n. 12, at 1273-74.

56. *Id.* at 1274. The United States adopted the United Nations Charter, the Universal Declaration of Human Rights, and began negotiations on an international human rights covenant.

57. *Id.*

58. *Id.* “At one point in 1954, the proposed [Bricker] amendment came within one vote of passage in the Senate.” *Id.* at 1275.

59. Furthermore, President Eisenhower allayed the fears of some segregationists and helped thwart passage of the Amendment by announcing that he “had no intention of becoming a party to the then-proposed human rights treaties.” Bradley, *Treaty Power*, *supra* n. 36, at 428. For a comprehensive discussion of Bricker’s proposed amendment consult Golove, *Treaty-Making*, *supra* note 12, at 1273-78.

60. 354 U.S. at 22 (holding that citizens are shielded from prosecution in a military court formed in a treaty because it would be “inconsistent with both the ‘letter and spirit of the constitution’ ”); see also



Black, speaking for a plurality, held that no treaty<sup>61</sup> could “confer power on the Congress, or on any other branch of government, which is free from the restraints of the Constitution.”<sup>62</sup> Unlike *Missouri*, the Court in *Reid* argued that the treaty power is limited by

[constitutional] restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and that of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States.<sup>63</sup>

Justice Black continued:

It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights – let alone alien to our entire constitutional history and tradition – to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.<sup>64</sup>

*Reid* overturned provisions of the Uniform Code of Military Justice because those provisions did not conform to the Fifth and Sixth Amendments.<sup>65</sup> *Reid* effectively limited the scope of the treaty making power when it held that no treaty may abridge an individual’s constitutional guarantees.<sup>66</sup>

Accordingly, the Patriot Act would be improper as a treaty if it violated the Fourth Amendment. Moreover, the Tenth Amendment seems to impose a slight limitation on the treaty power<sup>67</sup> because no treaty can be used to change the “character” of state government.<sup>68</sup> Thus, if a human rights treaty were deemed to alter the “character” of a state government, by transforming its law enforcement system, it would be an unconstitutional violation of the Tenth Amendment.

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Deeken, *supra* n. 38, at 1009 (explaining how the Court’s decision “quieted fears that it [(the Court)] would allow international treaties to circumvent constitutional limits on the federal government”).

61. Justice Black disposed of the case by upholding “the supremacy of the Constitution over a treaty,” despite the fact that an executive agreement was at issue. *Id.* at 16-17.

62. *Id.* at 16.

63. *Id.* at 17-18.

64. *Id.* at 17.

65. *Id.* at 39-40.

66. *Id.*

67. See *Reid*, 354 U.S. at 17-18 (discussing the prohibition against changing the “character” of a state likely emanates from the Tenth Amendment and “states’ rights” concerns). For an argument that the dicta in *Reid* repudiates this idea see Flaherty, *supra* note 17, at 1300.

68. *Reid*, 354 U.S. at 17.

Nevertheless, these issues remain ambiguous. The foremost reason for this ambiguity is that *Reid* was only a plurality opinion – meaning that *Missouri* is still good law.<sup>69</sup> Furthermore, Justice Black adds to the confusion by attempting to show how his plurality opinion is in consonance with *Missouri*, while unmistakably altering it.<sup>70</sup> Lastly, the Court frames the limitations of the treaty power in ambiguous language, such that definitive principles are not easily ascertainable.<sup>71</sup>

The Court has not revisited this issue since the *Reid* decision.<sup>72</sup> There is a strong probability, however, that the Senate still believes that there are substantive limits on the treaty power.<sup>73</sup> Moreover, since the Court has emphatically renewed its support of federalism,<sup>74</sup> it may very well decide to re-examine its anti-states' rights holding in *Missouri*. Therefore, the next section of this article will analyze whether *Missouri* is correct, in its unspoken assertion that the scope of the treaty power is nearly unlimited.

### III. SCOPE OF THE TREATY POWER

Two camps have developed in the debate over the extensive scope of the treaty power: the “nationalist”<sup>75</sup> faction and the “states’ rights” faction. The “nationalist” faction argues that there are no subject matter limitations

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69. According to Professor Flaherty, a five-member majority of the *Reid* Court held that a treaty cannot violate the individual rights guaranteed by the Constitution. Flaherty, *supra* n. 17, at 1300. Close consideration of Justice Frankfurter's concurrence in *Reid*, arguably yields a different result. Frankfurter said: “I therefore conclude that, in *capital cases*, the exercise of court-martial jurisdiction over civilian dependents *in time of peace* cannot be justified . . .” *Reid*, 354 U.S. at 49 (emphasis added). Seemingly, Frankfurter might agree with the plurality, but only in certain limited circumstances. Thus, it is incorrect to say that a majority in *Reid* holds that treaties may not usurp an individual's constitutional rights. In fact, most commentators support the view that only a plurality in *Reid* held that treaties cannot abridge individual state rights. See e.g. Bradley, *Treaty Power*, *supra* n. 36, at 425; Golove, *Treaty-Making*, *supra* n. 12, at 1277.

