



5-2015

# An Intersubjective Treaty Power

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## Recommended Citation

Duncan B. Hollis, *An Intersubjective Treaty Power*, 90 Notre Dame L. Rev. 1415 (2014).

Available at: <http://scholarship.law.nd.edu/ndlr/vol90/iss4/1>

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## SYMPOSIUM

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### AN INTERSUBJECTIVE TREATY POWER

*Duncan B. Hollis\**

#### INTRODUCTION

How does the Constitution limit the subject matter of the U.S.'s treaties? For decades, conventional wisdom adopted a textual emphasis—prohibitions and other limits on federal authority listed in the Constitution itself (e.g., the Bill of Rights) apply to U.S. treaties.<sup>1</sup> In contrast, proposals for subject matter limitations implied by federalism fared less well. The case of *Missouri v. Holland* is famous precisely because it dismissed the idea of any structural “invisible radiation” from the Tenth Amendment prohibiting treaties on subjects falling within the states’ reserved powers.<sup>2</sup> The Supreme Court emphasized that U.S. treatymakers could not only conclude treaties independent of states’ rights concerns, but that the Necessary and Proper Clause authorized

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1 See, e.g., *Reid v. Covert*, 354 U.S. 1, 77 (1957); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302(2) (1987) [hereinafter RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW] (“No provision of an agreement may contravene any of the prohibitions or limitations of the Constitution applicable to the exercise of authority by the United States.”); see also *id.* cmt. b. The textual limitation view usually includes some implied limitations as well. See, e.g., *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (denying that the treaty power “extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the [s]tates, or a cession of any portion of the territory of the latter, without its consent”). In this Article, I use “States” to refer to foreign nation States and “states” to refer to the states of the United States.

2 *Missouri v. Holland*, 252 U.S. 416, 434 (1920) (upholding the constitutionality of Migratory Bird Treaty Implementation Act); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 302 cmt. d (1987) (“[T]he Tenth Amendment, reserving to the several States the powers not delegated to the United States, does not limit the power to make treaties or other agreements.”); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 189–94 (2d ed. 1996).

Congress to implement them independent of its enumerated powers.<sup>3</sup> A more affirmative requirement that U.S. treaties regulate only subjects of “international concern” suffered a similar fate.<sup>4</sup> As the *Restatement (Third) of the Foreign Relations Law of the United States* notes, “Contrary to what was once suggested, the Constitution does not require that an international agreement deal only with ‘matters of international concern.’”<sup>5</sup> Taken together, such pronouncements suggest federalism imposes neither affirmative nor negative limits on which treaties the United States concludes or how it implements them.

In recent years, *Missouri v. Holland* and its two holdings have come under increasing scrutiny.<sup>6</sup> Academics like Curtis Bradley called for limits on the treaty power itself, subjecting treaties to “the same federalism limitations that apply to Congress’s legislative powers.”<sup>7</sup> Others like Nicholas Rosenkranz looked to undermine *Missouri v. Holland*’s suggestion that Congress could implement treaties beyond its enumerated powers under the Necessary and Proper Clause.<sup>8</sup> Both positions generated robust rebuttals from those committed to preserving *Missouri v. Holland*’s canonical status in U.S. foreign relations law.<sup>9</sup>

These debates did little, however, to resuscitate the idea of affirmative federalism limits on the treaty power to matters of international concern. Critics dismissed such a test as incapable of protecting federalism in the mod-

3 *Holland*, 252 U.S. at 425.

4 See, e.g., RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 117(1) (1965) [hereinafter RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW] (“[T]he Constitution [conveys the power] to make an international agreement if (a) the matter is of international concern . . .”).

5 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 302 cmt. c (1987).

6 See Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1330–31 (2006) (surveying the renewed discourse).

7 Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 450 (1998) [hereinafter Bradley I]; Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000) [hereinafter Bradley II]. Others adopting a similar stance include Gary Lawson, Guy Seidman, and Edward Swaine. See Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 44–45; Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 406–08 (2003).

8 See generally Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005). For a more nuanced take, see Carlos Manuel Vázquez, *Missouri v. Holland’s Second Holding*, 73 MO. L. REV. 939, 941 (2008) (suggesting that Congress’s treaty implementing authority extends beyond its enumerated powers for obligatory, but not for aspirational, treaties).

9 The most extensive defense was undoubtedly offered by David Golove. See David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000). For other supporters of *Missouri v. Holland* or the lack of subject matter limitations on U.S. treaty-making, see Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239 (2013); Michael D. Ramsey, *Missouri v. Holland and Historical Textualism*, 73 MO. L. REV. 969 (2008); David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963 (2003); Thomas Healy, Note, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726, 1728 (1998).

ern treaty context since “[t]oday, almost any issue can plausibly be labeled ‘international.’”<sup>10</sup> Thus, when the Supreme Court agreed to consider the Chemical Weapons Convention Implementation Act (CWCIA) in *Bond v. United States*, court watchers focused almost exclusively on whether the Court would sustain *Missouri v. Holland* or reconsider its holdings.<sup>11</sup> Noticeably absent from the prognostications was any substantial discussion of defining the treaty power in “international” terms.

*Bond* was thus a surprising decision on two levels. First, the majority avoided the *Missouri v. Holland* issues entirely.<sup>12</sup> Second, the case demonstrated that the “international concern” test is neither dead nor dying. Those Justices offering views on the constitutional scope of the treaty power—Alito, Scalia, and Thomas—all accepted some version of that test. Justice Thomas authored a concurrence (joined by Scalia and (largely) Alito) devoted to demonstrating that “the Treaty Power can be used to arrange intercourse with other nations, but not to regulate purely domestic affairs.”<sup>13</sup> In a separate concurrence, Justice Alito explained “that the treaty power is limited to agreements that address matters of legitimate international concern.”<sup>14</sup>

This Article explores whether the Constitution limits the making and implementation of U.S. treaties to subjects of “international” intercourse or concern. It does so in two steps. First, I undertake the existential inquiry, asking if the Constitution requires a nexus between treaties and “international” subject matters. I argue that Justices Alito, Scalia, and Thomas are correct—and the *Restatement (Third)* is wrong—on the question of whether the Constitution imposes an affirmative subject matter limitation on the treaty power. Various modalities of constitutional interpretation—original meaning, historical practice, doctrine, structure, and prudence—offer evidence in support of some version of an “international concern” test. And

10 Bradley I, *supra* note 7, at 451–52; see also Swaine, *supra* note 7, at 417–18 (noting that “[f]ew continue to advocate requiring an ‘external’ or ‘international’ object for a valid treaty” and finding it “difficult to imagine” that a court would adopt a subject matter test based on advancing U.S. national interests in its relations with other nations).

11 See, e.g., Howard J. Bashman, *Looking Ahead: October Term 2013*, 2012–2013 CATO SUP. CT. REV. 393, 405–06 (2013) (discussing *Bond* and its likely outcome); John C. Eastman, *Will Mrs. Bond Topple Missouri v. Holland?*, 2010–2011 CATO SUP. CT. REV. 185, 194 (2011) (discussing *Bond* and its first go-around at the Supreme Court); Michael S. Greve, *Straight Up, with Multiple Twists: Bond v. United States*, LIBRARY OF LAW & LIBERTY (Jan. 21, 2013), <http://www.libertylawsite.org/about/> (claiming that the Court took the case to reconsider *Missouri v. Holland*). The question presented in *Bond* was whether the implementing legislation of the Chemical Weapons Convention reached a “purely local crime: an amateur attempt by a jilted wife [Carol Anne Bond] to injure her husband’s lover.” *Bond v. United States*, 134 S. Ct. 2077, 2083 (2014).

12 See *Bond*, 134 S. Ct. at 2090. The Court declined to address the constitutional scope of either the treaty power or the Necessary and Proper Clause in implementing treaties. Instead, it decided the case via a statutory presumption, holding that statutes implementing treaties like the CWCIA should not be read to intrude on traditional areas of state authority absent a clear statement of Congress’s intent to do so. *Id.*

13 *Id.* at 2103 (Thomas, J., concurring in the judgment).

14 *Id.* at 2111 (Alito, J., concurring in the judgment).

this claim holds whether one endorses or rejects the claim that federalism requires reserved powers' limitations on the treaty power or treaty-implementing legislation.<sup>15</sup>

Assuming the existence of an international concern test, my second step analyzes its contours. Here, I part ways with Justices Alito, Scalia, and Thomas on what it means to require that treaties address matters of international intercourse or concern. For these Justices—and some other advocates—the line between international and domestic matters is static and objective, with a fixed line dividing “international” matters from “purely domestic” ones.

In contrast, I envision the treaty power's boundaries in subjective, rather than objective, terms. More specifically, I believe the international concern test is *intersubjective*; it operates by the presence or absence of a shared understanding among the relevant actors in the treaty process. Shared beliefs as to whether a particular subject matter is international undergird the processes for (i) making, (ii) ratifying, (iii) implementing, and (iv) applying treaties. To begin with, treatymaking itself operates as a referendum on the international nature of the subject matter under discussion. Where participants negotiate a treaty, it necessarily implies a shared belief that its subject matter deserves international regulation. If the participants lack such a shared belief, no treaty gets made.<sup>16</sup> Second, the U.S.'s ratification process incorporates an intersubjective test on the appropriateness of the subject matter as a U.S. treaty—only if the President and the Senate jointly accept the appropriateness of using the treaty vehicle to regulate the particular subject(s) in question, can ratification occur. The possibility of reservations and understandings offers both sides tools to adjust the treaty's subjects to redress any concerns about its reach. And where treaties require implementation or application, the beliefs of additional actors (e.g., Congress, the Court) come into play, as each has a role in deciding whether the treaty's implementation generally (or its meaning in a specific instance) coincides with the international concerns that the original treaty suggests.

The test is thus a staged one. In order to pass it, an intersubjective belief that the subject matter is international must exist at each level in the process. A treaty cannot be ratified unless negotiating States conclude it, and it cannot be implemented, absent ratification. The need to have this confluence of intersubjective understandings effectively limits the subject matter of U.S. treaties even in the absence of objective criteria. Simply put, U.S. treaties will only be formed (or ratified, implemented, or applied) where *all* relevant actors share a belief that the subject matter is sufficiently international in character.

