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Filling In The Gaps: A New Approach To Treaty Implementation Reconciling The Supremacy Clause And Federalism Concerns

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Filling in the Gaps: A New Approach to Treaty Implementation Reconciling the Supremacy Clause and Federalism Concerns

TESS DELIEFDE*

I. INTRODUCTION 567
II. BACKGROUND OF *BOND V. UNITED STATES* 570
A. *The 1993 Chemical Weapons Convention* 572
B. *Bond's Appeals* 574
III. JUDICIAL CONTROL OF TREATIES 575
A. *Judicial Analysis of the Treaty Power* 575
B. *Nationalists, New Federalists, and the Changing Nature of Treaties* 577
IV. EXECUTIVE CONTROL OF THE TREATY POWER 582
A. *The Role of the Executive Branch in Treaty-Making* 582
B. *Federal State Clauses and the Protection of Federalist Ideals* 584
V. THE "FILL IN THE GAPS" APPROACH TO TREATY IMPLEMENTATION 589
VI. CONCLUSION 595

I. INTRODUCTION

Carol Anne Bond received news from her best friend, Myrlinda Haynes, that Haynes was pregnant.[1] Unbeknownst to Bond, the father of Haynes's baby was Carol's husband, Clifford Bond.[2] Upon discovering this fact, Bond vowed to get revenge on Haynes and to make her life "a living hell."[3] Bond made threatening phone calls to Haynes, sent letters containing photos of Haynes with her face cut by a razor, and attempted to have Haynes fired by making disparaging comments to her employers.[4] Haynes reported these threats to the police, and a Pennsylvania court convicted Bond of harassment, leading Bond to change her tactics.[5] Bond, a trained microbiologist, stole toxic chemicals[6] from the Rohm & Hass laboratory where she worked and ordered additional toxic

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1. Bond v. United States, 581 F.3d 128, 131 (3d Cir. 2009).
2. *Id.*
3. Adam Liptak, *A 10th Amendment Drama Fit for Daytime TV Heads to the Supreme Court*, N.Y. TIMES, Oct. 19, 2010, at A14.
4. Brief for Respondent at 4, Bond v. United States, No. 09-1227 (July 9, 2010).
5. *Id.*
6. 10-chloro10H-phenoxarsine. Half a teaspoon of this chemical is lethal to an adult when ingested. *Bond*, 581 F.3d at 132.

chemicals over the Internet,[7] which she attempted to use on Haynes.[8] Bond was eventually arrested by federal investigators and charged under the federal statutory implementation of the 1993 Chemical Weapons Convention, which criminalized the knowing use of a "chemical weapon"—any chemical capable of causing "temporary incapacitation or permanent harm to humans or animals"—by any person.[9]

Bond argued that the federal statute violates the Tenth Amendment, since the police power is reserved to the states.[10] Bond's argument makes much sense on its face; it seems unlikely that a federal statute intended to prevent the use of chemical weapons on an international scale would be capable of addressing a domestic crime. This particular federal statute, however, was the result of a multilateral treaty, which the federal government signed and implemented under its powers granted in Article II, sec. 2, cl. 2 of the U.S. Constitution. The treaty power is expansive, as the Supreme Court held in *Missouri v. Holland*: "It is obvious that there may be matters . . . that an act of Congress could not deal with but that a treaty followed by such an act could . . . ."[11] This would seem to indicate that the Tenth Amendment is powerless to limit federal action when treaties are involved.

How, then, could Bond's concern be addressed? *Bond v. U.S.* presented an opportunity for the Supreme Court to overhaul *Holland*, setting out clear limits on the treaty power once and for all. The Supreme Court did not, however, seize this opportunity.[12] Certainly the

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7. Potassium dichromate. Less than a quarter of a teaspoon represents a lethal dose. *Id.*

8. John Shiffman, *Wife Charged with Using Chemical to Attack Rival*, PHILA. INQUIRER, June 15, 2007, at B3.

9. 18 U.S.C. § 229F (2006).

10. Brief for Respondent at 6, Bond v. United States, No. 09-1227 (July 9, 2010). The Tenth Amendment states "[t]he 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." U.S. CONST. amend. X. While the debates surrounding the meaning of the Tenth Amendment are too involved to discuss here, courts have recognized that the states have police power. Police power has no precise definition, but in *Jacobson v. Massachusetts*, the Court wrote that "[the] court has refrained from any attempt to define the limits of that [police] power, yet it has distinctly recognized the authority of a State to enact . . . all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States." 197 U.S. 11, 25 (1905).

11. Missouri v. Holland, 252 U.S. 416, 433 (1920).

12. Instead, the Court chose to address only the issue of standing in its June 16, 2011 decision, despite the fact that both parties conceded that Bond had standing to challenge the constitutionality of the statute under which she was convicted. Bond v. United States, No. 09-1227 (June 16, 2011). This outcome was hardly surprising. The Supreme Court has a long history of declining to review an issue of constitutionality "in advance of the necessity of deciding it." Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–9 (1936) (Brandeis, J., concurring). The Supreme Court's holding in *Bond* follows this tradition by addressing outstanding issues other than the constitutionality of the Chemical Weapons Convention Implementation Act, allowing the Third Circuit to come to a decision before potentially issuing its own opinion on the matter.

attempt to define such limitations has been at the forefront of scholarly research,[13] with analysis of the treaty power's limitations generally falling into one of two camps: the Nationalist view, which holds that the treaty power is only limited by the structure of the Constitution, and the New Federalist view, which holds that the treaty power should be limited by federalism and the scope of Congress' enumerated powers.

The Supreme Court, however, may not be the best place to look for limitations on the treaty power, as it still holds *Holland* to be good law.[14] Additionally, judicial restrictions on procedural and subject matter aspects of the treaty power suffer the problem of being too subjective for practical use.[15] The broad range of international agreements in existence today is particularly ill suited to the concept of simple rules separating valid and invalid uses of federal power. The executive branch, perhaps ironically, is a better source of limitations, since the executive is granted the power to make treaties by the Constitution.[16] I propose that the executive branch, through cooperation with state governments, indeed presents the best and most appropriate solution to the treaty power issues raised by *Bond* and future cases.

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13. *See generally* Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2009 SUP. CT. REV. 131 (2009); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005); 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); Judith Resnik, *Federalism and International Law: The Internationalism of American Federalism*, 73 MO. L. REV. 1105 (2008); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003); Johanna Kalb, *Dynamic Federalism in Human Rights Treaty Implementation*, 84 TUL. L. REV. 1025 (2010); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 A.J.I.L. 341 (1995).

14. *See, e.g.*, Asakura v. Seattle, 265 U.S. 322, 341 (1924) (holding that a commerce treaty with Japan cannot "be rendered nugatory . . . by municipal ordinances or state laws"); Amaya v. Stanolind Oil & Gas Co., 158 F.2d 554, 556 (5th Cir. 1946) (stating that the treaty-making power "might even be superior to those powers which are reserved to the states"); Kleppe v. New Mexico, 426 U.S. 529, 546 (1976) (holding that the Property Clause gives Congress enforcement power over public lands, "state law notwithstanding").

15. *See* Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. Cal. L. Rev. 1327, 1353–56 (2006); *see generally* Resnik, *supra* note 13.

16. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . ."). Additionally, Michael Paulsen has stated that the executive branch has the greatest power to interpret the law due to the breadth of the executive power, the mechanisms with which to implement and enforce such interpretations, and the "unique, strategic position of the executive as often the first and typically also the *last* branch to act on any given issue of legal controversy." (emphasis in original). Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 223 (1994). The irony is that the broad sweep of the executive branch's power to define the law, when combined with the expansive treaty power of *Holland*, allows the executive to largely ignore federalism constraints when making treaties while simultaneously putting the executive in the best position to defer to federalism concerns in treaty implementation.

Part II provides the facts of *Bond v. United States*, and describes how this case represents fertile ground to discuss the treaty power and to create a more permanent and stable solution to the concerns and debates surrounding treaty power. Then Part III will discuss approaches to the judicial control of treaties, and how the current mechanisms proposed are both insufficient for success in the long run as well as unlikely to occur based on the interpretation of *Missouri v. Holland* by subsequent decisions. Part IV explains the role of the executive in treaty-making and how the executive may currently choose to self-regulate the treaty power. Again, many of these executive branch tools fail to clarify the boundaries of the treaty power.

Finally, in Part V, I present the "fill in the gaps" approach, a flexible system for the implementation of treaties that maintains the protections of federalism while enabling the federal government to act quickly and decisively when needed. Under this system, the states are free to implement the portions of international treaty obligations that fall within their jurisdiction, with the federal government implementing national-level obligations and also providing "fallback" legislation for states that choose not to create their own implementing legislation. Lastly, I conclude by analyzing how this new proposal plays into the overall framework of the treaty power.