70. For a discussion of these points see the text accompanying *supra* notes 60-68.

71. See *Reid*, 354 U.S. at 18 (for example, the Court said: “*To the extent* that the United States can validly make treaties, the people and the states have delegated their power to the National Government and the Tenth Amendment is no barrier”) (emphasis added). But the term “extent” is left undefined.

72. Bradley, *Treaty Power*, *supra* n. 36, at 426.

73. Even when the Senate does ratify treaties it attaches a boilerplate set of reservations, understandings, and declarations (“RUDs”) that include a statement to the effect that the federal government will only implement the treaty to the extent that it possesses the legislative and judicial power over the matter in question. *Id.* at 428; see also *supra* nn. 24-25. These RUDs manifest “a desire not to effectuate changes to domestic law by means of the treaty-making power.” David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: Article: The Significance of the Reservations, Understandings, and Declarations*, 42 DePaul L. Rev. 1183, 1206 (1993). For a comprehensive discussion on the role of states in foreign affairs, see Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 Am. J. Intl. L. 821 (1989); Friedman, *supra* n. 23.

74. *Printz v. U.S.*, 521 U.S. 898, 935 (1997) (holding that the Tenth Amendment prevents Congress from “conscripting” state officers to enforce a federal regulatory program).

75. Bradley, *supra* n. 36, at 393 (Professor Bradley coined this term in his insightful article.).

on treaties and that the Tenth Amendment plays no part in limiting treaties.<sup>76</sup> In contrast, the “states’ rights” faction argues that treaties are both limited in scope and limited by Tenth Amendment considerations.<sup>77</sup> This section attempts to prove three things: (1) the Founders created the treaty power with limited scope; (2) changed circumstances created the disagreement between the “nationalist” faction and the “states’ rights” faction over the scope of the treaty power; and (3) *Missouri* was not decided in accordance with the original understanding of the treaty power. This part is, therefore, divided into three sections, all analyzing the treaty power. The first analyzes the constitutional text, the second examines the constitutional structure, and the third considers some of the legislative history.

#### A. Constitutional Text

[The president] shall have Power, by and with the Advice and Consent of the Senate, to make treaties, provided two thirds of the Senators present concur . . . .<sup>78</sup>

No State shall enter into any Treaty, Alliance, or Confederation . . . .<sup>79</sup>

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .<sup>80</sup>

The text of the Constitution seems to support the “nationalist” view.<sup>81</sup> Treaties, which are the “supreme law of the land,” are to be made only by the President with the “advice and consent of the Senate.” States have no say when it comes to treaties.<sup>82</sup> The text thus implies that the federal government can enact treaties on any subject.<sup>83</sup> Moreover, the Constitution does not qualify the word “treaty”; specifically the Constitution does not

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76. *Id.*

77. *Id.*

78. U.S. Const. art. II, § 2, cl. 2.

79. U.S. Const. art. I, § 10, cl. 1.

80. U.S. Const. art. VI, cl. 2.

81. Henkin, *Foreign Affairs*, *supra* n. 31, at 137 (arguing that the text of the Constitution “does not expressly impose prohibitions or prescribe [subject matter] limits on the treaty power”).

82. *See e.g. Belmont*, 301 U.S. at 331 (maintaining that state lines disappear in the area of foreign relations); *U.S. v. Curtiss-Wright*, 299 U.S. 304, 317 (1936) (holding that states have no power in the area of foreign relations); *Gibbons v. Ogden*, 22 U.S. 1, 78 (1824) (explicitly stating that “the states are unknown to foreign nations”).

83. *See* Henkin, *Foreign Affairs*, *supra* n. 31, at 383 n. 33 (quoting William Rawle, who said that “in our present Constitution no limitations [on the treaty power] were held necessary”).

state that treaties must solely concern issues of a foreign nature.<sup>84</sup> This further indicates that there is no subject matter restriction on treaties. Seemingly, treaties can cover any topic, including issues integral to the sovereignty of a state, such as fighting crime or the death penalty.<sup>85</sup> Accordingly, it seems that the constitutionality of the treaty in *Missouri* was correctly upheld, despite having a significant impact on the State of Missouri.<sup>86</sup> Additionally, this understanding of the treaty power would enable the Senate to ratify any pending human rights treaties without having to attach "RUDs."<sup>87</sup>

There are, however, glaring problems with this textual analysis. First, while it is true that the states delegated the treaty making power to the federal government, it does not mean that treaties do not have subject matter limitations. Moreover, the federal government could circumvent constitutional limitations by enacting treaties of unlimited scope, therefore making the Constitution a charade.<sup>88</sup>

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84. Flaherty, *supra* n. 17, at 1306 (noting that nowhere in the Constitution does it say that treaties must relate solely to matters of "international" concern, as opposed matters of domestic concern).