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15 Thus, this Article takes no position on the existence or scope of other claims for federalism limits on the treaty power, whether based on text, political safeguards, or powers otherwise reserved to the states.

16 Or the recalcitrant State sits outside whatever regime emerges. See *infra* notes 140–70 and accompanying text.

Given the test's staged nature, the context for its application matters. As *Bond* itself illustrates, having an intersubjective understanding that a treaty addresses matters of international concern does not necessarily translate into finding that every claimed implementation or application of that treaty qualifies as such. None of the Justices in *Bond* objected to the Chemical Weapons Convention as lacking in international character. Yet they all viewed either Ms. Bond's prosecution or the application of the treaty's implementing legislation as *not* matters of international concern.<sup>17</sup>

Moreover, contra Justice Thomas, the international concern test is clearly dynamic. What is (or is not) a matter of international concern may shift as the beliefs of those involved in the treaty process shift. No issue is "purely" domestic (or international) for all times. At one time, the test may preclude treatymaking on a particular topic (e.g., human rights) because nation States (or the President and the Senate) cannot agree to do so, only to have the same actors shift their views at a later date and conclude treaties on that very subject. Alternatively, actors may decide that a particular topic (e.g., relations with Native Americans) no longer warrants treaty treatment even if they believed it did at some point in the past.

Part I of this Article elaborates the case for an international concern test under standard modalities of constitutional interpretation. Part II examines the contents of this test, noting the difficulties of existing objective approaches and introducing the concept of intersubjectivity as it relates to treaties. Part III elaborates an intersubjective international concern test by explaining its staged, contextual, and dynamic character, using examples drawn from U.S. treaty practice. I conclude by highlighting the importance of intersubjectivity to resolving one of the longest running puzzles of U.S. foreign relations law and calling for more research on whether, when, and how well constitutional actors generate shared understanding on the permissible boundaries of the treaty power.

#### I. THE CONSTITUTION REQUIRES THAT TREATIES ADDRESS MATTERS OF INTERNATIONAL CONCERN

In 1929, Charles Evans Hughes addressed the American Society of International Law on the question of constitutional limits inherent in the nature of the treatymaking power. The former Secretary of State and future Chief Justice of the Supreme Court offered a famous (and succinct) articulation of the international concern test:

The normal scope of the power can be found in the appropriate object of the power. The power is to deal with foreign nations with regard to matters of international concern. It is not a power intended to be exercised, it may be assumed, with respect to matters that have no relation to international concerns.<sup>18</sup>

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17 See *infra* notes 204–05 and accompanying text.

18 Charles Evans Hughes, *Remarks on the Limitation of the Treaty-Making Power of the United States in Matters Coming Within the Jurisdiction of the States*, 23 AM. SOC'Y INT'L L. PROC.

Hughes offered his remarks extemporaneously without much elaboration or supporting evidence.<sup>19</sup> And if this were the only—or even the primary—evidence in support of that test, it would be easier to understand its dismissal in the *Restatement (Third)*. Indeed, Professor Henkin—the *Restatement (Third)*'s chief reporter—had operated on just such an assumption, claiming the test “sprang full blown from the mind and mouth of Charles Evans Hughes in 1929.”<sup>20</sup>

But the international concern test did not originate with Hughes. It has much firmer foundations. Evidence for such a requirement comes from manifold sources for constitutional interpretation, whether (i) originalism, (ii) historical support, (iii) doctrine, or (iv) structural and prudential claims. Opposing arguments in each of these areas are, moreover, relatively muted. Most critics emphasize functional objections, finding the international concern test either underinclusive or overinclusive depending on the constitutional values they prioritize for the treaty power. But putting aside (for now) questions on the test's nature and scope, there is a strong argument that the Constitution requires treaties to regulate only matters of international concern.

#### A. *Constitutional Text and the Treaty's Original Meaning*

In granting Congress the exclusive power to make treaties, the Articles of Confederation included an express limitation on their subject matter; Article IX barred Congress from making treaties regulating imports and exports as well as any that interfered with state imposts and duties on foreigners.<sup>21</sup> The Constitution, in contrast, is silent on the subject matter of U.S.

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194, 194 (1929); see also *id.* at 196 (“[F]rom my point of view the nation has the power to make any agreement whatever in a constitutional manner that relates to the conduct of our international relations, unless there can be found some express prohibition in the Constitution . . . . But if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdictions of the [s]tates, then I again say there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns . . . .”).

19 Hughes had moderated a debate on the treaty power featuring Charles Henry Butler. Hughes only offered his views after the discussion had stalled and other participants requested that he do so, views which he emphasized were equivocal. See *id.* at 194 (“I should not care to voice any opinion as to an implied limitation on the treaty-making power.”).

20 Louis Henkin, Comment, “*International Concern*” and the Treaty Power of the United States, 63 AM. J. INT’L L. 272, 274 (1969). The Reporters’ Notes in the RESTATEMENT (THIRD) center on unpacking and critiquing Hughes’s statement by citing international law and Supreme Court doctrine. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 302 reporters’ note 2 (1987).

21 ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1; see also *id.* art. VI, para. 3 (prohibiting the states from applying any imposts or duties that would interfere with U.S. treaties). For further discussion of the Articles of Confederation treaty power, see Golove, *supra* note 9, at 1102–32, and Ramsey, *supra* note 9, at 983–86.

treatymaking generally, let alone making any mention of matters of international concern. The regulation of treaties is instead procedural, vesting the President with the power “by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>22</sup> Such silence on subject matter might suggest the absence of any international concern test. After all, if the Framers had intended to require treatymaking only on matters of international concern, why not say so expressly?

The text itself provides an answer—as understood at the Framing, a “treaty” necessarily involved an agreement among sovereign States on international matters. To be sure, contemporary treatises did not use the term “international” to delineate the appropriate bounds for treatymaking; Bentham only coined that term in 1780.<sup>23</sup> Nonetheless, the treaty term was widely explained and understood to involve an (a) agreement, (b) among sovereigns or their proxies, on (c) matters of joint public welfare.

Burlamaqui defined “public treaties” to “mean such agreements as can be made only by public authority, or those which sovereigns, considered as such, make with each other, concerning things, which directly concern the welfare of the state.”<sup>24</sup> This accords with Grotius, whose earlier definition also distinguished treaties from “contracts of private persons,” “contracts of kings which are concerned with private affairs,” and sponsions.<sup>25</sup> According to Grotius, treaties may establish the same rights as the law of nature or lay out equal or unequal commitments on all sorts of topics involving sovereign relations.<sup>26</sup> Vattel—whose work, the *Law of Nations*, may have had the most influence on the Constitution’s treaty provisions<sup>27</sup>—defined a treaty as a

22 U.S. CONST. art II, § 2, cl. 2.

23 2 JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 260 n.\* (London, W. Pickering 2d ed. 1823); see also *International Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/international> (last visited Mar. 15, 2015).

24 JEAN-JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 517 (Peter Korkman ed., Thomas Nugent trans., Liberty Fund 2006) (1763); see also BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27 (1967) (discussing Burlamaqui’s influence on the Framers and colonial America generally); RAY FORREST HARVEY, JEAN JACQUES BURLAMAQUI: A LIBERAL TRADITION IN AMERICAN CONSTITUTIONALISM 75–76, 79–175 (1937) (same).

25 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES (Francis W. Kelsey et al. trans., 1925) (1646), reprinted in 2 CLASSICS OF INTERNATIONAL LAW 391 (James Brown Scott ed., 1995).

26 *Id.* In terms of equal treaties, for example, Grotius explained that they dealt with matters of peace or alliance, with alliance matters defined broadly to include “commerce, to contributions for the joint prosecution of a war, or to *other objects of equal importance.*” *Id.* (emphasis added).

27 Benjamin Franklin famously informed the *Law of Nations*’ publisher how important Vattel’s work was to the Continental Congress. See Letter from Benjamin Franklin to Charles Dumas (Dec. 19, 1775), in 2 FRANCIS WHARTON, THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 64 (Washington, Gov’t Printing Office 1889) (noting that since “circumstances of a rising State make it necessary frequently to consult the



“compact made with a view to the public welfare by the superior power, either for perpetuity, or for a considerable time.”<sup>28</sup> Vattel further elaborated limits on treaty-making, denying the validity of treaties that were unjust, dishonest, or “pernicious to the state.”<sup>29</sup> Taken together, these expositions reveal a concern not only with the locus of treaty-making authority (which occupied most of these scholars’ attention) but also with defining treaties as more than mere agreements: their subject matter needed to relate (in equal or unequal measure) to the parties’ public interests. It is this emphasis on *joint* public welfare that encompasses the modern “international” concept in defining treaties as agreements on subjects relating to or affecting two or more sovereign States.<sup>30</sup>

Beyond academic treatments, many (but not all) of the Framers clearly understood the treaty concept to require attention to *international* matters.<sup>31</sup>

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law of nations,” a copy of Vattel “has been continually in the hands of the members of our Congress now sitting”); Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by “Agreements or Compacts”?*, 3 U. CHI. L. REV. 453, 458–59 (1935). Vattel’s distinction between dispositive “agreements” and perpetual “treaties” helps explain the Constitution’s prohibition on state treaty-making while permitting compacts or agreements with congressional consent. See Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 773–75 (2010).

28 EMER DE VATTEL, *THE LAW OF NATIONS* § 152, at 338 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758). Vattel’s definitions appear to build on the scholarship of Christian von Wolff, who had little exposure in the nascent American Republic. See CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* (Joseph H. Drake trans., 1934) (1764), *reprinted in* 2 CLASSICS OF INTERNATIONAL LAW 191 (James Brown Scott ed., 1995) (“A treaty is defined as a stipulation entered into reciprocally by supreme powers for the public good, to last forever or at least for a considerable time. But stipulations, which contain temporary promises, or those not to be repeated, retain the name of compacts.”); Hollis, *supra* note 27, at 775 n.165.