II. BACKGROUND OF *BOND V. UNITED STATES*

Carol Anne Bond began a campaign of harassment that culminated in stealing chemicals from the laboratory where she worked and attempting to poison her best friend, Myrlinda Haynes, after discovering that Haynes was pregnant with Bond's husband's child.[17] For several months, Bond placed the chemicals on Haynes' doorknob, car door handle, and mailbox.[18] Haynes received a chemical burn once on her thumb, but otherwise saw the chemicals and avoided them.[19] After noticing the chemicals several times, Haynes called her local police to report these incidents.[20] The police thought the substance might have been cocaine, and simply told Haynes to clean the affected surfaces.[21] Police testing revealed that the substance was not cocaine, but the police took no further action; Haynes contacted the police department over a dozen times in an effort to provoke a more detailed investigation.[22] The lack of police action proved unsatisfactory for Haynes, who next complained to

17. Bond v. United States, 581 F.3d 128 (3d Cir. 2009).
18. Brief for Respondent at 3, *Bond*, No. 09-1227 (July 9, 2010).
19. *Id.*
20. *Bond*, 581 F.3d at 132.
21. *Id.*
22. Brief for Respondent at 5–6, *Bond*, No. 09-1227 (July 9, 2010).

her postal carriers about the chemicals on her mailbox.[23] The postal carriers then referred the issue to the United States Postal Inspection Service.[24]

Postal inspectors placed surveillance cameras around Haynes's premises, and caught Bond on film stealing mail, walking back and forth between her own car and Haynes's car, and placing chemicals in Haynes's car's muffler.[25] The postal inspectors tested the chemicals in Haynes's muffler, which eventually led to an arrest warrant for Bond.[26] Upon arrest, the postal inspectors took Bond to a holding cell at the Philadelphia Post Office, where Bond admitted to stealing chemicals from her employer.[27]

Inspectors discovered additional incriminating evidence in Bond's home, and a grand jury in the Eastern District of Pennsylvania charged Bond with two counts of possessing and using chemical weapons and two counts of mail theft.[28] Bond filed a motion to suppress some of the evidence against her on account of failure to establish probable cause for the search, as well as a motion to dismiss the chemical weapons charge as being unconstitutional, but both motions were denied.[29] In the end, Bond pleaded guilty to all charges and received a sentence of six years in prison, five years of supervised release, a $2000 fine and restitution of $9902.79, but she reserved her right to appeal.[30]

The grand jury's use of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction ("Chemical Weapons Convention" or "CWC") was an unusual tactic that took jurisdiction over Bond's attacks on Haynes out of the hands of the state of Pennsylvania and into the federal court system, adding to the charges Bond already faced for mail theft, a federal offense.[31] Being charged under the CWC resulted in a much longer sentence than what Bond otherwise would have received in state court.[32]

The decision to use the CWC was also intriguing from a conflict of laws standpoint. In this case, there is no true "conflict" to be found; the

23. *Bond*, 581 F.3d at 132.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. Brief for Respondent at 4, Bond v. United States, No. 09-1227 (July 9, 2010).
29. *Bond*, 581 F.3d at 133.
30. *Id.*
31. Liptak, *supra* note 3.
32. Bond's lawyer, Paul D. Clement, stated that if Bond had been prosecuted in state court under Pennsylvania law instead, she would have received a sentence of only three months to two years in jail, as opposed to the six year sentence she received in federal court. *Id.*

CWC Implementation Act, as a federal statute, preempts state law under the Supremacy Clause of the United States Constitution so long as it is constitutionally valid.[33] As implemented, however, the CWC Implementation Act was not the most logical or efficient choice of law in this case.

From a purely territorial point of view,[34] putting aside the Supremacy Clause, the state law of Pennsylvania seems the best choice of applicable laws. Haynes and Bond, as Pennsylvania residents,[35] share a common domicile. Bond's theft of the chemicals from her employer occurred in Pennsylvania, as did her attempted poisoning of Haynes.[36] The only potential interstate aspect of the case is Bond's purchase of toxic chemicals over the Internet,[37] but this is a tenuous link outside of the state as the purchase of potassium dichromate is not in itself illegal, unlike Bond's actual use of that chemical on Haynes in Pennsylvania.[38]

A Brainerd Currie-style "interest analysis" approach[39] to *Bond* would also find that the state of Pennsylvania has a strong interest in applying its own law when compared to the federal government. After all, the Tenth Amendment indirectly grants police power to the states, with the federal government only able to regulate matters that fall under police power as an exercise of the Commerce Clause or other constitutional provisions.[40] Pennsylvania can therefore demonstrate an interest in applying its own laws codifying its police power, both for the protection of an injured resident and for the prosecution of a resident defendant. In contrast, the federal government's interests are more muted, involving adherence to treaty obligations and national defense.

A. *The 1993 Chemical Weapons Convention*

Bond's chemical weapons charges were violations of the CWC

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33. *See* U.S. CONST. art. VI, cl. 2.

34. *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 315–320 (1992).

35. Bill Mears, *High Court to Hear Case of Woman Convicted of Chemical Weapon Crimes*, CNN (Feb. 22, 2011, 6:05 AM), http://www.cnn.com/2011/CRIME/02/21/us.scotus.toxic.love.

36. *Id.*

37. Bond v. United States, 581 F.3d 128, 131 (3d Cir. 2009).

38. While the purchase of potassium dichromate represents a minor contact outside of Pennsylvania, this would likely still be enough for a federal law to have jurisdiction over Bond under the Commerce Clause, as "transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered." Champion v. Ames (*The Lottery Case*), 188 U.S. 321, 352 (1903) (citing Hanley v. Kan. City S. R.R. Corp., 187 U.S. 617 (1903)).

39. *See* Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171.

40. *See* United States v. Lopez, 514 U.S. 549, 567 (1995). Justice Rehnquist stated in his majority opinion that "to uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."

Implementation Act of 1998,[41] which codified the United States' responsibilities as a signing party to the CWC.[42] The CWC requires signing parties to refrain from the use or manufacture of chemical weapons, and to destroy existing stockpiles of chemical weapons as verified by the Organisation for the Prohibition of Chemical Weapons, an independent agency headquartered in The Hague, Netherlands.[43]

The CWC, however, also requires signing parties to make certain changes to domestic law. To further the CWC's goal of eliminating the use of chemical weapons, signing parties must make it an illegal act for any "natural and legal person" within the territory of the signing party to use, create, or stockpile chemical weapons.[44] The definition of "chemical weapon" under the CWC is extremely broad: "toxic chemicals" and munitions intended to disperse them, where a "toxic chemical" is "[a]ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals."[45] Under this definition, the use of almost any chemical—even something as commonplace as bleach—could constitute an attack with a chemical weapon.[46]

The CWC was signed by the United States and implemented

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41. 18 U.S.C. § 229(a)(1) (1998).

42. Brief for Respondent at 2, Bond v. United States, No. 09-1227 (July 9, 2010).

43. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, art. I, *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 45 [hereinafter *CWC*]. The CWC has been a great success, with 188 signing parties and over 60% of all declared chemical weapon stockpiles verifiably destroyed. Press Release, Organisation for the Prohibition of Chemical Weapons, Global Campaign to Destroy Chemical Weapons Passes 60 Percent Mark (July 8, 2010).

44. *CWC*, *supra* note 43, art. VII, § 1.

45. *Id.*, art. II, § 1–2.

46. As reported to the Senate by the U.S. representative to the committee drafting the CWC, the CWC's broad definition of "chemical weapon" was not accidental:

> With regard to the definition of "chemical weapons," the negotiators debated whether to attempt to define specifically what chemical activities were to be prohibited, or to prohibit all activities except for those specifically not prohibited. The latter approach was chosen to facilitate verification and to preclude loopholes with regard to unknown or future chemicals of possible concern.

Chemical Weapons Convention: Hearing on S. Treaty Doc. No. 103-21 Before the S. Comm. on Foreign Relations, 103rd Cong. 37 (1994) [hereinafter *CWC Hearing*] (statement of Hon. Stephen J. Ledogar, U.S. representative to the Conference on Disarmament, U.S. Department of State). The result of this approach is to make what constitutes a "chemical weapon" extremely broad, but to lessen the potential for unintended consequences by making specific activities involving these "chemical weapons" permissible, such as industrial or agricultural uses. The approach also allows for simpler monitoring of "dual-use" chemicals, which have both industrial and wartime uses, by "separat[ing] the military activities of concern from legitimate commercial and governmental endeavors." *CWC Hearing* at 133 (statement of Amy Smithson, Director, Chemical Weapons Convention Implementation Project, Henry L. Stimson Center, Washington, D.C.). This broad definition made its way intact into the Chemical Weapons Convention Implementation Act of 1998.

through the use of federal legislation (the Chemical Weapons Convention Implementation Act of 1998).[47] Due to the CWC's broad and vague definitions of "chemical weapons," the CWC Implementation Act gave the federal government the ability to prosecute any criminal act utilizing chemical agents, regardless of whether the act at hand would have been within the federal government's jurisdiction prior to the signing of the CWC.[48]

B. *Bond's Appeals*

At the United States Court of Appeals, Third Circuit, the Court upheld the District Court's decision on a *de novo* review. The government contended that the chemical weapons statute was constitutional, as it was validly enacted under the Necessary and Proper Clause of the Constitution as a law implementing the treaty power. Bond, however, claimed the statute was unconstitutional, as it infringed upon police power as set forth in the Tenth Amendment.[49]

Before proceeding upon the merits of Bond's argument, the Court first had to decide if Bond even had standing to raise a Tenth Amendment challenge to the CWC Implementation Act.[50] The Court recognized a circuit split "on whether private parties have standing to challenge a federal act on the basis of the Tenth Amendment."[51] The Court followed the majority of the courts in concluding that a private party acting independently of a state lacks standing to raise Tenth Amendment claims, and affirmed the lower court's ruling.[52]

Bond next filed a petition for writ of certiorari to the United States Supreme Court. The question presented was "[w]hether a criminal defendant convicted under a federal statute has standing to challenge her conviction on grounds that, as applied to her, the statute is beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment."[53] The Supreme Court granted certiorari on October

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47. Brief for Respondent at 2, Bond v. United States, No. 09-1227 (July 9, 2010).