85. Even though "nationalist" scholars think that treaties can be made on matters of serious domestic concern, they nevertheless agree that treaties can only be made on subjects "appropriate for negotiation and agreement among states." Golove, *Treaty-Making*, *supra* n. 12, at 1090. Professor Golove concedes that even though "international law may allow a state to enter into a treaty for any purpose it may have (subject to the principle of *jus cogens*), in my view, the President and Senate may not constitutionally enter into a treaty for the sole purpose of making domestic legislation." *Id.* at n. 41. In other words, treaties can be used domestically, pending they relate to matters of international concern. Professor Henkin also agrees with this point and formulated it as an equation: "A treaty is an international agreement on a matter of international concern. It may not deal with a matter which is not of international concern; there is no matter which is of international concern with which it may not deal." Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. Pa. L. Rev. 903, 907 (1959) [hereinafter Henkin, *Law of the Land*]. Justice Field perhaps best summed up these views; holding that the treaty power "extends to all proper subjects of negotiation between our government and the governments of other nations . . . [and] it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country." *Geofroy*, 133 U.S. at 266-67.

86. *Id.* "Nationalists" maintain that this treaty is valid, since the migratory bird issue is of international concern. See *Missouri*, 252 U.S. at 435 (describing the impact of these migratory birds on the United States and Canada).

87. See *supra* n. 85. Domestic human rights treaties satisfy the international prong necessary in enacting a treaty because "the traditional conception of foreign affairs has changed to include matters formerly viewed as purely domestic issues." Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1622 (1997).

88. The inimitable words of Professor Henry St. George Tucker make this point very well:

If the establishment of an 'unlimited' treaty power is to be the ultimate conclusion of this great question, it must be admitted that the incorporation of the treaty-making power into the Constitution of the United States was the introduction into our governmental citadel of a Trojan horse, whose armored soldiery, for years concealed within it, now step forth armed *cap-à-pie*, shameless in their act of deception, eager and ready to capture the citadel upon which they pretended to bestow their gift. If such construction be possible it would be of interest to know for what purpose the Tenth Amendment was ever demanded and incorporated into the Constitution.

To recapitulate: superficially, the Constitutional text supports the “nationalist” reading – but that reading withers under critical scrutiny.<sup>89</sup> Therefore, since the literal text of the treaty power is ambiguous, the next section examines the constitutional structure to discern whether there are any limitations on the scope of the treaty power.

### B. Constitutional Structure

The Constitution’s procedural mechanisms support the “states’ rights” position that the Founders conceived of a treaty power that was limited in scope.<sup>90</sup> First, the House of Representatives was excluded from treaty making.<sup>91</sup> This effectively prevented the large states from dominating the smaller states in any treaty ratification debates. Second, even in the Senate—where each state is represented equally—a super majority of two thirds is required to ratify a treaty.<sup>92</sup> Both of these procedural mechanisms indicate that the Founders did not intend the treaty power to usurp the power of the states; in other words, the Founding Fathers intended the treaty power to be limited to foreign affairs with minimal domestic influence.<sup>93</sup>

Furthermore, it is indisputable that the Founders intended to set up a government of limited enumerated powers.<sup>94</sup> If the treaty power is unlim-

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Henry St. George Tucker, *Limitations On The Treaty-Making Power Under The Constitution Of The United States* § 296, 339 (Little, Brown, & Co. 1915).

89. Some commentators have critically scrutinized the Court’s decision in *Reid*. According to Professor Golove and Mr. Deeken, the Tenth Amendment does not present any bar because the treaty power is entirely delegated. At the same time, this does not mean that the treaty power is illimitable from violating other provisions of the Constitution. Golove, *Treaty-Making*, *supra* n. 12, at 1097; Deeken, *supra* n. 38, at 1010. If this reading is correct then the questions presented above are answered, because the treaty power is limited in scope. This reading of *Reid*, however, fails for two reasons. First, why is the rest of the Constitution any more sacrosanct than the Tenth Amendment? Second, Justice Black’s opinion in *Reid* must be considered in light of his judicial philosophy that consisted of an “overstated faith that the language of the Constitution would show the way.” John Hart Ely, *Democracy and Distrust* 3 (Harvard U. Press 1980). He also so eloquently said, “I cannot consider the Bill of Rights to be an outworn 18th Century ‘strait jacket.’” *Adamson v. Ca.*, 332 U.S. 46, 89 (1947) (Black, J., dissenting). So it would be farfetched to suggest that Justice Black did not take the Tenth Amendment seriously. Although, it should be noted that this second rebuttal is somewhat weakened, in that Justice Black did sign onto a nine-zero (New Deal) opinion, where the Court said that the Tenth Amendment is nothing “but a truism that all is retained which has not been surrendered.” *U.S. v. Darby*, 312 U.S. 100, 124 (1941).