29 VATTEL, *supra* note 28, § 160 (“[N]o conductor of a nation has the power to enter into engagements to do such things as are capable of destroying the state, for whose safety the government is intrusted to him. The nation itself, being necessarily obliged to perform every thing required for its preservation and safety, cannot enter into engagements contrary to its indispensable obligations.” (citation omitted)); see also *id.* § 161 (indicating that unjust or dishonest treaties are null).

30 I am less persuaded by Justice Thomas’s argument that treaty-making during the Articles of Confederation period supports an international concern test, since Thomas never defines the term “international,” instead simply listing treaty topics on the assumption that their international nature is obvious. *Bond v. United States*, 134 S. Ct. 2077, 2103–05 (2014) (Thomas, J., concurring in the judgment).

31 See Bradley I, *supra* note 7, at 411 (“[T]he Founders contemplated that treaties would govern truly *inter*-national relations.”); Golove, *supra* note 9, at 1134 (noting that emergence of a “shared supposition that the [treaty] power was general and would extend as far as was customary under international practice”); Ramsey, *supra* note 9, at 989 (“[A]t a minimum the ratifying debates seem to confirm (or at least not contradict) the interpretation that follows most naturally from the Constitution’s text itself and from its precursors in the Articles: that the treaty-making clause grants general power to make treaties on any subject of international concern.”); Note, *Restructuring the Modern Treaty Power*, 114 HARV. L. REV. 2478, 2479 (2001) (arguing that the Framers believed that treaties were limited to addressing international affairs rather than domestic ones).

Discussions of the treaty power at the Framing and in its immediate aftermath were notoriously limited (and the debate that did occur focused not on the power's scope, but on its allocation to the President and Senate).<sup>32</sup> Still, no less significant a troika than Hamilton, Jefferson, and Madison expressed an understanding whereby the nature of the treaty concept served to provide the boundaries for the subject matter it could reach.

Alexander Hamilton, *the* champion for a broad treaty power, recognized that the nature of the treaty dictated its subject matter. During the New York ratification debates, Hamilton defended allocating the treaty-making power to the President and the Senate (as well as Senate voting requirements) by emphasizing how treaties differ from laws and their execution.<sup>33</sup> He emphasized that treaties' "objects are *contracts* with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign."<sup>34</sup> Later, in defending the Jay Treaty as Camillus, Hamilton emphasized the breadth of the treaty power—asserting it conveyed "plenipotentiary authority" via a blank slate to the federal government.<sup>35</sup> Even so, Hamilton cabined this power by reference to a core premise: "Whatever is a proper subject of compact between Nation and Nation may be embraced by a Treaty."<sup>36</sup>

Thomas Jefferson's understandings of the treaty power were largely antithetical to those expressed by Hamilton.<sup>37</sup> Nonetheless, the two agreed on having international practice and the shared public interests of the treaty's parties delimit the appropriateness of its subject matter. In his *Manual of Parliamentary Practice*, Jefferson provided two conditions that pair with Hamilton's understandings. First, a treaty "must concern the foreign nation party to the contract, or it would be a mere nullity."<sup>38</sup> And second, "[b]y the gen-

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32 See HENKIN, *supra* note 2, at 175 (noting that the Framers were concerned with the procedure for making treaties, not their scope); Golove, *supra* note 9, at 1134 (noting the "paucity of material directly addressing the scope of the treaty power" in the Constitutional Convention records); see also Ramsey, *supra* note 9, at 986–87 ("[D]elegates had few discussions of subject matter limitations on treaty-making power.").

33 THE FEDERALIST NO. 75, at 378–80 (Alexander Hamilton) (Ian Shapiro ed., 2009).

34 *Id.* at 379.

35 Alexander Hamilton, *The Defence No. 36*, in 20 THE PAPERS OF ALEXANDER HAMILTON 3, 6 (Harold C. Syrett ed., 1974); see also *id.* ("The power 'to make,' implies a power to act *authoritatively* and *conclusively*. . . . With regard to the objects of the Treaty, there being no specification, there is of course a *charte blanche*.").

36 *Id.* ("A power 'to make treaties,' granted in these indefinite terms, extends to all kinds of treaties and with all the latitude which such a power under any form of Government can possess."). Hamilton acknowledged that treaties, like other delegated powers, could not violate the Constitution. *Id.*

37 Jefferson recognized opinions varied on the appropriate scope of U.S. treaty-making. See THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE 169 (Washington, Joseph Milligan & William Cooper 2d ed. 1812) ("To what subject this [treaty] power extends, has not been defined in detail by the constitution; nor are we entirely agreed among ourselves.").

38 *Id.* at 169–70.

eral power to make treaties, the constitution must have intended to comprehend only those subjects which are usually regulated by treaty, and cannot be otherwise regulated.”<sup>39</sup>

It is Madison, however, who provided the most robust and detailed defense of the international concern test during the Framing period. Madison started with the premise that the Constitution’s treaty power largely mirrored that of the Articles of Confederation.<sup>40</sup> The elimination of the specific subject matter limitations in the Articles, Madison explained, did not suggest an unlimited power but merely rectified earlier problems posed by the states in the making and enforcement of U.S. treaty commitments.<sup>41</sup> The treaty power, he insisted, spoke to its own “propriety.”<sup>42</sup> Madison thus accepted the idea that by referencing the “treaty,” the constitutional text incorporated the boundaries of that concept into the federal treaty power, a power Madison believed included regulating “intercourse with foreign nations.”<sup>43</sup>

The nature of the treaty power received (by far) the most attention during the Virginia Ratification Debates.<sup>44</sup> Several notable anti-federalists—e.g., Patrick Henry, George Mason—worried about the possibility of a treaty ceding Virginia’s claim to the Mississippi River.<sup>45</sup> They complained that the Constitution provided for an “unbounded” treaty power whereby the President and the Senate could “make any treaty.”<sup>46</sup> Henry, in particular, worried that the U.S. treaty power extended further than any other nation’s, including a “municipal” status in “a doctrine totally novel.”<sup>47</sup>

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39 *Id.* at 170. Jefferson’s two other conditions—that the treaty power did not include the right to regulate rights reserved to the states and excluded legislative subjects assigned by the Constitution to the House of Representatives—were much more controversial and contested. *See* Golove, *supra* note 9, at 1187–88.

40 THE FEDERALIST NO. 42, *supra* note 33, at 213–14 (James Madison).

41 *Id.* at 213 (The treaty power “is disembarrassed by the plan of the convention, of an exception under which treaties might be substantially frustrated by regulation of the [s]tates.”). On state interference with U.S. treaty-making and implementation during the Articles of Confederation, *see* Golove, *supra* note 9, at 1107–20.

42 THE FEDERALIST NO. 42, *supra* note 33, at 213 (James Madison).

43 *See id.*; *see also* THE FEDERALIST NO. 45, *supra* note 33, at 237 (James Madison) (stating that the delegation of powers “to the federal government are few and defined” and “will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce”).

44 *See* Bradley I, *supra* note 7, at 410; Golove, *supra* note 9, at 1141–42.

45 Golove, *supra* note 9, at 1142.

46 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 315 (Jonathan Elliot ed., 2d ed. 1907) (1836) [hereinafter ELLIOT’S DEBATES] (Patrick Henry claimed the treaty power was “unlimited and unbounded.”); *id.* at 513 (Henry described treaty power as “destructive; for they can make any treaty.”); *id.* at 509 (George Mason charged that under the Constitution “[t]he President and the Senate can make any treaty whatsoever.”). Anti-federalists also expressed concern that treaties might infringe individual rights, the Bill of Rights having yet to be incorporated into the constitutional text. *See, e.g., id.* at 503–04, 512–14 (remarks by Patrick Henry).

47 *Id.* at 500 (remarks by Patrick Henry).

Madison rejected such complaints. He insisted that the Constitution's treaty power was coextensive with that of the English King and both nations allowed treaties to have domestic effects as law.<sup>48</sup> He denied the Constitution delegated a treaty power that was "absolute and unlimited."<sup>49</sup> For Madison, the Constitution limited the power even without specific subject matter enumerations by virtue of the purpose of treaty-making itself:

The object of treaties is *the regulation of intercourse with foreign nations, and is external*. I do not think it possible to enumerate all the cases in which such external regulations would be necessary. Would it be right to define all the cases in which Congress could exercise this authority? The definition might, and probably would, be defective. They might be restrained, by such a definition, from exercising the authority where it would be essential to the interest and safety of the community. It is most safe, therefore, to leave it to be exercised as contingencies may arise.<sup>50</sup>

Thus, Madison envisioned that the treaty power would be limited by the very concept of a treaty to matters of international concern, even if those limits were best left unenumerated. Although Antifederalists like Henry and Mason questioned whether those limits would hold, they chose not to propose an alternative test but instead sought greater procedural protections on the power's exercise.<sup>51</sup> Taken together, the received meaning of the treaty concept, as reflected in the Framers' own views, supports the idea that the Constitution conveyed a treaty power limited to matters of international intercourse or concern.

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48 *Id.* at 500–01 (remarks by James Madison). George Nicholas claimed that the English treaty power paralleled that of the United States:

He insisted they resembled each other. If a treaty was to be the supreme law of the land here, it was so in England. The power was as unlimited in England as it was here. Let gentlemen, says he, show me that the king can go so far, and no farther, and I will show them a like limitation in America.

*Id.* at 502.

49 *See id.* at 514 (remarks by James Madison); *see also* 5 ANNALS OF CONG. 777 (1796) (stating that Madison believed that the "Treaty Making power was a limited power"). Madison emphasized that a treaty could not "dismember the empire" or "alienate any great, essential right." ELLIOT'S DEBATES, *supra* note 46, at 514. Vattel's discussion of treaties supported Madison's views, even if Madison had been more equivocal on making these sorts of treaties during the Constitutional Convention. *See* VATTEL, *supra* note 28, at 338; 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 297–98 (Max Farrand ed., 1911) (remarks of James Madison).