48. Despite this broad ability to prosecute, *Bond* is in fact the first time that the CWC Implementation Act has been applied in the United States to an actual use of a "chemical weapon." Previous cases citing the CWC Implementation Act have dealt with the destruction of government-owned chemical weapons or provisions providing exceptions to an automatic stay in bankruptcy proceedings for organizations enforcing the CWC. *See, e.g.*, Sierra Club v. Gates, 499 F. Supp. 2d 1101 (S.D. Ind. 2007); In re Dolen, 265 B.R. 471 (Bankr. M.D. Fla. 2001).

49. Bond v. United States, 581 F.3d 128, 134 (3d Cir. 2009).

50. *Id.* at 135.

51. *Id.* at 136.

52. *Id.* at 137.

53. Petition for a Writ of Certiorari, Bond v. United States, No. 09-1227 (Apr. 9, 2010).

12, 2010.[54] Unexpectedly, the United States conceded in its brief that Bond had standing "to defend herself by arguing that the statute under which she is being prosecuted was beyond Congress's Article I authority to enact."[55] This represented a reversal of the United States' position during the initial appeal. The United States asked that the Court "grant the petition, vacate the judgment of the court of appeals, and remand for further proceedings in light of the position of the United States asserted in this brief."[56] Oral arguments were heard on February 21, 2011, and the Court reached a decision on June 16, 2011, holding that Bond has standing to challenge the constitutionality of the statute under which she was convicted and remanding the case to the Court of Appeals without addressing the merits of Bond's argument.[57] As a result, the Third Circuit will now have to address the constitutionality of the CWC Implementation Act.[58]

III. Judicial Control of Treaties

A. *Judicial Analysis of the Treaty Power*

The Supreme Court's decision resolved the case simply, by concurring with the two parties on the standing issue and reversing the lower court's decision.[59] The scope of the treaty power, however, is an important, increasingly troubled issue that has reemerged since *Missouri v. Holland*, the last decisive case on the matter.[60]

In *Holland*, the United States and Great Britain, on behalf of Canada, agreed upon a treaty that would provide protection to birds during their migration through North America in order to prevent extermination.[61] The two parties agreed to pass legislation in their respective countries in order to carry out the treaty. The resulting statutes made it a

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54. Lyle Denniston, *Counsel Named for* Bond *Case*, SCOTUSblog (Nov. 10, 2010, 1:56 PM), http://www.scotusblog.com/2010/11/counsel-for-bond-case.

55. Brief for Respondent at 6, *Bond*, No. 09-1227 (July 9, 2010).

56. *Id.*

57. *Bond*, No. 09-1227, slip op. at 1–2 (June 16, 2011)

58. Should the Third Circuit uphold the statute's constitutionality, Bond could re-petition for a writ of certiorari, the acceptance of which would be at the Supreme Court's discretion.

59. The Supreme Court does not have to render a decision in accordance with only the question presented in the petition. Rules of the Supreme Court of the United States (2010), http://www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf. Rule 14(1)(a) states "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court." Since the United States conceded the question presented, the question of whether Congress overstepped its implementation abilities in regard to the treaty power would still be "fairly included therein." The Court thus could have granted plenary review and taken this opportunity to readdress the treaty power and its limitations.

60. 252 U.S. 416 (1920).

61. *Id.* at 431. The treaty was signed on December 8, 1916.

crime to kill, capture, or sell any of the birds protected by the terms of the treaty.[62] The case eventually came before the Supreme Court when Missouri alleged that the statute was unconstitutional, because it interfered with the rights reserved to the States by the Tenth Amendment.[63]

In his opinion for the seven-member majority, Justice Holmes wrote: "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 . . . ."[64] Holmes' decision set an important precedent on the scope of the treaty power, which has yet to be overturned. Treaties were explicitly declared "the supreme law of the land . . . when made under the authority of the United States," and in cases where a given matter is generally regulated by states, *Holland* held that "a treaty may override [the states'] power."[65]

The decision in *Holland* also made the Supreme Court the official arbiter of what limitations, if any, existed on the scope of the treaty power. *Holland* continues to be the starting point for discussions over potential approaches to integrating federalist protections into the making of treaties.

While Holmes' decision reiterated the unparalleled scope of the treaty power, it was not entirely without limitations. "We do not mean to imply," stated Holmes, "that there are no qualifications to the treaty-making power; but they must be ascertained in a different way."[66] The

62. *Id.* at 430–31. In the United States, the implementing statute was known as the Migratory Bird Treaty Act of July 3, 1918.

63. *Id.* at 431.

64. Justice Holmes did not define what "matters" he was referring to, stating only that any limitations on the treaty power cannot be found by analyzing "the authority of the United States." Instead, these matters "must be ascertained in a different way," another phrase Justice Holmes neglected to elaborate upon. *Id.* at 433.

65. *Id.* at 433–34. In making these statements, Justice Holmes was simply repeating the Supremacy Clause of the U.S. Constitution, which states:

> 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; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

U.S. Const. art. VI, cl. 2. While this clause may seem to settle the issue once and for all, the situation is in fact more complicated. Treaties may be the supreme law of the land, but the Supremacy Clause makes no distinction between treaties and the laws enacted by Congress to implement them. Furthermore, no provision of the Constitution is absolute in itself. The Commerce Clause, for example, allows the federal government to regulate interstate commerce, but "in our modern world, no person or institution but the most hardily self-sufficient is free from possessing some amount of goods that have, at one point in time, traveled interstate;" a truly unlimited Commerce Clause power would thus grant the federal government the ability to regulate nearly anything, in violation of other constitutional provisions like the Tenth Amendment. United States v. Lamont, 330 F.3d 1249, 1256 (9th Cir. 2003).

66. *Holland*, 252 U.S. at 433.

pursuit of this "different way" has ultimately led to two schools of thought regarding judicial limitation of the treaty power: the Nationalists and the New Federalists.

B. *Nationalists, New Federalists, and the Changing Nature of Treaties*

Scholarly debate about the treaty power has largely focused on judicial restrictions. Under the Constitution, the treaty power gives the executive, with the agreement of two-thirds of the Senate, the power to make international agreements, so long as those agreements do not conflict with the structure of the Constitution itself.[67] The crux of the matter, though, is to what degree Congress can pass legislation to implement such international agreements. This question has led to two camps with distinct approaches to judicial limits on the treaty power: the Nationalists and the New Federalists.

The Nationalists believe that the issue of Congressional power under the Article II treaty power was decisively settled by the Supreme Court's decision in *Missouri v. Holland*, and that treaties which do not seek to overwrite the Constitution face few limitations.[68] It is an argument that finds its basis in the very text of the Constitution. Treaty-making is a power explicitly delegated to the executive branch, and the states are prohibited from forming treaties.[69] Nationalists rely on the "Necessary and Proper Clause" of the U.S. Constitution[70] to uphold Congress' nearly unlimited legislative scope when acting in concert with a treaty. The Nationalists believe that if a treaty has been constitutionally signed, then Congress, in enacting implementing legislation, is merely doing what is "necessary and proper" for carrying the treaty into

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67. U.S. CONST. art. II, § 2, cl. 2; Reid v. Covert, 354 U.S. 1, 16 (1957) (plurality opinion) ("no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."). *Reid*, however, seems largely focused on the rights of *individuals* affected by a treaty, while being relatively unconcerned about federalism. Later in his opinion, Justice Black states that "[t]here is nothing in Missouri v. Holland which is contrary to the position taken here. . . . 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." *Reid*, 354 U.S. at 18 (citation omitted).

68. Hollis, *supra* note 15, at 1330. Even after *Holland*, treaties may not change the fundamental nature of the Constitution—e.g. conflict with the Bill of Rights, re-assign the powers of the various branches of government, or create a monarchy.

69. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power . . . to make Treaties . . . ."); U.S. CONST. art. I, § 8, cl. 3 ("[The Congress shall have Power] [t]o regulate Commerce with foreign Nations . . . ."); U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . . .").

70. U.S. CONST. art. I, § 8, cl. 18 ("[The Congress shall have Power] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

execution.[71]

There are also a number of policy justifications for the Nationalist viewpoint. Perhaps the most pronounced is the "one voice" argument—that the United States must act as a singular entity with regard to foreign nations, since control of foreign affairs is a power granted specifically to the federal government at the expense of the states.[72] To create strict limitations in the treaty power would weaken the ability of the federal government to conduct foreign affairs, making the federal government a representative of fifty separate state governments rather than a single, unified voice.[73]

The Nationalist approach to the treaty power is not without its flaws. Detractors of the "one voice" argument point to the recent history of United States treaties, in which several treaties were signed only after the President or Senate sought provisions allowing for deference to federalism in implementation;[74] despite non-unilateral implementation, the federal government is still the only voice representing the United States in matters arising from these treaties. Furthermore, critics fear that an effectively unlimited treaty power could also allow Congress to increase the scope of its own powers through the use of treaties.[75]

In contrast, the New Federalists argue that treaty-implementing leg-

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71. Hollis, *supra* note 15, at 1335.

72. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) (holding that "the President alone has the power to speak or listen as a representative of the nation."); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)) (stating that the President holds the "vast share of responsibility for the conduct of our foreign relations."); U.S. CONST. art I, § 10, cl. 1.

73. These fears were a real concern during the Articles of Confederation period, in which the Continental Congress had power over foreign relations but not foreign commerce, leading to a potential situation where a lack of state implementation might cause signed treaty obligations not to be upheld. John Jay exemplified the belief that a single national representative in foreign affairs was a necessity:

> Under the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner, whereas,—adjudications on the same points and questions, in thirteen States, or in three or four confederacies, will not always accord or be consistent.

THE FEDERALIST No. 3 (John Jay).

74. An example of deference to federalism can be seen in the U.N. Convention Against Transnational Organized Crime, which the United States joined on November 3, 2005, but only after making a reservation stating that the federal government would be unable to prosecute "purely local" offenses due to the lack of interstate activity. U.N. Convention Against Transnational Organized Crime, Nov. 15, 2000, 40 I.L.M. 335, 2225 U.N.T.S. 209; full text of U.S. reservation *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=EN.

75. *See* Rosenkranz, *supra* note 13, at 1870–71. This concern has been made real in international agreements that enabled Congress to enact federal legislation via the treaty power to encroach upon police power, regardless of whether or not such implementing legislation is within the scope of the Commerce Clause.

islation is subject to the same broadly defined federalism limitations as all other federal legislation. New Federalists point to recent Supreme Court cases like *New York v. United States*,[76] *United States v. Lopez*,[77] *Printz v. United States*,[78] and *United States v. Morrison*[79] that have held that the federal government possesses only the powers enumerated or delegated to it in the Constitution.[80] New Federalists argue that *Holland*, by failing to recognize federalism limitations inherent in the federal government's structure, was decided incorrectly, and push for various judicial methods of limiting the scope of the treaty power.

Two common approaches for such limits are the use of subject-matter limitations, allowing treaties only for matters of "international concern,"[81] and Tenth Amendment limitations, under which treaty-implementing legislation may only be enacted if it would be valid federal law even without a treaty.[82] A newer, related area of New Federalist inquiry concerns the distinction between "self-executing" treaties (which require no additional legislation) and "non-self-executing" treaties (which require Congress to pass legislation before entering into effect).[83] New Federalists see non-self-executing treaties as an area of primary concern since they require action on the part of Congress, which directly calls into question the scope of federal legislative power under the treaty

76. 505 U.S. 144 (1992).

77. 514 U.S. 549 (1995).

78. 521 U.S. 898 (1997).

79. 529 U.S. 598 (2000).

80. Curtis Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 392 (1998). This is an oversimplification of federalism issues, of course. The federal system requires that the federal and state governments divide power between themselves, but there are multiple ways in which this division could occur.

The boundaries of the powers granted to the federal government by the U.S. Constitution are fluid, expanding and contracting over time. *New York*, *Lopez*, *Printz*, and *Morrison* were followed by *Gonzalez v. Raich*, 545 U.S. 1 (2005), which reversed the trend of the previous four cases of constraining the Commerce Clause by holding that Congress could regulate the private growth of marijuana despite the lack of a direct connection to interstate commerce, on the grounds that such marijuana would inevitably be drawn toward the interstate market.

Perhaps the most useful concept in understanding the intricacies of federalism in the context of this discussion is the notion that "[f]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." Coleman v. Thompson, 501 U.S. 722, 759 (1991). States' rights is therefore not an end in and of itself, but rather a means by which the Constitution attempts to safeguard individual rights from a "tyrannical" government, whether federal or state.

81. Bradley, *supra* note 80, at 429–30.

82. *Id.* at 426–27. Generally, in the context of this discussion, any mention of the New Federalist approach will reference attempts to limit the treaty power through the Tenth Amendment, not subject matter limitations, as subject matter limitations raise an entirely separate set of issues that will not be discussed here, such as the definition of what truly constitutes "international" concern.

83. *See generally* Carlos Manuel Vazquez, The *Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601 (2008).

power.[84]

The Nationalist view of treaty power, however, has been dominant since the Supreme Court's decision in *Missouri v. Holland*, and the Court has never challenged a treaty on federalism grounds.[85] This existing practice in treaties is a significant hurdle for New Federalists to overcome.

As a second hurdle, a key element of the New Federalist vision of the treaty power is the overturning (or substantial modification) of *Holland*.[86] The Supreme Court, however, seems reluctant to revisit *Holland*. The Court has cited *Holland* favorably in recent cases.[87] Furthermore, the Court has recently held that the federal government's foreign policy powers may trump state law, re-emphasizing the importance of the "one voice" argument.[88] Even *Medellín v. Texas*, which held that the Vienna Convention on Consular Relations ("VCCR") was not a self-executing treaty and that as a result, the President had no authority to enforce its provisions, made no reference to the constitutionality of any legislation Congress might pass to formally implement the VCCR.[89]

Finally, the New Federalists face a problem of definitions. Subject-matter limitations suffer from the blurred lines between "international" and "domestic" issues.[90] Louis Henkin has argued that "every treaty, regardless of subject, serves the external purposes of the United States;" there is no clear way for the Supreme Court to decide which specific subjects are truly "international" and which are purely "domestic."[91] Several treaties that may have beneficial effects for the nation as a whole fall into this gray area. As an example, human rights treaties, which may help safeguard United States citizens abroad, generally require signing

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84. *See* Rosenkranz, *supra* note 13, at 1928–29.

85. Hollis, *supra* note 15, at 1354–55.

86. *See* Rosenkranz, *supra* note 13, at 1869.

87. Hollis, *supra* note 15, at 1353. *See, e.g.*, United States v. Lara, 541 U.S. 193 (2004) (dealing with Congress' ability under the treaty power and Indian Commerce Clause to dictate the extent of Indian tribes' jurisdiction on criminal matters); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (concerning hunting and fishing rights on lands the Chippewa ceded to the United States via treaty in 1837). In *Lara*, Justice Thomas stated in his concurrence that his fellow Justices seemed to believe "the treaty power . . . provide[s] Congress with free-floating power to legislate as it sees fit on topics that could potentially implicate some unspecified treaty." 541 U.S. at 225 (Thomas, J., concurring).

88. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413, 424 (2003) (holding that a California statute was invalid due to conflicts with executive foreign policy).

89. 552 U.S. 491, 498–99 (2008). In his opinion for the majority, Justice Roberts stated that "our Framers . . . recognized that treaties could create federal law", and noted that "Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes." *Id.* at 515, 521.

90. Hollis, *supra* note 15, at 1355.

91. Louis Henkin, *"International Concern" and the Treaty Power of the United States*, 63 AM. J. INTL. L. 272, 276–77 (1969).

countries to implement legislation criminalizing human rights abuses, which could be seen to interfere with the states' police power.[92] Strict adherence to New Federalist restraints on the treaty power could effectively prevent the United States from ever taking part in human rights, environmental, or legal harmonization treaties.

One factor with implications for both the Nationalist and New Federalist approaches is the changing nature of treaties. In the early years of the Constitution, treaties were generally conducted between two countries, and concerned matters that could easily be classified as "international concerns," such as peace treaties or treaties dealing with the treatment of each country's citizens in the territories of the other.[93] The modern treaty, however, has reached into the realm of private international law.

Increasingly, treaties take the form of agreements between multiple countries to treat their own citizens in a particular way. Examples of this process include human rights treaties, where each country outlaws certain human rights abuses within its territory; environmental treaties, in which each country regulates its own industrial output; and legal harmonization treaties, which serve to create uniform legal procedures for private law issues such as wills, contracts, and arbitral awards.[94] The line between "international" and "domestic" becomes increasingly blurred in these forms of treaty. While the United States could obviously derive benefit from these treaties—better treatment of U.S. citizens abroad, improved environmental conditions, or more efficient international legal procedures—the legislation required to implement such treaties is purely domestic, with little to no treatment of foreign citizens.