90. Bradley, *Treaty Power*, *supra* n. 36, at 411 (arguing that the “Founders contemplated that treaties would govern truly inter-national relations”).

91. *See supra* n. 78 and accompanying text.

92. *Id.*

93. *See* Bradley, *Treaty Power*, *supra* n. 36, at 411. Additionally, until 1913 and the ratification of the Thirteenth Amendment, Senators were elected by state legislatures. This enabled the States to exert tremendous influence over the Senate, which provides further indication that the treaty power was never intended to be unlimited.

94. *E.g. U.S. v. Lopez*, 514 U.S. 549, 552 (1995) (holding that “[t]he Constitution creates a Federal Government of [limited] enumerated powers . . . ‘the powers delegated . . . are few and defined’ ”).

ited in scope, it would in effect “permit amendment of [the Constitution] . . . in a manner not sanctioned by Article V.”<sup>95</sup> This would be patently contrary to the Founders intent.<sup>96</sup> This structural analysis is problematic because these inferences do not change the simple fact that the Constitution does not limit the scope of the treaty power. Therefore, the next section scrutinizes the legislative history to determine whether there was an original understanding of the treaty power inherent in the word “treaty.”

### C. Legislative History<sup>97</sup>

By 1787, it became clear that the government created by the Articles of Confederation was ineffectively weak.<sup>98</sup> A major impotency of the Articles was its inherent inability to force states to abide by treaties.<sup>99</sup> For this and other reasons, a Constitutional Convention was called to form a stronger and “more perfect union.”<sup>100</sup> “But the method for erecting a stronger national government was a point of great dispute. While many delegates . . . wished to have a powerful central government, other delegates . . . feared an oppressive central government that would undercut the power of the states.”<sup>101</sup> The vibrant debate between state and federal power has raged since the Constitution’s founding,<sup>102</sup> and it does not appear that this controversy will end in the near future.<sup>103</sup>

At the Constitutional Convention, there was minimal debate—if any at all—regarding the scope of the treaty power or its impact on states’ rights.<sup>104</sup> The sheer paucity of debate on this topic indicates that there was no substantial disagreement between the “nationalistic” position and the “states’

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95. *Reid*, 354 U.S. at 17.

96. *Id.*

97. The preceding notes on the legislative history, while certainly not exhaustive, nevertheless provide an inkling regarding the original understanding of the treaty power. For a thorough and fascinating historical discussion—albeit one partial to the “nationalist” view—see Golove’s, voluminous 240 page article: Golove, *Treaty-Making*, *supra* n. 12.

98. Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. Dayton L. Rev. 5, 18-19 (1989).

99. Golove, *Treaty-Making*, *supra* n. 12, at 1102.

100. U.S. Const. preamble.

101. Ehrman, *supra* n. 98, at 19.

102. See *Slaughter-House Cases v. Crescent City*, 83 U.S. 36, 60 (1872). The issue of “states’ rights” came to a climax over slavery, and resulted with the Southern States seceding, which caused the Civil War.

103. Ironically, although the debate continues, the sides have switched. The original Federalists, like Alexander Hamilton, were conservative and supporters of the English. Yet today, although conservatives remain pro-English, they nevertheless are strong supporters of “states’ rights.” On the other hand, the original anti-Federalists, like Thomas Jefferson, were liberal supporters of the French. Today, although still supporters of the French, they back a strong central government.

104. Golove, *Treaty-Making*, *supra* n. 12, at 1134. This is not to say that there was no debate relating to the treaty power. If it was debated, it only concerned the procedural process necessary to enact a treaty. Bradley, *Treaty Power*, *supra* n. 36, at 410.

rightists” position pertinent to the treaty power.<sup>105</sup> Apparently, the Founders inherently understood the meaning of a treaty<sup>106</sup> and did not see a conflict between states’ rights and treaties. Perhaps this abeyance on the part of the “states’ rightists” was predicated on an accepted principle that the *sine qua non* of a treaty was to affect a change in foreign affairs without substantially limiting the states’ powers.<sup>107</sup>

These issues were not discussed at the Constitutional Convention nor during the ratification debates of the states,<sup>108</sup> the only exception was Virginia.<sup>109</sup> This further supports the proposition that treaties and states’ rights were not seen as conflicting with one other because treaties were limited to the scope of foreign affairs. For example, James Madison said, “[t]he exercise of the [treaty] power must be consistent with the object of the delegation... The object of treaties is the regulation of intercourse with foreign nations, and is external.”<sup>110</sup> Furthermore, Edmund Randolph said, “neither the life nor property of any citizen, nor the particular right of any state, can be affected by a treaty.”<sup>111</sup> Thus, the treaty power in the Constitution was originally understood as being limited in scope.