50 ELLIOT'S DEBATES, *supra* note 46, at 514–15 (emphasis added) (remarks of James Madison). Earlier in the debates, Edmund Randolph also dismissed the idea of delimiting, which contingencies the treaty power covered: "The various contingencies which may form the object of treaties, are, in the nature of things, incapable of definition. The government ought to have power to provide for every contingency." *Id.* at 363.

51 Mason, for example, sought to have three-fourths of both the House and Senate approve any treaty to cede territory. *Id.* at 509.

B. *Historical Support for an International Concern Test*

For over 150 years after the Framing, the international concern test remained a visible feature of the treaty power, enjoying support in both academic and government circles. In his early and influential treatise on constitutional law, William Rawle emphasized that the treaty power covered only those subjects “which properly arise from intercourse with foreign nations,” accompanied by an open-ended list of appropriate topics: “[P]eace, alliance, commerce, neutrality, and others of a similar nature.”<sup>52</sup> Noted states’ rights advocate John Calhoun emphasized a similar limitation in debates over the 1815 Commercial Treaty with Great Britain.<sup>53</sup> Like Madison before him, Calhoun insisted on a limited treaty power despite the Constitution’s failure to enumerate subject matter limits. He relied instead on how treaties require mutual consent and a nexus with foreign relations:

The wisdom of the Constitution appears conspicuous. When enumeration was needed, there we find the powers enumerated and exactly defined; when not, we do not find what would be vain and pernicious. Whatever, then, concerns our foreign relations; whatever requires the consent of another nation, belongs to the treaty power; can only be regulated by it; and it is competent to regulate all such subjects; provided, and here are its true limits, such regulations are not inconsistent with the Constitution.<sup>54</sup>

Decades later, Calhoun would insist on a treaty power “strictly limited” to “questions between us and foreign powers which require negotiation to adjust them.”<sup>55</sup> In 1857, Attorney General Caleb Cushing stipulated to Calhoun’s views on the treaty power’s limits in deciding on the constitutionality of regulating alien property rights in a treaty with Prussia.<sup>56</sup>

Joseph Story, in his *Commentaries on the Constitution*, also endorsed a version of the international concern test. He advocated for a broad treaty power by emphasizing that it extended so far as “the policy or interests of independent sovereigns may dictate in their intercourse with each other.”<sup>57</sup> Others

52 WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 58 (Philadelphia, H.C. Carey & I. Lea 1825).

53 29 ANNALS OF CONG. 528 (1816). Calhoun’s speech focused on differentiating the nature of treaties from legislation, adopting a view that the two were distinct and thus that “the treaty-making power, when it was legitimately exercised, always did that which could not be done by law” since a “treaty always effects the interests of two.” *Id.* at 528–29.

54 *Id.* at 531; *see also id.* at 532 (“Besides these Constitutional limits, the treaty power, like all powers, has others derived from its object and nature. It has for its objects contracts with foreign nations.”).

55 JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 203 (Richard K. Cralle ed., Charleston, Walker & James 1851).

56 *See* Letter from Caleb Cushing, Attorney Gen., to William L. Marcy, Sec’y of State (Feb. 26, 1857), in 8 Op. Att’y Gen. 411, 416–18 (1858).

57 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 355–56 (Boston, Hilliard, Gray & Co. 1833) (giving examples of treaty subjects to include “peace or war; for commerce or territory; for alliance or succours; for indemnity of injuries or payment of debts; for the recognition and enforcement of principles of public law”).

like John Randolph Tucker inverted the test to deny that the treaty power allowed regulation of the “internal concerns of the country.”<sup>58</sup>

Adherence to the international concern requirement thus did not necessarily dictate a particular position on whether the treaty power could regulate matters otherwise left to the states. Proponents of a broad power suggested that the presence of an international connection could justify overriding state interests as much as states’ rights advocates emphasized that the “local” nature of certain subjects should protect them from any international label. Despite such differing views on what matters qualified as “international” as opposed to “internal,” proponents of both a broad and narrow treaty power continued to support the idea that U.S. treaties had to deal with international matters.<sup>59</sup>

Similar variations were evident in government circles. At times, government representatives would invoke the international concern test to support a broad reach for U.S. treaty-making. In its *Missouri v. Holland* brief, for example, the executive branch acknowledged that matters of “purely local nature”<sup>60</sup> were reserved to the states, but insisted that the scope of the treaty power could still trump so long as the matter “may properly be the subject of negotiations between the two governments.”<sup>61</sup> In contrast, in opposing the

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Story explained that the treaty power was “general and unqualified” because of the difficulty in circumscribing it “within any definite limits, applicable to all times and exigencies, without impairing its efficacy, or defeating its purposes.” *Id.* at 356.

58 2 JOHN RANDOLPH TUCKER, *THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION* § 355, at 727 (Henry St. George Tucker ed., Chicago, Callaghan & Co. 1899).

59 *See, e.g.*, 1 CHARLES HENRY BUTLER, *THE TREATY MAKING POWER OF THE UNITED STATES* § 3, at 5 (1902) (“[T]he power of the United States to enter into treaty stipulations in regard to all matters, which can properly be the subject of negotiation between sovereign states is practically unlimited, and that in no case is the sanction, aid or consent of any [s]tate necessary to validate the treaty or to enforce its provisions.”); EDWIN S. CORWIN, *NATIONAL SUPREMACY: TREATY POWER VS. STATE POWER* 18 (1913) (“[T]reaty-power . . . must be confined to its proper business.”); NICHOLAS PENDLETON MITCHELL, *STATE INTERESTS IN AMERICAN TREATIES* 154 (1936) (concluding that the reserved power limitations “may be ignored, so long as the subject of negotiation is a proved national interest, and properly a matter for international treatment”); 1 WESTEL WOODBURY WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* § 216, at 504 (1910) (noting subject matter of treaties must be of “international concern”); Charles H. Burt, *The Treaty-Making Power of the United States and the Methods of Its Enforcement as Affecting the Police Powers of the States*, 51 AM. PHIL. SOC’Y 270, 285 (1912) (“[T]reaties must only contain provisions which in the usual and normal intercourse of nations should properly become the subject of treaties.”); Quincy Wright, *The Constitutionality of Treaties*, 13 AM J. INT’L L. 242, 258 (1919) (“The immunity from treaty interference of certain [s]tate powers can only be sustained by showing that they cover a subject-matter inherently inappropriate for treaty negotiation. That there are matters within [s]tate legislative competence thus excluded from treaty making is doubtless true.”).

60 Brief for Appellee at 19, *Missouri v. Holland*, 252 U.S. 416 (1920) (No. 609), reprinted in *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 407, 428 (Philip B. Kurland & Gerhard Casper eds., 1975).

61 *Id.* at 36.

Bricker Amendment,<sup>62</sup> Secretary of State Dulles painted the international concern test in a more limiting fashion, arguing that treaty-making should occur within “traditional limits” and denying that “treaties should, or lawfully can, be used as a device to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.”<sup>63</sup> The State Department would codify this advice in its internal memorandum, known as Circular 175: “Treaties are not to be used as a device for the purpose of effecting internal social changes or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.”<sup>64</sup>

By the mid-twentieth century, conventional wisdom had instantiated the international concern test. In 1965, the *Restatement (Second) of the Foreign Relations Law of the United States* (which, despite the title, was the first Restatement on the subject) endorsed the test, relying on Hughes’s 1929 language: “The United States has the power under the Constitution to make an international agreement if (a) the matter is of international concern . . . .”<sup>65</sup> An accompanying comment elaborated the contours of the test to include the domestic effects of international matters:

An international agreement of the United States must relate to the external concerns of the nation as distinguished from matters of a purely internal nature. As the effect of international agreements is the creation or modification of relationships under international law, it would be inconsistent to utilize them for the regulation of matters bearing no relation to international

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62 Senator Bricker led a multi-year effort to amend the Constitution to limit the treaty power, including an effort to supersede *Missouri v. Holland*. See DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY 32–48 (1988). Interestingly, a committee of the American Bar Association suggested that the Bricker Amendment was unnecessary, given the limitation that treaties must deal with a matter that is “properly the subject of negotiation with a foreign country.” ABA COMM. ON CONST’L ASPECTS OF INT’L AGREEMENTS, REPORT TO SECTION OF INTERNATIONAL LAW AND COMPARATIVE LAW ON SENATE JOINT RESOLUTION 1 AND THE KNOWLAND SUBSTITUTE AMENDMENT, at 19 (1953) (quoting *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890)) (internal quotation marks omitted).

63 *Treaties and Executive Agreements: Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the S. Comm. on the Judiciary*, 83d Cong. 825 (1953) (statement of John Foster Dulles, Secretary of State of the United States) [hereinafter 1953 *Senate Judiciary Committee Hearings*]. Dulles later informed the Senate that treaties could not reach “purely internal” affairs, but must “essentially affect the actions of nations in relation to international affairs.” *Treaties and Executive Agreements: Hearings on S.J. Res. 1 Before a Subcomm. of the S. Comm. on the Judiciary*, 84th Cong. 183 (1955) (statement of John Foster Dulles, Secretary of State of the United States) [hereinafter 1955 *Senate Judiciary Committee Hearings*]. The ABA adopted a similar view in a report on human rights conventions. ABA, *Report of the Standing Committee on Peace and Law Through United Nations: Human Rights Conventions and Recommendations*, 1 INT’L LAW. 600 (1967).

64 U.S. Dep’t of State, Circular No. 175, Dec. 13, 1955, *reprinted in* 50 AM. J. INT’L L. 784, 785 (1956). The current C-175 version no longer contains such guidance, emphasizing the need instead to ensure that treaty-making “is carried out within constitutional and other appropriate limits.” 11 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 720.2(a) (2006).

65 RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 117(1) (1965).

affairs. Matters of international concern are not confined to matters exclusively concerned with foreign relations. Usually, matters of international concern have both international and domestic effects, and the existence of the latter does not remove a matter from international concern.<sup>66</sup>

This codification of the international concern test was unsurprising given its lengthy history. Certainly, the precise contours of the treaty power generated substantial debate in the interim, but there is little in those debates that suggests, as Henry or Mason once had, that the treaty power was unlimited. On the contrary, historical practice suggests that the international concern test remained attached to the treaty power even as debates arose over which subjects deserved the label “international.”