Scholars from both camps attempt to use the text and structure of the Constitution, records of debates over the wording and scope of the Constitution, and the personal letters of the Framers to argue for a Nationalist or New Federalist intent for Article II.[95] The modern treaty, however, is so different from anything the Framers would have commonly experienced that historical arguments for the scope of the treaty power may simply not carry much weight. Thomas Jefferson in particular wrote that a treaty "must concern the foreign nation party to the con-

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92. Bradley, *supra* note 80, at 397, 444.

93. *See* Golove, *supra* note 13.

94. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966; United Nations Framework Convention on Climate Change, May 9, 1992; Convention on the Law Applicable to Trusts and on Their Recognition, Jul. 1, 1985, http://www.hcch.net/index_en.php?act=conventions.text&cid=59

95. *See generally* Golove, *supra* note 13, Rosenkranz, *supra* note 13, Bradley, *supra* note 80.

tract."[96] As mentioned earlier, the role of the treaty power has changed since *Holland*, with an increase in treaties that "make laws for the people of the United States in their internal concerns."[97] Indeed, the American Law Institute acknowledged this change in the nature of treaties by writing in the Restatement (Third) of the Foreign Relations Law of the United States that "contrary to what was once suggested, the Constitution does not require that an international agreement deal only with 'matters of international concern.'"[98]

As the Nationalists and New Federalists demonstrate, judicially enforced limitations on the treaty power may not be capable of integrating federalist protections while also permitting broad and effective foreign policy actions by the federal government. Since the treaty-making power is explicitly delegated to the President, the executive branch may be an alternative source for limitations of the treaty power.

IV. Executive Control of the Treaty Power

A. *The Role of the Executive Branch in Treaty-Making*

The executive branch is sensitive to federalism concerns, and treaty-making is rarely undertaken without at least some thought to a treaty's effect on the states.[99] In determining how to fit federalism into a given treaty, the executive utilizes a set of approaches termed "executive federalism."[100] For some treaties, the executive may find swift national implementation of a treaty to be of the utmost importance, and as a result the executive may choose to make no accommodations to federalism.[101] In other cases, the executive may refuse to sign a treaty, finding that the treaty would too strongly interfere with the states.[102]

Between these two extremes, the executive has several other options in making a treaty. The executive may seek to modify a treaty before signing it, either through clauses that explicitly allow for different ratification processes for federal states ("federal state clauses") or through clarifications that clearly separate federal and state responsibili-

96. Thomas Jefferson, *A Manual of Parliamentary Practice*, *in* Jefferson's Parliamentary Writings 420 (Wilbur Samuel Howell ed., 1988).

97. Charles Evans Hughes, 23 Proc. Am. Soc'y Int'l L. 196 (1929).

98. Restatement (Third) of the Foreign Relations Law of the United States § 302 cmt. c (1987)

99. *See* Hollis, *supra* note 15.

100. *Id.* at 1361.

101. *Id.* at 1371. This would entail the President signing a treaty with a two-thirds vote of the Senate, to then be implemented as federal legislation regardless of any overlap with areas of state concern.

102. *Id.* at 1373. As an example, President Eisenhower refused to join human rights treaties that would have required federal legislation affecting the police power.

ties under a treaty.[103] The executive may sign a treaty, but with a reservation, understanding, or declaration that notifies other signing parties that the United States may not uphold all aspects of the treaty, generally those aspects that implicate federalism.[104] In certain cases, such as when signing a treaty on a subject the law of the United States already addresses, the executive may choose to limit the implementation of a signed treaty by utilizing existing legislation that is "good enough" to meet treaty obligations.[105] Finally, the executive may sign a treaty but limit its enforcement when federalism is threatened, asking states to act in accordance with treaty obligations but not "compelling" them to do so, in accordance with the Supreme Court's prohibition of "commandeering."[106]

Taken together, "executive federalism" represents a useful toolkit for treaty creation and implementation. The executive possesses a range of approaches to federalism issues, self-selecting the most appropriate method for the treaty or goal at hand. "Executive federalism" also shows the executive branch to be far more willing to self-regulate than the New Federalists might believe. Each of the "executive federalism" methods has been used to sign (or refuse to sign) a treaty, making the toolkit a practical object and not merely a hypothetical exercise.

While the "executive federalism" system provides a wide range of approaches under which the executive branch can form treaties, each method has its own problems.[107] This leaves the use of federal state clauses in multilateral agreements as the most likely approach for maintaining federalism in the treaty-making process.

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103. *Id.* at 1374–78.

104. *Id.* at 1379–81.

105. *Id.* at 1382.

106. *Id.* at 1384–86. This prohibition can be found in New York v. United States, 505 U.S. 144 (1992). The approach of limiting enforcement can most clearly be seen in the events surrounding Medellín v. Texas, 552 U.S. 491 (2008), in which the President urged Texas to reconsider Medellín's conviction in light of the ICJ's decision in Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31), but was powerless to force the state to do so.

107. Making no accommodations for federalism (i.e., enacting federal legislation alone to implement treaties) may be appropriate in certain purely "international" contexts, but the "international" increasingly intrudes upon the "domestic," and to do so in general evokes the spirit of the New Federalist arguments against enhancing the scope of federal power. Rejecting treaties on federalism grounds may be counterproductive to United States interests in widespread ratification of multilateral agreements, sending a signal that the United States does not value the subject matter of the treaty. Making reservations of consent to a treaty could have similar negative effects, as the failure of the United States to fully ratify a given convention would make it less likely that foreign governments would ratify in full. Similarly, the limiting of federal implementation or execution of treaty obligations may raise questions among foreign states about the United States' willingness to uphold its duties under a treaty, giving the United States less bargaining power during treaty-making.

B. *Federal State Clauses and the Protection of Federalist Ideals*

One method the executive may use to protect federalism in treaty implementation is the use of "federal state clauses" in multilateral agreements.[108] What was quite possibly the first federal state clause was created in 1919, in the Commission responsible for drafting the Constitution of the International Labor Organization ("ILO").[109] In fact, it was the American delegation that led the fight for an official recognition of federalism, arguing that such recognition was essential if the United States were to join the ILO.[110] The federal state clause was, at its essence, a compromise between the interests of unitary and federal states.[111]

The federal state clause went through several drafts, each time changing its wording to remedy the conflicting interests of federal and unitary states. Federal states worried that they would be unable to uphold treaty obligations if their constituent states did not cooperate; unitary states worried that the constituent states of federal states would seek their own representation at the ILO, and that federal states would be subject to less stringent treaty obligations.[112]

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108. Hollis, *supra* note 15, at 1374–78.

109. Robert B. Looper, *"Federal State" Clauses in Multi-Lateral Instruments*, 32 Brit. Y.B. Int'l L. 162, 164 (1955–1956).

110. *Id.*

111. A unitary state consists of a single level of government, while a federal state is composed of two or more interacting levels of government.

112. Under the original British proposal for the ILO, member states would be obligated to ratify all ILO Conventions unless a concerned member state's legislature "actively expressed its disapproval of ratification." The American delegation objected; in the United States, jurisdiction over labor regulation belonged with the states and not the federal government, and since *Missouri v. Holland* would not be decided until 1920, it would be impossible to guarantee United States ratification of ILO Conventions.

A first draft of the federal state clause allowed federal states to leave ratification of a Convention concerning matters over which constituent states had "power of legislation" to those constituent states directly, absolving the federal state's government of responsibilities under the Convention. The British delegation found this solution unworkable, arguing that to accept such a clause would invite constituent territories of federal states like the United States, Australia, or Canada to send their own delegates to ILO meetings. Delegates from Great Britain and Belgium sought a compromise measure, and a second draft of the federal state clause was created on March 24, 1919:

> In the case of a federal state, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of the Government of such State to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this article with respect to recommendations shall apply in such case.

This draft clause was accepted by both the American and British delegations, and ultimately became Article 19 of the ILO Constitution.

The clause only led to further disagreement, though, among unitary states. In practice, the clause meant that unitary states were subject to harsher obligations than federal states, which could treat conventions as mere recommendations instead. The nature of ILO Conventions was

As a result of these disagreements, the ILO Delegation invited several federal states to meet in Montreal in May 1946 to address deficiencies in the ILO Constitution, most notably the phrasing of the federal state clause.[113] Several possibilities were considered, including the removal of the federal state clause in its entirety; the transformation of all Conventions into Recommendations, to put all states on an equal footing; or even shifting responsibility for ratification to the constituents of federal states directly, despite prohibitions in most federal constitutions preventing constituent states from entering into treaties.[114] The end result of the Montreal meetings was a re-working of the federal state clause, focusing on "appropriateness" rather than limitations:

> 7. In the case of a federal State, the following provisions shall apply:
> *(a)* in respect of Conventions and Recommendations which the federal government regards as appropriate under its constitutional system for federal action, the obligations of the federal State shall be the same as those of Members which are not federal States;
> *(b)* in respect of Conventions and Recommendations which the federal government regards as appropriate under its constitutional system, in whole or in part, for action by the constituent states, provinces, or cantons rather than for federal action, the federal government shall:
>
> > (i) make, in accordance with its Constitution and the Constitutions of the states, provinces or cantons concerned, effective arrangements for the reference of such Conventions and Recommendations not later than 18 months from the closing of the session of the Conference to the appropriate federal, state, provincial or cantonal authorities for the enactment of legislation or other action . . . .[115]

The federal state clause of the ILO Constitution became largely subjective, allowing contracting federal states to determine how and to what extent treaty obligations would best be implemented.