The legislative history shows that the Founders understood treaties to affect foreign affairs and not to usurp the powers of the states. Hence, *Missouri* was not decided in accordance with the original understanding of the treaty power, as the Migratory Bird Treaty substantially diminished Missouri’s regulatory powers. Similarly, the original understanding of the treaty power prevents the Senate from ratifying treaties concerning domestic human rights, as these treaties effectively impede on the states’ rights to individually regulate its citizens.

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105. Henkin, *Law of the Land*, *supra* n. 85, at 906 (suggesting that perhaps no questions existed as to what a treaty is, and what is a proper subject for a treaty).

106. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of obscenity]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . .”).

107. It would be a gross overstatement to say that the original scope of a treaty did not have *any* affect on the states. From the founding of this Nation, treaties always affected the states to some degree. See e.g. *Rocca v. Thompson*, 223 U.S. 317, 325 (1912) (concerning a treaty dealing with deceased foreigners that affected California’s probate laws); *Compagnie Francaise v. La.*, 186 U.S. 380, 393-95 (1902) (involving a treaty regulating treatment of foreign nationals that affected Louisiana’s quarantine laws). Nevertheless, the effect of treaties on the states was limited to the way a state treated its foreigners. Henkin, *Law of the Land*, *supra* n. 85, at 910; but see Golove, *Treaty-Making*, *supra* n. 12, at 1266-69 (arguing that not only was there never a subject matter limitation on treaties, but also that treaties were permitted to substantially affect the states). The problem with Professor Golove’s analysis is that he cannot point to a single treaty prior to the Twentieth Century that regulated anything remotely resembling a human rights treaty that would, in effect, regulate a states own citizens.

108. See *supra* n. 104 and accompanying text.

109. Bradley, *Treaty Power*, *supra* n. 36, at 410.

110. *Id.* at 413 (quoting Virginia’s ratification debates).

111. *Id.*

In summary, the constitutional text of the treaty power is unqualified and ostensibly enables the federal government to enact treaties of unlimited scope. Yet the legislative history, supported by its constitutional structure, indicates that the Founders understood treaties as being inherently limited in scope to foreign affairs.<sup>112</sup>

This contradiction is not insurmountable. At the Founding there was no contradiction; treaties were universally understood to be limited in scope. Hence, the constitutional text does not contradict the legislative history or constitutional structure. The word “treaty” was embedded with meaning limiting its scope in consonance with the history and structure of the Constitution.<sup>113</sup> The scope of the term “treaty”—shrouded with ambiguity today—was not originally debated because the Founders thought it was a transparently simple term.

The current controversy regarding the scope of the treaty power is therefore relatively new. The argument arose when the meaning of “treaty” evolved to include agreements concerning domestic problems.<sup>114</sup>

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112. Perhaps the most conclusive proof that treaties were understood to have an inherent subject matter limitation, is a statement from the most renowned of the “states’ rightists,” Senator John C. Calhoun. This venerable Southerner said:

The limits of the [legislative power] are exactly marked; it was necessary, to prevent collision with similar co-existing States’ powers... Exact enumeration on this head is necessary, to prevent the most dangerous consequences. The enumeration of legislative powers in the constitution has relation, then, not to the treaty-making power, but to the powers of the States. In our relation to the rest of the world [however] the case is reversed. Here the States disappear. Divided within, we present the exterior of undivided sovereignty. . . . Whatever, then, concerns our foreign relations; whatever requires the consent of another nation, belongs to the treaty-making power.

Golove, *Treaty-Making*, *supra* n. 12, at 1091 (quoting Calhoun). It is inconceivable that Senator Calhoun would have made that statement, unless it was crystal clear that treaties were limited in scope to foreign affairs and could not be used to affect a state’s domestic affairs. Curtis A. Bradley, *Correspondence: The Treaty Power and American Federalism, Part II*, 99 Mich. L. Rev. 98, 103 (2000) [hereinafter Bradley, *Treaty Power Part II*].

113. Justice Black suggested another reason why the treaty power was left unlimited in the text. He said: “[T]he reason treaties were not limited to those made in ‘pursuance’ of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect.” *Reid*, 354 U.S. at 16-17. Although, this explanation makes sense, it does not satisfactorily answer the aforementioned contradiction. It seems that the Founders—if they had so desired—could have conceived a usage of words that would have enabled the old treaties to remain in effect, while ensuring that new treaties would comply with the Constitution. Professor Bradley suggests a third answer to this question; he says: “The Founders did not enumerate subject matter limitations on the treaty power in order to preserve flexibility, not because they thought the power unlimited.” Bradley, *Treaty Power*, *supra* n. 36, at 417. This answer is not much better because it creates a slippery slope, since there is no clearly demarcated treaty power.

114. Barry E. Carter & Phillip R. Trimble, *International Law*, 176 (3d ed., Aspen 1999) (stating that the constitutional term “treaty” has come to include any international agreement, regardless of subject matter). This change is something entirely alien to the original conception of the treaty power. Bradley, *Treaty Power Part II*, *supra* n. 112, at 121.