### C. Doctrinal Support for the International Concern Test

Supreme Court opinions offer a robust defense of the international concern test. The Court has never invalidated a treaty under the test, but it has repeatedly referenced the idea as one of the treaty power’s boundaries.<sup>67</sup> And although the test has received less public support recently (at least until Justice Thomas’s and Justice Alito’s concurrences), the Court has never dismissed it.

Early Supreme Court opinions emphasized the effects of U.S. treaties rather than their propriety.<sup>68</sup> In 1840, however, in *Holmes v. Jennison*, Justice Taney tied the treaty power to the original understanding, noting that it “was designed to include all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty.”<sup>69</sup> The Court would reiterate this view after the Civil War as well.<sup>70</sup>

Most notably, in *Geofroy v. Riggs*, the Court endorsed the international concern test even for matters otherwise regulated by state law:

66 *Id.* cmt. b.

67 The Court has never struck down any Article II treaty on any ground. *Reid v. Covert* invalidated executive agreements for conflicts with the Fifth and Sixth Amendments. 354 U.S. 1, 77 (1957) (Harlan, J., concurring). The lack of such cases may be explained by the Court’s implicit adoption of Justice Chase’s views in *Ware v. Hylton*: “If the court possess[es] a power to declare treaties void, I shall never exercise it, but in a very clear case indeed.” 3 U.S. (3 Dall.) 199, 237 (1796) (Chase, J.) (emphasis omitted); see also Golove, *supra* note 9, at 1153 n.234 (noting reasons for judicial deference).

68 See, e.g., *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817); *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603 (1813); *Ware*, 3 U.S. (3 Dall.) at 237 (Chase, J.).

69 *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840).

70 *In re Ross*, 140 U.S. 453, 463 (1891) (“The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments.”); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 242–43 (1872) (“[T]he framers of the Constitution intended [the treaty power to] extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the [s]tates and the United States.”); see also *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1879) (citing Calhoun favorably but finding no need to elaborate limits in the case at hand despite “doubtless limitations” on the treaty power).



That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. . . . It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.<sup>71</sup>

Justice Holmes may have dismissed the idea of states' rights limitations on the treaty power in *Missouri v. Holland*, but he still acknowledged a limited treaty power.<sup>72</sup> He described the reach of treaties in terms of "matters requiring national action" to match the treaty power of other nations.<sup>73</sup> It was on this foundation that Holmes went on to articulate his more famous pronouncement that on "matters of the sharpest exigency for the national well being" the treaty power could override state powers even on subjects that "usually fall within the control of the [s]tate."<sup>74</sup>

In the decade that followed, the Court would reaffirm both *Missouri v. Holland* and *Geofroy's* boundaries for the treaty power, with the last overt reference coming in 1931 in *Santovincenzo v. Egan*.<sup>75</sup> Thereafter, the Court had few occasions to remark on the treaty power's scope, a result of the expansion of the Court's reading of the Commerce Clause.<sup>76</sup> A number of lower court cases, most notably *Power Authority of New York v. Federal Power Commission*, continued to reaffirm the test.<sup>77</sup> More recently, the Second Circuit questioned the validity of a divide between international and domestic mat-

71 *Geofroy v. Riggs*, 133 U.S. 258, 266–67 (1890) (citation omitted).

72 *Missouri v. Holland*, 252 U.S. 416, 433 (1920) ("We do not mean to imply that there are no qualifications to the treaty-making power.").

73 *Id.*; see also Hathaway et al., *supra* note 9, at 284 n.261 (reading *Missouri v. Holland* to justify the validity of the Migratory Bird Treaty based on the national interest involved and its linkage to "a valid international subject matter").

74 *Holland*, 252 U.S. at 433–34.

75 284 U.S. 30, 40 (1931) ("The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations."); see also, e.g., *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) ("The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other nations." (quoting *Geofroy*, 133 U.S. at 267)).

76 Swaine, *supra* note 7, at 415. In 1995, in *United States v. Lopez*, the Court reasserted its authority to police the boundaries of the Commerce Clause, which may help explain the return of the treaty power to the judicial agenda. 514 U.S. 549, 561 (1995); see also Bradley I, *supra* note 7, at 400–01.

77 *Power Auth. of N.Y. v. Fed. Power Comm'n*, 247 F.2d 538, 542–43 (D.C. Cir. 1957) ("The treaty power's relative freedom from constitutional restraint, so far as it attaches to 'any matter which is properly the subject of negotiation with a foreign country,' is a long-established fact. No court has ever said, however, that the treaty power can be exercised without limit to affect matters which are of purely domestic concern and do not pertain to our relations with other nations." (citations omitted) (quoting *Geofroy*, 133 U.S. at 267)).

ters—citing the *Restatement (Third)*—even as it accepted limiting treaties by reference to the proper subjects for negotiations among nations.<sup>78</sup> The Supreme Court has left the international concern test untouched, even with much renewed attention to treaty matters in *Medellín v. Texas* and *Bond*.<sup>79</sup> If anything, Justice Thomas’s and Justice Alito’s concurrences signal the test may play a renewed role in future Court cases.

#### D. Structural and Prudential Arguments Favor an International Concern Test

Beyond historical materials, the international concern test may be defended on structural and prudential grounds. As a structural matter, the treaty power has always posed a conundrum. For some, it is an *inherent* power of the federal government derived from the United States’ status as a sovereign nation; the *Restatement (Third)*, for example, takes this approach.<sup>80</sup> For others, the treaty power must arise from the constitutional delegation to comport with the most basic premise of federalism—that the national government is one of enumerated, and thus limited, powers.<sup>81</sup>

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78 See *United States v. Lue*, 134 F.3d 79, 82–84 (2d Cir. 1998) (“[D]efendant relies far too heavily on a dichotomy between matters of purely domestic concern and those of international concern, a dichotomy appropriately criticized by commentators in the field.” The court then quoted from the *RESTATEMENT (THIRD)* before concluding: “Whatever the potential outer limit on the treaty power of the Executive, the Hostage Taking Convention does not transgress it. At the most general level, the Convention addresses—at least in part—the treatment of foreign nationals while they are on local soil, a matter of central concern among nations. More specifically, the Convention addresses a matter of grave concern to the international community: hostage taking as a vehicle for terrorism.”); see also *United States v. Bond*, 681 F.3d 149, 161 (3d Cir. 2012) (noting shift in the “tide of opinion” on the international concern test but finding the Chemical Weapons Convention constitutional “[w]hatever the Treaty Power’s proper bounds may be”); *United States v. Ferreira*, 275 F.3d 1020, 1027–28 (11th Cir. 2001).

79 See *Medellín v. Texas*, 552 U.S. 491 (2008).

80 See, e.g., *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 302 cmt. a (1987) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)). In *United States v. Curtiss-Wright Export Corp.*, Justice Sutherland drew a sharp line between the exercise of powers over foreign and domestic matters. *Curtiss-Wright*, 299 U.S. at 315. With respect to the former, he assumed that Britain’s “external sovereignty” over the colonies had passed directly to the federal government, rather than flowing to it through the states as a function of the constitutional enumeration of powers. As such, he reasoned that the external affairs powers—in which he included the treaty power—was free from whatever limits the Constitution imposed on the federal government’s internal powers. *Id.* at 316; see also BUTLER, *supra* note 59, § 3, at 5 (stating that the treaty-making power derived not only from the Constitution but was also “possessed by [the] Government as an attribute of sovereignty”).

81 The Majority in *Bond* emphasized this point in crafting its clear statement rule. *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014); see also *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2643 (2012) (Scalia, J., dissenting); *United States v. Comstock*, 560 U.S. 126, 129–30 (2010); *United States v. Morrison*, 529 U.S. 598, 607–08 (2000); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Although it has never squarely addressed the question, the Supreme Court has referred to the treaty power in passing as an enumerated power. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526

The international concern test provides a bridge between these poles. By emphasizing the international concern test as a *constitutional* requirement, it avoids giving the treaty power exceptional status; it remains an enumerated power like all other federal powers.<sup>82</sup> Thus, the treaty power cannot invoke any “inherent” authority to support treaty-making on topics proscribed by the Constitution, nor can it interfere with the republican form of government it establishes.<sup>83</sup> At the same time, since the international concern test ties the treaty power to proper subjects for treaty-making, the power’s operation remains (at least in part) a function of what other nation States do with their own treaty powers.

If the treaty power is enumerated, the international concern test also ensures it is limited.<sup>84</sup> Affirmatively requiring treaties to relate to the “international” while denying them coverage of matters entirely “domestic,” the test provides zones for permissible and impermissible subject matters. “Proper” treaty subjects of legitimate interest to both the United States and its treaty partner(s) pass muster. At the same time, the test precludes treaties on “improper” subjects, which today include treaties violating *jus cogens* (peremptory norms of international law).<sup>85</sup> Similarly, the Constitution would not validate a “mock marriage” treaty of no real interest to a treaty partner which but was rather an effort to regulate domestic standards.<sup>86</sup>

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U.S. 172, 204 (1999); *see also* Bradley I, *supra* note 7, at 437–38; Golove, *supra* note 9, at 1132–33.

82 Unlike some other federal powers, however, the treaty power is exclusive; in delegating it to the federal government, the Constitution also denies it to the states. U.S. CONST. art. I, § 10 (prohibiting states from making treaties); *see* Hollis, *supra* note 6, at 1334–35.

83 *See supra* note 1. There appears to be consensus, therefore, on denying treaties the ability to dismember a state of the United States, cede state territory, modify the republican character of a state’s government, or abolish its militia. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 302 reporters’ note 3 (1987); HENKIN, *supra* note 2, at 166, 193; Golove, *supra* note 9, at 1285; Healy, *supra* note 9, at 1750. The RESTATEMENT (THIRD) distinguishes between a treaty ceding a state’s territory from one that settles international boundaries. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 302 reporters’ note 3 (1987) (citing Convention for the Solution of the Problem of the Chamizal, U.S.-Mex., Aug. 29, 1963, 15 U.S.T. 21).