Having successfully fought for a federal state clause in the ILO

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changing as well, addressing matters of social and cultural regulation that would put unitary states at a disadvantage if forced to implement them while federal states treat them as recommendations. Furthermore, questions loomed as to what truly constituted a federal state "the power of which to enter into conventions . . . is subject to limitations." At the time of the ILO Constitution's adoption, no federal state could meet this requirement; even Canada, which can only implement treaties through the action of its constituent territories, is free to "enter into conventions" without territorial interaction. After arguing for the insertion of a federal state clause, the United States did not join the ILO until 1934, and even then it did not utilize the federal state clause to do so. Looper, *supra* note 109, at 165–167, 169, 171, 176–77.

113. *Id.* at 180.

114. *Id.* at 180–81.

115. ILO Constitution, art. 19(7), *as amended* April 20, 1948, *available at* http://www.ilo.org/ilolex/english/constq.htm. This section, which became Article 19(7) of the revised ILO Constitution, goes on to specify how federal states using Article 19(7)(b) above must communicate with their constituent territories and with the ILO's leadership.

Constitution, the United States, along with other federal states, sought the inclusion of similar clauses in many other multilateral treaties.[116] The form of this clause has changed over time, though. As an example, the Convention Providing a Uniform Law on the Form of an International Will ("Washington Convention"), which was created in Washington, D.C. in 1973, contained the following clause as Article XIV:

> 1. If a State has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, it may at the time of signature, ratification, or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.
> 2. These declarations shall be notified to the Depositary Government and shall state expressly the territorial units to which the Convention applies.[117]

The language of the Washington Convention's federal state clause is extremely broad compared to that found within the 1919 or 1946 ILO Constitutions. Under the Washington Convention, federal states need not make reference to either limitations or appropriateness; all that is required is the presence of "different systems of law" in constituent states.[118] This form of federal state clause also effectively allows individual states within a federal state to ratify a treaty so long as the federal government allows it, as the federal government could declare that the treaty only applies to those states which have chosen to take part in the treaty—creating a form of end-run around the constitutional prohibition on U.S. states making treaties with foreign states.

The relative laxity of the Washington Convention federal state clause led President Reagan to utilize a "two-tier" approach to its ratification, based on the use of the federal state clause.[119] As wills are a matter generally regulated by state governments, there was a concern about whether the treaty would interfere too much in the state's role of regulating the recognition of wills.[120] Testators and attorneys customarily consult state laws when drafting wills, and are not used to checking for federal rules.[121] It would be preferable, therefore, for the implemen-

116. *See* Looper, *supra* note 109, at 188.
117. Convention Providing a Uniform Law on the Form of an International Will, art. XIV, Oct. 26, 1973, 12 I.L.M. 1298.
118. *Id.*
119. Letter of Submittal from Ronald Reagan, President of the United States, to the 99th Congress 2d Session (July 2, 1986), http://www.cabinetchone.com/website/will/message.html.
120. Letter of Submittal from George P. Shultz, Department of State, to Ronald Reagan, President of the United States (June 4, 1986), http://www.cabinetchone.com/website/will/message.html.
121. *Id.*

tation of the Washington Convention to occur primarily at the state level.

Under the "two-tier" approach, the federal and state governments would both pass legislation implementing separate portions of the treaty.[122] The Washington Convention could be broadly split into two parts: the recognition of international wills created in foreign states, and the creation of international wills by United States citizens.[123] President Reagan's plan was for the federal government to implement the recognition of international wills throughout the United States, as well as to facilitate the creation of international wills by United States citizens abroad.[124] The state legislatures, in turn, would optionally pass legislation allowing state residents to create international wills.[125] The federal government prepared a model law, the Uniform International Wills Act, for the state governments to follow, which could either be enacted as-is or used as a basis for the drafting of state legislation.[126]

Using the federal state clause of the Washington Convention, the United States would determine the extent to which the Convention's obligations would apply to its territories, ensuring that international obligations could be upheld.[127] Without the federal state clause, this approach would have been impossible, as the federal government would have been held responsible for all obligations arising under the Washington Convention, regardless of the status of state implementations. Ultimately, twenty states enacted the Uniform International Wills Act or similar legislation.[128] The federal government, however, never passed the International Wills Act that would have guaranteed recognition of international wills, meaning that the United States is still not a party to the Washington Convention.[129] Thus, while the Reagan "two tier" system holds great promise, it has never been officially put to use.

To add further complications to the use of the Reagan "two tier" system, not all federal state clauses have been so relaxed as the clause in the Washington Convention. Consider, for example, the federal state clause included in the Council of Europe Convention on Cybercrime.[130]

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122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. Julian G. Ku, *The Crucial Role of the States and Private International Law Treaties: A Model for Accommodating Globalization*, 73 Mo. L. Rev. 1063, 1067 (2008).

129. *Id.* at 1066–67.

130. Council of Europe Convention on Cybercrime, art. 41, *opened for signature* Nov. 23, 2001, S. Exec. Rep. No. 109-06. The Cybercrime Convention's federal state clause (Article 41) read as follows:

Unlike the federal state clauses of the ILO Constitution or International Will convention, the Cybercrime Convention federal state clause restricts the ability of federal states to deviate from the obligations placed on unitary states. Federal governments ratifying the treaty may make reservations under Article 41(1), but they will still be tied to "broad and effective law enforcement" with respect to the treaty.[131]

The recent wave of restrictions on federal state clauses, as exemplified by the Cybercrime Convention, can sometimes lead to a loss of bargaining power for federal states such as the United States. While negotiating amendments to the World Health Organization International Health Regulations, the United States argued for the inclusion of a federal state clause allowing for the division of implementation "consistent with . . . [its] constitutionally mandated systems of government."[132] The request was denied, leaving the United States in a difficult position in regard to federalism. Without the federal state clause, the Reagan "two-tier" approach could not be used, and the federal government would have to choose between leaving implementation to the states but drafting a reservation from certain treaty obligations, or ignoring federalism and ratifying the treaty in full, but exclusively at the federal level.

As these recent developments demonstrate, the United States cannot rely upon federal state clauses being present in multilateral treaties, and therefore similarly cannot rely upon the Reagan "two-tier" approach for the protection of federalism in treaty implementation. There is, however, another way of allowing for state participation in treaty implementation without the need for federal state clauses: the "fill in the gaps" approach.

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1. A federal State may reserve the right to assume obligations under Chapter II of this Convention consistent with its fundamental principles governing the relationship between its central government and constituent States or other similar territorial entities provided that it is still able to co-operate under Chapter III.
2. When making a reservation under paragraph 1, a federal State may not apply the terms of such reservation to exclude or substantially diminish its obligations to provide for measures set forth in Chapter II. Overall, it shall provide for a broad and effective law enforcement capability with respect to those measures.
3. With regard to the provisions of this Convention, the application of which comes under the jurisdiction of constituent States or other similar territorial entities, that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States of the said provisions with its favourable opinion, encouraging them to take appropriate action to give them effect.

131. *Id.*, art. 41(2).
132. Hollis, *supra* note 15, at 1377.

V. The "Fill in the Gaps" Approach to Treaty Implementation

As previously demonstrated, no current solution to the issues stemming from *Missouri v. Holland* is fully appropriate. Judicial limitations, the "executive federalism" system, and the use of federal state clauses represent a variety of means for preserving federalism under the treaty power, but each brings significant disadvantages in practice.

Each of the previous approaches also neglects a significant force in the creation of treaties—the states themselves. While the states are prohibited from forming treaties with foreign states directly, they are free to implement multilateral agreements within their competence without being an "official" signing party of a treaty. Consider, for example, the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW").[133] While the United States signed CEDAW in 1980, no federal implementing legislation was ever enacted, and the United States has never officially ratified the treaty as a result.[134] Despite this fact, by 2004, "forty-four U.S. cities, eighteen counties, and sixteen states had passed or considered legislation relating to CEDAW, with yet others contemplating action."[135] If the United States ratified the treaty, and Congress passed overarching CEDAW legislation, these existing state implementations would create separate, overlapping implementations so long as they did not conflict with federal legislation.[136]

Municipal entities can also serve as implementers of foreign policy.