Consequently, the unqualified treaty power has been revised to comply with modern times. This creates a contradiction between the constitutional text—now understood to be limitless in scope—and its structure and history—which are forces of limitation.<sup>115</sup> If this thesis is correct, it certainly sheds light on the nature of Holmes's soaring rhetoric in *Missouri*.

We may add that when we are dealing with words that are also a constituent act, like the Constitution of the United States, *we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters*. It was enough for them to realize or to hope that they had created an organism; *it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.*<sup>116</sup>

Holmes bases his opinion on at least five factors: (1) the Founders could not foresee the world of today; (2) consideration of the Nation's experiences; (3) the understandings of yesteryear cannot resolve the current question; (4) consideration for the changed nature of the Nation; and, (5) the text of the constitution. Holmes weakens the Founders' understanding of the treaty power by reasoning that the Founders would have deemed the Migratory Bird Treaty unconstitutional. For this reason, Holmes' only grounds dating to the Founding is his fifth factor, the text of the constitution, which following *Missouri*, has been wrenched open to include even human rights treaties.<sup>117</sup>

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115. Changed circumstances is an age-old problem inherent in the codification of law. A classical example of this problem is a hypothetical statute passed in 1930 that says "no vehicles in the park." Clearly, the statute prohibits cars, but does it include a child's remote controlled car, does it include a motorized wheelchair? Since these objects did not exist at the time of the statute's passage it is unclear whether they are included in the prohibition.

116. *Missouri*, 252 U.S. at 433-34 (emphasis added).

117. *See supra* n. 115. The problem confronted by Holmes is not new. Constitutions, like all documents, are dated and are most applicable at the moment in time when enacted, and are not designed to last forever. Yet, it is worth considering Justice Cardozo's enduring words regarding the nature of constitutions:

The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and deri-

## IV. TREATY POWER AND THE TENTH AMENDMENT

This article has endeavored to show that the original meaning of the word “treaty” only included agreements between nations that would not substantially affect the domestic regulatory powers of the states. Assuming there is no subject matter restriction on the treaty power, is the treaty power unlimited? Does the Tenth Amendment play a role in constraining the treaty power?<sup>118</sup> These questions are particularly relevant because the Court has reinvigorated its federalism jurisprudence. The Tenth Amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>119</sup> Not surprisingly, the “nationalists” and “states’ rightists” disagree as to whether the Tenth Amendment constrains the treaty power.<sup>120</sup> Justice Holmes enunciated the prevailing “nationalist” view in *Missouri*.<sup>121</sup> He explained that the Tenth Amendment does not limit the treaty power; it is entirely “delegated” to the federal government.<sup>122</sup>

If the Tenth Amendment prevents the federal government from impeding on a state’s reserved powers, why should the treaty power be impervious to the Tenth Amendment? The same Court that decided *Missouri* held that the Tenth Amendment constrained the uninhibited use of the Commerce Clause.<sup>123</sup> If so, why should the treaty power be more immune from the Tenth Amendment than the Commerce Clause?<sup>124</sup> Hence, the “states’ rightists” faction argues that the Migratory Bird Treaty was unconstitu-

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sion of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders.

Benjamin N. Cardozo, *The Nature of the Judicial Process* 92-93 (Yale U. Press 1921). For a fascinating discussion regarding Holmes’s theory of judicial review, see John Dewey, *Logical Method and Law*, 10 Cornell L. Rev. 17, 19-22 (1924-1925).

118. See *supra* n. 47.

119. U.S. Const. amend. X.

120. See e.g. Bradley, *Treaty Power*, *supra* n. 36 (expositing the “states’ rights” position); *contra*, Flaherty, *supra* n. 17 (espousing the “nationalist” position).

121. Bradley, *Treaty Power*, *supra* n. 36, at 434.

122. *Missouri*, 252 U.S. at 432.

123. See *supra* n. 45 (discussing *Hammer v. Dagenhart*; *Kansas v. Colorado*, 206 U.S. 46, 85-92 (1907) (sustaining Colorado’s claim that Congress lacked the power to regulate its use of rivers for the purpose of reclamation of arid lands)). It should be noted that Justice Holmes dissented in *Hammer*, leading some to suggest that perhaps Holmes did not view the Tenth Amendment as a barrier. Bradley, *Treaty Power*, *supra* n. 36, at n. 261. The majority of the Court signed onto both cases implying that the Tenth Amendment only limits the commerce power, but not the treaty power.

124. Bradley, *Treaty Power*, *supra* n. 36, at 434.

tional because it inhibited Missouri's exercise of its reserved powers.<sup>125</sup> Accordingly, the "states' rightists" faction maintains that the Tenth Amendment prevents all federal encroachment on states' rights, notwithstanding "delegated" federal infringement.