84 For a discussion of the related question of *who* should enforce these limits, *see infra* Part II.

85 *See* Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 344 (entered into force Jan. 27, 1980) [hereinafter VCLT] (“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For purposes of the present Convention, a peremptory norm is . . . a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted . . . .”); HENKIN, *supra* note 2, at 197; Hathaway et al., *supra* note 9, at 285 n.84.

86 *See* HENKIN, *supra*, note 2, at 185; Golove, *supra* note 9, at 1090 n.41; Healy, *supra* note 9, at 1750; *see also* Hathaway et al., *supra* note 9, at 312–14. Although he hatched the idea of a migratory bird treaty after federal courts struck down federal legislation over migratory birds, Root emphasized that treaty-makers should not conclude treaties “under pretense” on subjects inappropriate for the exercise of that power. Elihu Root, *The Real*

The existence of an international concern test does not depend on the precise boundary line for international matters, a subject of dispute between those who would allow that label to reach matters otherwise within the exclusive jurisdiction of states and those who insist some domestic subjects must be entirely off limits.<sup>87</sup> A test can exist even if proponents differ on its answers in specific contexts.<sup>88</sup> Likewise, the international concern test does not depend on accepting or denying further subject matter limits on the treaty power. It could stand by itself as the sole federalism limit on the treaty power. Or it could be but one of several tests, such as those proposed to limit the treaty power (or Congress's ability to implement it) to cover only subjects within Congress's enumerated Article I powers.<sup>89</sup>

As a prudential matter, therefore, the international concern test balances two core constitutional values: federalism and foreign affairs.<sup>90</sup> The ability to employ the international concern test to regulate the treaty power comports with the core goal of federalism—ensuring a federal government of limited powers. It affords a vehicle for treaty-making to respect at least some noninternational competencies of the states even if other “domestic” issues garner international attention. At the same time, the international concern test supports the United States' ability to speak—and act—internationally.<sup>91</sup> Consolidating and strengthening the foreign affairs powers gener-

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*Questions Under the Japanese Treaty and the San Francisco School Board Resolution*, 1 AM. J. INT'L L. 273, 279 (1907).

87 Cf. *Bond v. United States*, 134 S. Ct. 2077, 2107 (2014) (Thomas, J., concurring in the judgment) (quoting 5 ANNALS OF CONG. 662 (1796), specifically Congressman Hillhouse during the Jay Treaty debates, for the notion that certain laws—e.g., those “regulating our own internal police”—are “wholly beyond [the treaty power’s] reach”); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 117 cmt. b (1965) (“Matters of international concern are not confined to matters exclusively concerned with foreign relations. Usually, matters of international concern have both international and domestic effects, and the existence of the latter does not remove a matter from international concern.”).

88 I have, however, argued recently that interpretative questions have existential implications and vice versa. See Duncan B. Hollis, *The Existential Function of Interpretation in International Law*, in INTERPRETATION IN INTERNATIONAL LAW 78 (Andrea Bianchi et al. eds., Oxford University Press 2015).

89 Jefferson proposed these limits alongside the international concern test in his parliamentary manual. JEFFERSON, *supra* note 37, at 169–70. Others have suggested the same. See, e.g., Bradley I, *supra* note 7, at 450 (favoring Article I limits for treaties); Rosenkranz, *supra* note 8, at 1878, 1919, 1928 (favoring Article I limits for treaty implementing legislation).

90 The Court has affirmed an interest in promoting foreign affairs and federalism in recent cases, although federalism seems to have garnered more attention of late. Compare *Bond v. United States*, 134 S. Ct. 2077 (2014), and *Medellín v. Texas*, 552 U.S. 491 (2008), with *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413–14 (2003), and *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000).

91 The ability of the United States to engage in international relations has long served as a motivating explanation for the distribution of foreign affairs powers. See, e.g., THE FEDERALIST NO. 42, *supra* note 33, at 213 (James Madison) (“If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”). But see Bradley I, *supra* note 7, at 445–50 (critiquing the one-voice thesis).

ally—and the treaty power specifically—were among the motivating factors in drafting the Constitution.<sup>92</sup> The international concern test provides room for the President and the Senate to pursue the U.S.’s foreign relations within a designated sphere: those issues generating international activity. Simply put, the international concern test offers a vehicle for protecting *state autonomy* from federal interference in noninternational subject areas and protecting *foreign affairs autonomy* from state interference in areas where matters appropriately garner international concern.

In sum, Professor Henkin was mistaken in resting the international concern test solely at Hughes’s feet.<sup>93</sup> The test has deep roots in the original meaning of the treaty concept, a meaning elaborated by key Framers and reiterated by government officials and academics alike. The Supreme Court has endorsed the test in earlier opinions, and nothing in its recent jurisprudence suggests any disassociation from that view. For those not convinced by precedent and past practice, structural and prudential arguments exist to support conditioning U.S. treaty-making to preserve and balance both foreign affairs and federalism interests. This support undermines the test’s dismissal by the *Restatement (Third)* and scholars who followed its lead, while also endorsing the views of Justices Alito, Scalia, and Thomas in *Bond*.<sup>94</sup> Simply put, the Constitution requires that U.S. treaties address matters of international concern.<sup>95</sup>

## II. WHAT DOES THE INTERNATIONAL CONCERN TEST MEAN? AN INTERSUBJECTIVE SOLUTION

The real controversy surrounding the international concern test lies not in its existence, but in its meaning. These are differences, moreover, of method, not of lexicon. It is true that proponents have offered various formulations of the test in different settings, from Hughes’s emphasis on matters of “international concern” to earlier versions tying treaties to “intercourse with foreign nations”<sup>96</sup> or “proper subjects of negotiation.”<sup>97</sup>

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92 See, e.g., Golove, *supra* note 9, at 1136.

93 I am not the first to critique Henkin’s analysis. See Bradley I, *supra* note 7, at 429 n.228.

94 See, e.g., Golove, *supra* note 9, at 1125–36 (noting that the international concern test is widely rejected).

95 This conclusion applies to treaties proceeding through the Article II process. Today, the United States concludes the vast majority of its international agreements via other processes, most often relying on congressional legislation, other executive powers, or even a prior Article II treaty instead. See Robert E. Dalton, *National Treaty Law and Practice: United States*, in NATIONAL TREATY LAW AND PRACTICE 765, 780–85 (Duncan B. Hollis et al. eds., 2005); Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1254 n.45 (2008) (indicating that 2744 U.S. executive agreements were concluded between 1980 and 2000, as opposed to 372 Article II treaties). Although there is little historical support for extending the international concern test to these agreements, as a functional matter, there are good reasons to apply the test to preclude executive efforts to avoid its application.

96 See *supra* note 50 and accompanying text (quoting Madison).

But it would be a mistake to read too much into the particular choice of words. All the formulations essentially distill to a requirement that treaties address permissible subjects of communication or dealings among (or involving) nation States.

#### A. *Objective Candidates for Defining the “International”*

How does the Constitution populate the “permissible” category of treaty subjects? Existing proposals operate in tension with the U.S.’s interests in either foreign affairs or federalism while also failing to provide a descriptive theory for actual U.S. treaty practice. Three in particular warrant attention. At one end of the spectrum is the originalist version of the international concern test, limiting treaties to “only those subjects which [were] usually regulated by treaty” circa 1791 (e.g., treaties on peace, commerce, and navigation).<sup>98</sup> This interpretation has few supporters.<sup>99</sup> It conflicts with Madison’s explanation for not enumerating treaty subjects to deal with future, unforeseen contingencies.<sup>100</sup> Justice Thomas’s concurrence in *Bond* emphasized using the international concern test to “draw a line that respects the original understanding of the Treaty Power.”<sup>101</sup> In doing so, however, Thomas emphasized that the distinction between international and domestic matters would “not be obvious in all cases,” suggesting that he would avoid limiting treaties to only those subjects regulated at the Founding.<sup>102</sup>

Moreover, as a descriptive matter, an originalist interpretation fails to explain dozens if not hundreds of treaties on topics (e.g., outer space, human rights, the environment) that lack the required historical antecedents.<sup>103</sup> To invalidate such treaties would pose significant challenges to U.S.

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97 See *supra* note 71 and accompanying text (quoting *Geofroy v. Riggs*, 133 U.S. 258 (1890)). Although he rejects the international concern test’s existence, David M. Golove offers a companion condition for treatymaking, limiting U.S. treaty subjects to those that “advance[ ] the national interests of the United States in its relations with other nations.” Golove, *supra* note 9, at 1090 n.41. I believe, however, that Golove’s test is not too far afield from my intersubjective explanation of the treaty power’s limits; his conditions require both a relationship that drives the treaty’s creation as well as an (implicitly) intersubjective understanding among the relevant treaty actors that it satisfies the “national interest” in much the same way that I suggest treaty actors must coalesce around the idea that the treaty’s subject matter is an appropriate topic for international regulation.

98 JEFFERSON, *supra* note 37, at 170.

99 Bradley I, *supra* note 7, at 451; Hathaway et al., *supra* note 9, at 285–86.

100 See *supra* note 50 and accompanying text.

101 *Bond v. United States*, 134 S. Ct. 2077, 2110 (2014) (Thomas, J., concurring in the judgment).

102 *Id.*

103 See, e.g., United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. NO. 103-38 (1992), 1771 U.N.T.S. 107; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205; International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

foreign relations interests, not to mention obstructing future innovation in treaty-making to accommodate new problems. Whatever the merits of originalism in other contexts, it has little appeal for the treaty power.

At the other end of the spectrum are proposals to make the constitutional limit on the treaty power coextensive with international law's limits on treaty-making.<sup>104</sup> In other words, if international law does not prohibit the treaty's subject, the Constitution permits it. But this formula poses challenges to federalism as much as the originalist version ran afoul of foreign affairs. International law does not impose any subject matter limitations on treaty-making other than *jus cogens*, delimiting treaty boundaries primarily in terms of participants and their intentions.<sup>105</sup> It does nothing to ensure U.S. treaties' respect for federalism and its core principles.<sup>106</sup> Such concerns might be mitigated if the test still precluded "mock marriage" treaties, but even that caveat does not offer any rationale for how international requirements further the constitutional separation of federal and state authorities.<sup>107</sup> In any case, this approach fails to accommodate the fact that U.S.