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133. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 19 I.L.M. 33.

134. Resnik, *supra* note 13, at 1110.

135. *Id.*

136. Human rights treaties like CEDAW may represent the only practical way to provide individuals rights that the Supreme Court has held are beyond the scope of Congress' powers under the Fourteenth Amendment. First, the Court has used the "state action doctrine" to limit the effectiveness of federal measures promulgated under the Fourteenth Amendment. In *Morrison*, the Court stated that the Fourteenth Amendment only allows the federal government to address the actions of states and those individuals acting as representatives of the states, and does not "shield against merely private conduct, however discriminatory or wrongful." Morrison v. United States, 529 U.S. 598 (2000) (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)). This state action requirement is not part of the text of Section 5 of the Fourteenth Amendment, but the Court has continually interpreted this requirement as being implied, preventing effective implementation of legislation like the Violence Against Women Act ("VAWA") at issue in *Morrison*.

Second, the Court has held that the Fourteenth Amendment grants limited due process rights. The Court held in *Castle Rock v. Gonzales* that Jessica Gonzales, a victim of domestic violence, had no procedural due process claim under the Fourteenth Amendment for the Castle Rock Police Department's lack of enforcement of Gonzales' restraining order against her ex-husband, who abducted and killed their three children. 545 U.S. 748 (2005). While Gonzales was able to bring her case before the Inter-American Commission on Human Rights ("Commission") due to the United States' participation in the American Declaration of the Rights and Duties of Man, the Commission's report finding violations of eight articles of the American Declaration was mostly a symbolic victory, as the report had no legally binding effects on the United States. Lenahan v.

What might be politically risky at the national level can often find broader support at the local level; "[d]eep inside the local, one can often see the global."[137] Efforts to act in compliance with current international treaties can often be implemented at the city level, and through trans-local organizations such as the National League of Cities, these efforts can have national or even global significance, providing "signals" to Congress about popular opinion of treaties and promoting a "cooperative federalism" where state action can inform or even implement federal policy.[138]

These state and municipal implementations serve as the basis for an alternative approach to treaty implementation, the fill in the gaps approach, that maintains federalist protections domestically while presenting "one voice" and a unified ratification process to the international community. Under the fill in the gaps approach, the federal government signs treaties via the President and a two-thirds majority of the Senate as normal, and then provides the states with the option of implementing non-federal aspects of treaties, subject to a generous time limit. In turn, the federal government enacts legislation implementing the federal aspects of a treaty, while simultaneously drafting model legislation for the states to apply, adjust, or ignore as they see fit. At the end of the state legislation time limit, the model legislation becomes federal law, applying to all states that have not enacted their own implementation of

United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, *available at* http://www.oas.org/en/iachr/decisions/2011/USPU12626EN.doc.

As a result of these limitations, effective human rights legislation likely requires the use of the treaty power's broad scope under *Holland*. While the use of the treaty power to pass human rights legislation has been highly controversial, the fill in the gaps approach presented below could present a workable compromise. If the federal government had implemented CEDAW, the combination of state and federal implementations would likely have led to different results in *Castle Rock* and *Morrison*.

137. Resnik, *supra* note 13, at 1124. This does not always result in increased local participation in foreign affairs, as can be seen in Oklahoma (and twenty other states) attempting to enact controversial legislation that would prevent judges from using international law sources in their decisions, isolating the local from the global. *See* Mark Schlachtenhaufen, *CAIR-OK Launches Anti-Sharia Bill Campaign*, EDMOND SUN, Mar. 18, 2011, http://www.edmondsun.com/local/x740880415/CAIR-OK-launches-anti-Sharia-bill-campaign.

138. Resnik, *supra* note 13, at 1138, 1133–34. Johanna Kalb has taken this concept further in her idea of "dynamic federalism," in which the states *must* participate when the federal government creates a space for state implementation of treaties. Where Kalb differs from my fill in the gaps approach is in her attitude toward enforcement. Under dynamic federalism, the federal government delegates implementation entirely to the states, with the federal government assuming the position of reviewer of state actions in comparison to a "floor" of enforcement and holding the states responsible when they fail to meet that floor. Kalb, *supra* note 13, at 1055–59. In contrast, the fill in the gaps approach below takes a more lenient attitude toward state participation, offering states the opportunity to draft local solutions to the problem of treaty implementation but also allowing states to "opt out" of enforcement burdens for matters that they do not find important or prudent to address at the state level.

the treaty's obligations. The end result is a system in which states can take control of the domestic implications of treaty obligations, while still allowing the federal government to ratify treaties as a singular entity without resorting to reservations or the use of federal state clauses. The spirit of federalism is thereby preserved through the use of the very tool that allows the federal government to disregard federalism concerns—the Supreme Court's holding in *Missouri v. Holland.*

The fill in the gaps approach derives its legitimacy from *Holland*'s statement that the treaty power allows Congress to pass any legislation necessary for the implementation of a treaty.[139] Under fill in the gaps, the federal government delegates the implementation of certain aspects of a signed treaty to the states, with Congress using its abilities under *Holland* and the treaty power to bring non-implementing states into line with the federal government's international treaty obligations. The result is an executive branch free to make foreign policy decisions as needed without subject matter or execution limitations, and state governments which are encouraged to take an active part in the foreign policy of the United States through their own domestic legislation.

This approach represents a compromise designed to bridge the flaws in the Nationalist and New Federalist viewpoints. Fill in the gaps puts an end to the Nationalist contention that state involvement in treaty-making would lead to the President representing fifty state governments rather than "one United States,"[140] because the federal government's "fallback" legislation allows the President and Senate to conclude treaties without fear that the United States will be held to account for an individual state's failure to implement treaty provisions. It also addresses the New Federalist concerns about unchecked expansion of congressional power[141] by providing each state with the opportunity to legislatively prevent Congress from encroaching upon that state's areas of jurisdiction. Under fill in the gaps, Congress only gains the ability to enact treaty-implementing legislation that disregards the Tenth Amendment in the absence of state action.

This proposal may seem to limit federalism, by "commandeering" the states into choosing between enacting burdensome state legislation on the one hand or losing the ability to control matters occurring within their own borders on the other. The closest analogy is *New York v. United States*[142], in which states like New York were similarly forced to choose between two potentially disadvantageous outcomes. In *New*

139. Missouri v. Holland, 252 U.S. 416, 433 (1920).
140. Golove, *supra* note 13, at 1276.
141. Bradley, *supra* note 80, at 450.
142. New York v. United States, 505 U.S. 144 (1992).

York, the Supreme Court addressed the federal Low-Level Radioactive Waste Policy Amendments Act, which created three incentives for states to regulate the disposal of nuclear waste.[143]

Most states complied with the Act by joining a regional compact, delivering their waste to a receiver state that would collect surcharges for its trouble.[144] Rather than join a compact, New York attempted to comply by constructing its own disposal facility, but residents of the five proposed disposal sites opposed the move.[145] As a result, New York was placed in a difficult situation: it could pay disposal surcharges to a receiver state, or take title to its waste and face liability for damages. In either case, New York would be forced to exert its state resources in furtherance of a federal regulation program.

The Supreme Court agreed, finding the "take title" provision unconstitutional for "commandeering" state governments into implementing federal regulation, "cross[ing] the line distinguishing encouragement from coercion."[146] The central problem described in the opinion was the lack of alternatives. States could not decline to administer the federal government's regulatory program, since the state would be forced to either implement federal legislation at the state level or be liable under federal law.[147]

The fill in the gaps approach, however, is quite different from the situation the states faced in *New York*, and actually enhances federalism protections. Unlike *New York*, the fill in the gaps approach allows states to completely opt out of the burden of enforcing federal treaty obligations. Federal "fallback" legislation, when put into effect for states that have chosen not to create their own implementing legislation, would be enforced at the federal level. The states could therefore be free of the burden to enforce treaty obligations.[148] In *New York*, the federal government mandated that the states enact regulation; here, the federal govern-

143. The first two incentives allowed states to collect surcharges from other states for receiving shipments of nuclear waste, and to raise surcharges or deny imports for states that failed to comply with the statute. The third incentive was referred to as the "take title" provision, and required states which were unable to dispose of all radioactive waste generated in their own state to take title to that waste and be liable for any damages resulting from it. The Act itself was "based largely on a proposal submitted by the National Governors' Association," another example of federal policy originating at the state level. *Id.* at 151, 153–54.

144. "In the seven years since the [Amendments] Act took effect, Congress has approved nine regional compacts, encompassing 42 of the states." *Id.* at 154.

145. *Id.*

146. *Id.* at 175.

147. "No matter which path the State chooses, it must follow the direction of Congress." *Id.* at 177.

148. The states would, however, be prevented from enacting legislation that conflicts with federal treaty obligations. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (holding that executive agreements and treaties may pre-empt conflicting state law).

ment provides states the *opportunity* to do so, if they wish to implement a plan that better matches their local situation and concerns.