The "states' rightists" view is problematic, however, because it is predicated on a dynamic that no longer exists. In 1791, the Tenth Amendment made sense. At that time, a federal government of limited and enumerated powers could conceivably co-exist beside a state government without substantially imposing on the state's affairs.<sup>126</sup> Today, the original demarcation line between state and federal is illusory. As the United States continues to globalize, the national economy engenders extensive federal and state interdependency.<sup>127</sup> These factors cause even the permitted exercise of federal power to seriously affect the reserved powers of a state.<sup>128</sup> Thus, current reality creates an awkward constitutional incongruity. If the permitted regulation of commerce impacts a state's reserved powers, then the enumerated powers of the Constitution are at odds with the Tenth Amendment's reserved powers. Consequently, the Commerce Clause and the Tenth Amendment must not be given its full effect to avoid this predicament.

Unfortunately for the "states' rightists" there is blackletter law dealing with the conflict between the Commerce Clause and the Tenth Amendment. The Court has repeatedly held that the Tenth Amendment only reserves *non-delegated* powers to the states.<sup>129</sup> However, "[i]f a power is delegated . . . the Tenth Amendment expressly disclaims any reservation of that power to the States."<sup>130</sup> "The Tenth Amendment imposes no restriction on the exercise of delegated powers."<sup>131</sup> Therefore, Congress can infringe on the states' reserved powers pursuant to the scope of its own dele-

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125. Holmes argued—to use popular parlance—that the birds are “here today and gone tomorrow.” This ostensibly weakens Missouri's claim, as they cannot really regulate a transitory creature. *Missouri*, 252 U.S. at 434-35.

126. “All legislative power must be vested in either the state or the National Government; *no legislative powers belong to a state government other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress.*” *Kansas*, 206 U.S. at 89 (emphasis added). Logically this makes sense, because how could the Tenth Amendment reserve powers solely for the state, if, at ratification, state powers were intertwined with federal powers?

127. Friedman, *supra* n. 23, at 1447-65 (discussing globalization's impact on federalism).

128. *N.Y.*, 505 U.S. at 156 (In the words of Justice O'Connor: “As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power.”).

129. *E.g. Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991) (explaining the nature of the non-delegated powers and the reasons why they were reserved to the states).

130. *N.Y.*, 504 U.S. at 156 (emphasis added).

131. *Printz*, 521 U.S. at 941 (Stevens, J., dissenting).

gated powers.<sup>132</sup> This means that *Missouri* was correctly decided in relation to the Tenth Amendment question.<sup>133</sup> Accordingly, if Congress adheres to the scope of the treaty power, the Tenth Amendment poses no problem – even if the treaty has a substantial impact upon the reserved powers of the state. The Court, however, rejected this Tenth Amendment approach in its recent jurisprudence.<sup>134</sup> The Court insisted that there are non-scope based limits to Congress’ “delegated” powers.<sup>135</sup> The obvious problem is how can a “delegated” power be limited if the Tenth Amendment is not implicated?

The answer is that the Tenth Amendment is not the means being used to limit the “delegated” power. Rather there is an inviolable state sovereignty that prevents Congress from “commandeering” both state legislatures<sup>136</sup> and state executives.<sup>137</sup> Hence, there are now three limitations on Congress: (1) scope; (2) state sovereignty;<sup>138</sup> and (3) the Tenth Amendment.

These rulings are part of a recent trend that restricts Congress’ right of action.<sup>139</sup> Many scholars have roundly criticized these decisions.<sup>140</sup> The fundamental problem with the Court’s ruling is that the Constitution does not create a right of state sovereignty.<sup>141</sup> The Court unilaterally created this right by looking to constitutional history, structure, and its own juris-

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132. See *supra* n. 47. The issue of the scope of delegation must be kept analytically separate from the inquiry regarding the Tenth Amendment. The reason is that, at times, the scope of the delegation will inherently limit the exercise of the delegated power, even though the Tenth Amendment is irrelevant. See *supra* pt. II. Perhaps, for this reason, Justice Thomas has been advocating a reexamination of the scope of the Commerce Clause. *Lopez*, 514 U.S. at 585.

133. Note that this section is assuming *arguendo* that the Migratory Bird Treaty did not violate the scope of the treaty power. See *supra* nn. 47, 118 and accompanying text. Hence, Holmes’s decision is not problematic, as Congress was acting within the scope of the treaty power.

134. See *e.g.* *Printz*, 521 U.S. at 924 (disagreeing with the dissents’ view of the Tenth Amendment).

135. *Id.* at 905, 935 (explaining that state sovereignty prevents congressional action, while conceding that the Tenth Amendment is irrelevant to the inquiry).

136. *N.Y.*, 505 U.S. at 188 (holding that “a residuary and inviolable sovereignty” prevents Congress from exercising its commerce power to coerce a state’s legislature).