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104 See HENKIN, *supra* note 2, at 184–85; Hathaway et al., *supra* note 9, at 284–85. Ironically, even as it dismissed the international concern test, the RESTATEMENT (THIRD) emphasized a variation of that test:

The references in the Constitution presumably incorporate the concept of treaty and of other agreements in international law. International law knows no limitations on the purpose or subject matter of international agreements, other than that they may not conflict with a peremptory norm . . . States may enter into an agreement on any matter of concern to them, and international law does not look behind their motives or purposes in doing so.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 302 cmt. c (1987) (citation omitted).

105 Thus, international law focuses its attention on limiting which actors can conclude treaties, authorizing nation States and international organizations to do so, but denying such authority to individuals and corporations. International law requires an intention to enter into an agreement "governed by international law" to distinguish treaties from political commitments among nations as well as contracts governed by domestic law. See *generally* VCLT, *supra* note 85, art. 2(1)(a), 1155 U.N.T.S. at 333; Duncan B. Hollis, *Defining Treaties*, in THE OXFORD GUIDE TO TREATIES 11 (Duncan B. Hollis ed., 2012).

106 As Hathaway and her coauthors explain, a subject matter limit tied to international law alone would leave unchallenged a treaty with Mexico to create gun-free zones near schools, notwithstanding *Lopez*. See *United States v. Lopez*, 514 U.S. 549, 561 (1995) (striking down a federal statute regulating carrying handguns near a school as beyond Congress's enumerated powers); Hathaway et al., *supra* note 9, at 284 n.264. It is hard, however, to imagine the relevant treaty actors (at least in the current environment) sharing an intersubjective understanding that such a treaty is an appropriate matter of international concern to the United States.

107 See *supra* note 86 and accompanying text. One could argue, for example, that a treaty designed to primarily regulate domestic conduct lacks the requisite intent to be governed by international law and thus would not actually comprise a treaty. There is little precedent or scholarship in international law, however, to suggest such a result. Moreover, as others have noted, this would not be a subject matter limitation *per se*. Bradley II, *supra* note 7, at 108 n.56.

practice *has* regularly accommodated federalism, suggesting it does not offer an accurate boundary for the treaty power.<sup>108</sup>

A third, more common interpretation would define permissible treaties by some *ex ante* listing of subjects or categories of sufficiently international interest or a list of “matters of a purely internal nature.”<sup>109</sup> Hughes himself may have favored this method.<sup>110</sup> But the barriers for generating such a list have proven substantial, leading most scholars to dismiss the test entirely. Professor Henkin rejected the international concern test for fear that human rights treaties could be listed as “internal in nature” and thus off limits as a constitutional matter, even though Henkin himself believed they were an appropriate subject for international regulation.<sup>111</sup> Alternatively, the test could permit only those subjects that the federal government can regulate in the absence of a treaty, effectively making the international concern test a proxy for states’ rights limitations on the treaty power. That interpretation would be inconsistent with *Missouri v. Holland* and those (few) treaties that have relied on its denial of states’ rights limits.<sup>112</sup>

In contrast to Henkin’s concerns of an underinclusive list, Bradley fears the international concern test will be overinclusive. He views the increasing interdependence of globalization as creating a scenario in which “any” subject can bear the international label.<sup>113</sup> Thus, he would dismiss the test for failing to limit the treaty power in any meaningful way.<sup>114</sup> Both Henkin and Bradley, moreover, express concern with employing the international concern test where “international” subjects will “undoubtedly vary over time.”<sup>115</sup> Furthermore, there is the problem of U.S. treaty practice; its apparent inco-

108 I have detailed this behavior extensively elsewhere. Hollis, *supra* note 6, at 1361–86.

109 RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 117 cmt. b (1965); *see also* Hathaway et al., *supra* note 9, at 286 (quoting the same RESTATEMENT (SECOND) section).

110 Bradley I, *supra* note 7, at 451; *supra* note 18 and accompanying text.

111 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 302 reporters’ note 2 (1987) (emphasizing early arguments against human rights treaties on grounds that they dealt with matters of “strictly domestic concern”); HENKIN, *supra* note 2, at 197–98; Louis Henkin, *The Constitution, Treaties, and International Human Rights*, 116 U. PA. L. REV. 1012, 1025–26 (1968).

112 *See, e.g.*, Peter J. Spiro, *Resurrecting Missouri v. Holland*, 73 MO. L. REV. 1029, 1030 (2008) (describing political branches’ reluctance to take advantage of *Missouri v. Holland*’s rejection of states’ rights limitations on U.S. treaties).

113 Bradley I, *supra* note 7, at 393, 451–53. Bradley notes, however, strong arguments as a matter of both effects and need for treating human rights as a matter of international concern. *Id.* at 453.

114 *Id.* at 452. Bradley cites Laurence Tribe in support, noting his views that the international concern test was “unlikely to prove a serious limitation.” In his last edition, however, Tribe conceded that the test may operate as a “meaningful restriction.” *Compare* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-4, at 646 (3d ed. 2000), *with* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-5, at 227–28 (2d ed. 1988).

115 Bradley I, *supra* note 7, at 454; Henkin, *supra* note 111, at 1025. Others embrace such flexibility and cite it to endorse the making and implementation of treaties on subjects (e.g., religious dissent) viewed as internal matters for the states. Gerald L. Neuman, *The Global Dimension of RFRAs*, 14 CONST. COMMENT. 33, 34 (1997).



herence in terms of treaty subjects does not marry neatly to one version of the international concern test or the other.<sup>116</sup>

Such interpretative difficulties pose a challenge to the international concern test. If its meaning is so elusive, how can it operate as an effective limit on the treaty power? If we cannot settle on some fixed criterion to divide permissible international subjects from (to quote Justice Thomas) topics “of strictly domestic concern,” what value does this test have?<sup>117</sup> To the extent that none of the foregoing proposals has generated a settled meaning of the “international” (let alone a coherent narrative for its application in practice), the conventional wisdom has been to discard the test entirely. Otherwise, critics say, the “treaty power encompasses any treaty that the treaty makers decide to conclude.”<sup>118</sup> Thus, modern resistance to the international concern test can be explained along functionalist lines, notwithstanding the (substantial) evidence in favor of its existence.

Despite its current popularity, the functionalist critique of the international concern test does not withstand close scrutiny. It rests on a mistaken assumption—that the international concern test must operate objectively.<sup>119</sup> Existing proposals all proffer fixed criteria—whether original meaning, international law, or some *ex ante* lists of subjects—to define the “international” (or the “internal”). In doing so, they presuppose that the international concern test cannot have meaning without some measuring stick exogenous to the views of the treaty makers themselves in assessing compliance.

But exogenous reference points are not the only means for assessment. Meanings may also arise endogenously. In other words, we do not need to define “international” via some preconceived list of subjects or, as Madison put it, “contingencies.”<sup>120</sup> Rather, the international concern test may gain its meaning (and its value) from how those engaged in the treaty process understand it. Instead of disqualifying the international concern test, the idea that it permits “any treaty that the treaty makers decide to conclude” actually opens up the possibility of a coherent definition of what constitutes international matters.<sup>121</sup>

This is not to suggest that the international concern test is entirely subjective, where any actor (e.g., the executive) can dictate for itself what “inter-

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116 See Hathaway, *supra* note 95, at 1239–40 (demonstrating that U.S. treaty practice offers “no identifiable rational basis” in terms of which domestic approval method(s) are chosen).

117 *Bond v. United States*, 134 S. Ct. 2077, 2103 (2014) (Thomas, J., concurring in the judgment). Scholars adopting this view include Hathaway et al., *supra* note 9, at 283–88.

118 Bradley II, *supra* note 7, at 108; see also Bradley I, *supra* note 7, at 451–52; Swaine, *supra* note 7, at 417.

119 I am using “objectively” here, not in its philosophical sense, but to refer to a decision made on facts rather than opinions or thoughts. Philosophically, intersubjective understandings are often taken as the basis for establishing objective meaning—that is a meaning existing outside of the mind in the real world. See THOMAS A. SCHWANDT, *Intersubjectivity*, in THE SAGE DICTIONARY OF QUALITATIVE INQUIRY 161 (3d ed. 2007).

120 See *supra* note 50 and accompanying text (remarks of James Madison).

121 Bradley II, *supra* note 7, at 108.

national” means. Certainly, the views of treaty actors are important (if occasionally understudied).<sup>122</sup> But neither the international stage nor the constitutional setting accords any single actor plenary authority over treaties. Instead, we must look for expressions of collective understanding among relevant actors on what the term “international” means. As such, the test becomes a question not of objective criteria but of social construction. Matters will qualify as international (or not) based on the *intersubjective* understanding of participants in the treaty process. The concept of intersubjectivity thus provides the basis for not only understanding the international concern test, but also how the Constitution limits what subject matters U.S. treaties can address.

### B. Intersubjectivity and Treaties

Intersubjectivity is a concept employed in a wide range of disciplines (e.g., philosophy, sociology, and psychology). In its simplest form, it refers to something “occurring between or among (or accessible to) two or more separate subjects or conscious minds.”<sup>123</sup> An understanding is thus intersubjective when it involves a meaning accessible to more than one mind.<sup>124</sup>

Over the course of the last several decades, political scientists have extended the concept of intersubjectivity from individuals to institutional actors.<sup>125</sup> Thus, “constructivist” scholars—who claim ideational factors rather than material ones best explain international relations—employ intersubjective beliefs as the core of their thesis, arguing that “these shared beliefs construct the interests and identities of purposive actors” (e.g., nation States).<sup>126</sup> Four of their claims have particular relevance to an intersubjective understanding of the treaty power generally and the international concern test in particular.