By choosing not to implement treaty obligations themselves, states would both lose the ability to influence certain activities within their borders and acquiesce to the federal government's proposed implementation of the treaty. "Commandeering" does not become a concern because the federal government is not forcing the states to take a particular action.[149] Instead, the states may either choose to create their own legislation or to leave treaty compliance entirely to the federal government—the "critical alternative" missing in *New York*.[150]

At a glance, this approach may also seem burdensome to the federal government. The states may seek to avoid costly enforcement of treaty obligations by leaving all implementing legislation and enforcement responsibility to the federal government. This is, however, precisely the way in which most current treaties have been implemented. The 1998 Act implementing the Chemical Weapons Convention assigned responsibility for prosecuting persons making, using, or stockpiling chemical weapons entirely to the federal government, with no state interaction at all.[151] Even if only a small number of states ultimately create their own implementing legislation, this would still represent a reduction, rather than an increase, in the enforcement burdens of the federal government.

Consider, for example, the treaty provision at issue in *Medellín v. Texas*.[152] There, Article 36 of the VCCR required law enforcement officials to contact an arrested foreign national's consulate, an obligation to which the state of Texas objected.[153] If the VCCR had been ratified using a fill in the gaps approach, Texas could have simply opted out of passing state legislation implementing the VCCR, leaving implementation to the federal government.[154] Enforcement at the federal level, how-

149. *See generally* New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997).

150. *New York*, 505 U.S. at 176–77.

151. Chemical Weapons Convention Implementation Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

152. Medellín v. Texas, 552 U.S. 491 (2008).

153. *Id.* at 497–98.

154. In the same manner, other states could have "opted in" to state implementation. Governor Brad Henry of Oklahoma, for example, stated that the VCCR was "important in protecting the rights of American citizens abroad," and commuted Osbaldo Torres' death sentence to life without possibility of parole after the ICJ's decision in Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31). *Medellín*, 552 U.S. at 537.

Note also that applying the fill in the gaps approach to the VCCR explicitly assumes that it is a non-self-executing treaty. The critical issue in *Medellín* was not whether or not the federal government had the power to implement VCCR legislation, but whether the VCCR represented a self-executing treaty that the President could demand enforcement of without federal implementing legislation. Federal implementation of human rights treaties is politically risky

ever, would be quite simple. Rather than monitoring all arrests in the state and contacting embassies as needed, the federal government could simply enact as "fallback" legislation the ability for foreign nationals denied their rights under Article 36 to appeal their convictions in federal courts. States that implemented their own Article 36 provisions could handle such appeals internally according to state law, while those states that did not would find their criminal cases against foreign nationals increasingly being appealed to federal courts. This distinction would allow states to tailor their approaches to treaty obligations based on their particular circumstances. States which arrest a large number of foreign nationals would likely be incentivized to pass state legislation in order to maintain tighter control over activities occurring within their borders, while states in which foreign nationals are rarely arrested could essentially transfer cases against foreign nationals, along with the burden of observing VCCR obligations, to the federal government by choosing not to implement the treaty.

How might fill in the gaps have applied to *Bond*? If the ratification of the CWC had utilized this approach, the federal government could have passed legislation ensuring the declaration and verified destruction of its own chemical weapons stockpiles, as well as the prosecution of individuals creating, using, or stockpiling chemical weapons in non-state U.S. territories. At the same time, the federal government would draft model legislation for the states, defining chemical weapons and setting out the required crimes and punishments. States would then be free to enact or modify the proposed model legislation, to draft entirely new legislation that still meets the requirements of the treaty, or to leave implementation of the CWC within the state entirely to the federal government. At the end of the state legislation time period, the federal government would enact "fallback" legislation, ensuring treaty compliance in all states that had not implemented their own legislation.[155]

If Pennsylvania had enacted its own CWC legislation criminalizing chemical weapons use, Bond could have been charged at the state level instead. Pennsylvania would have been free to set its own sentencing terms as well, since the CWC merely required "enacting penal legislation" without minimum or even recommended sentencing guidelines.[156]

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under the current treaty framework, as it generally entails federal interference in state police power. A fill in the gaps approach would hopefully provide the federal government with the ability to put human rights treaty obligations into federal law without fear of offending state governments, making the self-executing / non-self-executing distinction less important.

155. The state legislation time period mentioned here need not be final, either; it would most likely be in the federal government's best interest to allow states which had chosen not to implement treaty obligations to do so even after the fallback legislation goes into effect.

156. *CWC*, *supra* note 43, art. VII, § 1.

Indeed, the door would be open for states to implement a sliding scale of punishments based on severity, an idea that the federal CWC Implementation Act did not address. Pennsylvania could have set chemical weapons sentencing for acts like Bond's in line with similar state offenses, giving Bond a sentence of up to two years imprisonment and eliminating one of the main pillars of her argument—the disparity between federal and state sentencing terms.

VI. Conclusion

From its earliest roots in the drafting of the United States Constitution, the treaty power has had a long and storied history, with spirited debate from all sides. For all of its criticisms, the modern treaty power is not some form of monster; it is merely the result of attempts to unite disparate ideals in the service of the nation. On one hand, the treaty power attempts to provide the federal government with the power to make international agreements that are beneficial to the United States, whether peace treaties, coalitions of nations, or multilateral private international law agreements. On the other hand, the treaty power seeks to fit within the structure of the Constitution, a structure that establishes a federal government of limited and enumerated powers. Providing foreign policy power while remaining sensitive to federalism has proven to be a difficult balancing act, one that the Supreme Court's decision in *Holland* only barely addressed.

Holland embodied Nationalist conceptions of the treaty power. Foreign policy was placed at the forefront of the treaty power, and federalism was left behind. *Holland* was not purely Nationalist, as Justice Holmes stated that "[w]e do not mean to imply that there are no qualifications on the treaty-making power."[157] When Justice Holmes stated that limitations on the treaty power must be "ascertained in a different way,"[158] without elucidating what that "way" might entail, he opened the door to a range of possible limitations on the treaty power.

One such "way" could be to find limitations in the subject matter of treaties, or another "way" could be through Congress' power to implement treaties. These New Federalist ideas are attractive because of their preservation of the ideal of federalism within the federal government's actions. Judicial limitations, however, can only achieve so much without upsetting the delicate balance of foreign policy power and federalism. Strict limits on the treaty power could throw it out of equilibrium, protecting states' rights so strongly that the United States suffers on the international stage as a result.

157. Missouri v. Holland, 252 U.S. 416, 433 (1920).
158. *Id.*

An additional "way" could be to look beyond the courts to find the limits of the treaty power. The treaty power, granted to the executive branch by Article II of the United States Constitution, could perhaps best be limited through the very executive branch tasked with its use. This change of source is the basis of "executive federalism," the idea that the executive can choose from among several methods to implement treaties and thereby maintain the balance of the treaty power.[159] It is a far more flexible approach than judicial limits, but it suffers from many of the same problems, with several of its methods resulting in either a loss of international influence and bargaining power, or the casting aside of federalism concerns.

A fourth "way" of finding treaty power limits requires us to seek limitations in the language of treaties themselves. This is the realm of the federal state clause, the clarification, and the reservation, understanding, or declaration. Each of these methods—and in particular the use of federal state clauses—has the potential to maintain the ability for decisive federal action while protecting the rights of the states. Each method, however, has drawbacks during treaty negotiation. The federal state clause may be expensive to bargain for, since most parties to multilateral agreements are non-federal states and are likely to resent the lessened treaty obligations of federal states.[160] Clarifications, reservations, understandings and declarations all represent deviations from the wording of the treaty, and by choosing to use these methods, the United States may indirectly encourage other states to limit their treaty obligations as well. Treaties obtain value from their ability to regulate the actions of foreign states in predictable ways, and the inclusion of reservations or other tools to limit state obligations undermines that predictability.

A new approach to treaties is needed. By "filling in the gaps" in state implementation of treaties at the federal level, the fill in the gaps approach can preserve the balance between foreign policy power and federalism restraint. This approach gives the states meaningful choices with regard to treaty implementation, while allowing the federal government to speak with one voice at the negotiating table. It represents a compromise formed from the current state of the treaty power, and as such does not require new legislation, new judicial precedent, or the inclusion of new treaty clauses—only a new approach to treaties on the part of the executive. "Filling in the gaps" also removes concerns of "commandeering" since the states are not forced to implement treaties. Instead, it puts responsibility for limiting federal power squarely with the states, the very entities that are best motivated to do so, and it

159. Hollis, *supra* note 15, at 1361.
160. Looper, *supra* note 109, at 179.

encourages the federal government and state governments to work together in the enforcement of international obligations.

Would increasing use of the fill in the gaps approach settle the treaty power issue once and for all? Only time can tell. The approach has never been used in the implementation of an actual treaty, and as a result there is no empirical way to evaluate the approach's strengths and weaknesses. On its face, though, the fill in the gaps approach presents a workable framework for the treaty power, capable of solving federalism problems in treaty implementation while still allowing for unburdened federal participation in important international agreements.