137. See *Printz*, 521 U.S. at 935; *N.Y.*, 505 U.S. at 188 (extending the holding to a state’s executive branch).

138. Ironically, the Court’s view of the Tenth Amendment has remained consistent. In *Darby*, the Court held that the Tenth Amendment is “but a truism.” 312 U.S. at 124; see also *supra* n. 89. While in *N.Y.*, the Court held that the Tenth Amendment is “essentially a tautology.” 505 U.S. at 157. The only difference is that, in *Darby*, the impotence of the Tenth Amendment led to the constitutionality of the New Deal, whereas, in *N.Y.*, it led to the unconstitutionality of congressional action.

139. See *e.g.* *Alden v. Me.*, 527 U.S. 706 (1999) (prohibiting Congress from subjecting non-consenting states to suit within the state’s own court); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that Congress cannot expand rights under the Fourteenth Amendment); *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996) (restricting congressional abrogation of state sovereign immunity).

140. See *e.g.* Flaherty, *supra* n. 17 (calling the Court’s federalism jurisprudence “a wasting force in U.S. life”).

141. *Printz*, 521 U.S. at 905.

prudence.<sup>142</sup> This article is not concerned with the propriety of the Court's actions; it merely asks whether the anti-commandeering principle affects the treaty power.<sup>143</sup>

It is probable that the Court will apply its anti-commandeering principle to the treaty power if *Missouri* is reexamined. This theory is based upon two factors. First, the Court in *Printz* made clear that commandeering a state's apparatus is "fundamentally incompatible with our constitutional system of dual sovereignty."<sup>144</sup> Accordingly, since the Commerce Clause cannot be used to commandeer state action, neither can the treaty power. Second, the Court has presumed "that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution."<sup>145</sup> It would be anomalous to allow commandeering under the treaty power and not under the commerce power. Logically, the Court must broaden its anti-commandeering holding or foster an anomalous result. These two reasons suggest that the Court will extend the anti-commandeering principle to the treaty power, if it reexamines *Missouri*.

Nevertheless, it is not a foregone conclusion that a *Missouri* type treaty or a human rights treaty would be deemed unconstitutional. The uncertainty is caused by the elusiveness of the word commandeering. For example, if Congress commands a state to perform function A, it could be said with certainty that Congress is commandeering. Hence, commanding a state to give the federal government information, as stipulated in the Patriot Act, would be unconstitutional commandeering.<sup>146</sup> But, what happens if Congress merely tells a state not perform function A – is that commandeering? The answer is unclear.<sup>147</sup> Therefore, if passive commandeering is constitutional, the federal government can ratify a human rights treaty forbidding states from carrying out the death penalty.

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142. *Id.* (explaining that since "there is no constitutional text [in the Tenth Amendment] speaking to the precise question, the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court"). It would not be farfetched to say that *Printz* and *N.Y.* are *Griswold* type decisions. In *Griswold* the Court created a constitutional "right to privacy" from the "penumbras" of the Bill of Rights. *Griswold v. Conn.*, 381 U.S. 479, 484-85 (1965).

143. See *Printz*, 521 U.S. at 935; *N.Y.*, 505 U.S. at 188.

144. *Printz*, 521 U.S. at 935.

145. *Alden*, 527 U.S. at 727. *Alden* reinvigorated the original anomalous holding presented in *Hans*, 134 U.S. at 18. Both cases extend a constitutional ruling to an open constitutional question, solely to prevent an anomalous result.

146. See *supra* n. 8.

147. "Do the principles articulated in *N.Y.* and *Printz* support a distinction between compelled action and compelled inaction?" Geoffrey R. Stone et. al., *Constitutional Law* ch. II, 252 (4th ed., Aspen L. & Bus. 2001).

## V. CONCLUSION

Legal doctrines are not self-generated abstract categories. They do not fall from the sky; nor are they pulled out of it. They have a specific juridical origin and etiology. They derive meaning and content from the circumstances that gave rise to them and from the purposes they were designed to serve. To these they are bound as is a live tree to its roots. . . . They cannot be wrenched from it and mechanically transplanted into an alien, unrelated context without suffering mutilation or distortion.<sup>148</sup>

And yet although:

Many will have deep sympathy for those who dream of old days thought good, or better; who yearn for decentralization even in foreign affairs and matters of international concern, for limitations on federal power, for increase in the importance of the States; who thrill to a wild, poignant, romantic wish to turn back all the clocks, to unlearn the learnings, until the atom is unsplit, weapons unforged, oceans unnarrowed, the Civil War unfought.<sup>149</sup>

Nevertheless:

[Their] wish remains idle, and the effort to diminish power in this area for fear that it may not be used wisely is quixotic, if not suicidal. It is not the moment to attempt it when all ability, flexibility, [and] wisdom are needed for cooperation for survival by a frightened race, on a diminishing earth . . . .<sup>150</sup>

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148. *Reid*, 354 U.S. at 50 (Frankfurter, J., concurring).

149. Henkin, *Law of the Land*, *supra* n. 85, at 936.

150. *Id.*