122 See Hollis, *supra* note 6, at 1363.

123 SCHWANDT, *supra* note 119, at 161. For more elaborate analysis of the various meanings ascribed to intersubjectivity, see Alex Gillespie & Flora Cornish, *Intersubjectivity: Towards a Dialogical Analysis*, 40 J. FOR THEORY SOC. BEHAV. 19, 19 (2010).

124 For lawyers, unanimous or majority opinions of courts provide an obvious source for intersubjective understandings when multiple judges publicly acknowledge a shared view. Intersubjectivity becomes more complicated if we try to separate out real or “felt” shared understandings versus those that actors participate in for other reasons (e.g., to gain something, to protect a public image). For a recent attempt to differentiate these two, see Daphna Lewinsohn-Zamir, *The Importance of Being Earnest: Two Notions of Internalization*, 65 U. TORONTO L.J. (forthcoming 2015).

125 See, e.g., Friedrich Kratochwil & John Gerard Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT’L ORG. 753, 774 (1986).

126 Martha Finnemore & Kathryn Sikkink, *Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics*, 4 ANN. REV. POL. SCI. 391, 392–93 (2001). For a recent review of constructivism and its research agenda(s), see Jutta Brunneé & Stephen J. Toope, *Constructivism and International Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 119, 119–45 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

First, constructivists prioritize the importance of socially constructed concepts. They study the significance of “social facts,” things that have no material reality (like a mountain or lake does) and “exist only because people collectively believe they exist and act accordingly.”<sup>127</sup> Treaties are an example of social facts; these instruments have meaning only by virtue of our collective understanding. Whatever their physical representation, a treaty exists by reference to shared (or intersubjective) definition(s) of the concept, i.e., an “international legal agreement.”<sup>128</sup>

Second, constructivists like Emanuel Adler emphasize that many of the so-called “realities” of international relations are not inherent conditions, but rather products of endogenous social interaction.<sup>129</sup> Alexander Wendt famously argued that the identities and interests that shape state preference and actions are endogenous to their interactions rather than exogenous as previous theories had suggested.<sup>130</sup> Thus, intersubjective understandings emerge from an interactive process of signals, interpretations, and responses among relevant actors. But—and this is an important caveat—intersubjective understandings are not inevitable. Interactions may reveal confusion instead of a collective understanding; intersubjectivity is not a necessary or universal condition for every case.

The constructivist’s endogenous emphasis suggests a new approach for conceptualizing the treaty process. If a treaty is a social fact, the elements that generate it are best conceptualized as the product of social construction instead of some set of inherent or objective conditions. Although they may not do so in constructivist terms, international lawyers are well familiar with how intersubjective understandings dictate the existence of an “international legal agreement”; States believe a treaty arises whenever they intend (mutually) to create one.<sup>131</sup> A similar logic follows when it comes to the interna-

127 Finnemore & Sikkink, *supra* note 126, at 393. For the concept of “social facts” versus “brute facts” that have a physical existence, see JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* (1995); see also BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (rev. ed. 1991).

128 Hollis, *supra* note 105, at 11 (noting that definitions of the treaty concept vary by context and discussing three ways to define treaties—by their constitutive elements, by differentiating them from other agreement types (e.g., contracts and political commitments), and by their functions); see also VCLT, *supra* note 85, art. 2(1)(a), 1155 U.N.T.S. at 333 (treaty definition in international law).

129 See Emanuel Adler, *Seizing the Middle Ground: Constructivism in World Politics*, 3 *EUR. J. INT’L REL.* 319, 327 (1997).

130 Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 *INT’L ORG.* 391 (1992) (focusing on establishing the anarchy system as socially constructed instead of as an inherent condition of state relations). See generally ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999). Wendt and other constructivists adopted a third way from those who insisted that material factors (e.g., the physical world) create conditions for international relations as well as those who view the world as a product of individual actions independent of collective understandings. Adler, *supra* note 129, at 324; Finnemore & Sikkink, *supra* note 126, at 393.

131 Hollis, *supra* note 105, at 25 (discussing intentional aspect of treaty definition). This is not to deny efforts to adjudicate existential questions about treaties on objective

tional concern test. Whether something is “international” or “strictly internal” is neither predetermined nor inherent. Actors may define what comprises the international via interactions that generate intersubjective understanding.

Third, constructivists emphasize that intersubjectivity is capable of both stability and dynamism depending on systemic conditions and institutional identities.<sup>132</sup> Even though they are the (collective) product of opinions, intersubjective understandings are not entirely malleable. Once established, intersubjective meaning can “persist[ ] beyond the lives of individual social actors, embedded in social routines and practices as they are reproduced by interpreters who participate in their production and workings.”<sup>133</sup> Intersubjective understandings may become “naturalized” and taken for granted, making them self-perpetuating and more stable over time.<sup>134</sup> Intersubjectivity may thus create path dependencies that must be overcome for meanings to evolve.

But intersubjective meanings can also evolve with new information and continual interactions among relevant actors.<sup>135</sup> In thinking about what “international” means, therefore, we should be attuned to looking for both continuity and change. Certain meanings of “international” have the capacity to become settled over time, while others may face the possibility of evolutionary shifts in understanding.

Fourth, and finally, for all the emphasis on the communicative process, constructivists acknowledge that intersubjective meanings do not dictate which epistemic community of actors share it nor the particular contents of the understandings themselves. Specification of actors and content must, as Finnemore and Sikkink highlight, “come from some other source” before analysis can begin.<sup>136</sup> Thus, we need to stipulate in advance *who* gets to participate in the construction of intersubjective meaning in order to identify its presence (or absence).

Treaties present a unique vehicle for identifying the relevant epistemic community since they emerge from a staged process of international *and*

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grounds, but only to note such efforts have proven controversial. *See id.* at 27–28; *see also* Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 1994 I.C.J. 112, ¶ 27 (July 1); Aegean Sea Continental Shelf (Greece v. Turk.), Judgment, 1978 I.C.J. 3, 43 (Dec. 19).

132 Wendt, *supra* note 130, at 411.

133 Adler, *supra* note 129, at 327.

134 *Id.* Wendt emphasizes how “[f]or both systemic and ‘psychological’ reasons, then, intersubjective understandings and expectations may have a self-perpetuating quality, constituting path-dependencies that new ideas about self and others must transcend.” Wendt, *supra* note 130, at 411; *see also* Ted Hopf, *The Promise of Constructivism in International Relations Theory*, 23 INT’L SECURITY 171 (1998).

135 Adler, *supra* note 129, at 339–40.

136 Finnemore & Sikkink, *supra* note 126, at 393. Thus, some constructivists limit their analysis to States and their intersubjective understandings, while a separate constructivist research agenda has proffered broader epistemic communities including interactions among State and non-State actors as well as interactions within a State. *Id.* at 400.

domestic interactions. Treaties are first conceived as representations of agreement among nation States in accordance with the collective understandings embodied in international law.<sup>137</sup> International law delineates for us a community of relevant actors—States—whose views matter for purposes of intersubjectivity.<sup>138</sup> But treaties can also come to live a more domestic life, as creatures of national law, e.g., the United States Constitution. Under the Constitution, additional stages emerge for U.S. treaties, involving additional actors, most notably the President and the Senate. By its assignment of judicial authority to the Supreme Court and certain powers exclusively to Congress as a whole (e.g., the power to appropriate federal funds), the Constitution implicates those institutions as potential actors as well.

### III. TESTING FOR INTERSUBJECTIVE UNDERSTANDINGS OF THE “INTERNATIONAL”

How do we perform an intersubjective international concern test? The approach is relatively straightforward: we ask if the relevant set of actors approved the treaty. On occasion, actors will expressly defend a treaty on the ground that its subject matter is international in nature. Alternatively, actors may defeat a treaty by asserting it is not properly a subject for treaty-making (or that it addresses purely domestic matters). Often, however, the relevant actors are silent. In such cases, treaty approval suffices to demonstrate the existence of an intersubjective belief that the treaty addresses a matter of international concern. Since a treaty, by definition, qualifies its subject matter as “of international concern,” it follows that actors who approve a treaty must necessarily believe it regulates an international subject.<sup>139</sup>

We must, however, look beyond the various *stages* of approval to also consider the *context* in which the treaty’s subject matter arises. Ratification offers a general, *ex ante* understanding of the treaty’s international character, but it does not necessarily follow that this represents a shared understanding for everything subsequently done in the treaty’s name in terms of implementation or application. Similarly, timing matters. In some cases, once an intersubjective understanding exists, it becomes habituated and we can expect it to continue. But in other cases (e.g., changed conditions or a new subject matter), intersubjective understandings may be more *dynamic*. A matter previously collectively understood as entirely domestic may move to the international ledger or vice versa. By focusing on the *staged, contextual,*

137 See generally VCLT, *supra* note 85, 1155 U.N.T.S. 331.

138 International law also authorizes treaty-making by non-State actors such as international organizations. See, e.g., Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, 25 I.L.M. 543 (1986). For ease of analysis here, however, I focus my attention on inter-State treaty-making.

139 The converse does not follow—a treaty *may* be rejected because it does not address a matter of international concern, but since that is not the only basis for treaty rejections, we cannot assume that this explains treaty failures in all cases of silence.

and *dynamic* aspects of intersubjectivity, we can test the limits of the treaty power even in the absence of objective criteria.

### A. *Intersubjectivity and the Stages of Treaty Approval*

If a treaty's approval provides a simple, if somewhat crude, means for identifying intersubjectivity, we need to study the process by which approval occurs. The treaty-making process incorporates different stages: (i) formation, (ii) ratification, (iii) implementation, and (iv) application. To pass the international concern test, we will need to find affirmative intersubjectivity at each of these inflexion points.

#### 1. Treaty Formation

The formation of a treaty offers the most basic—and indispensable—evidence of an intersubjective understanding that it addresses a matter of international concern. The law and practice of nation States have long recognized that the very act of concluding a treaty means its participants understand (expressly or implicitly) that the subject matter is international in nature. Indeed, international law acknowledges that matters previously understood to be domestic in nature become international by virtue of treaty regulation.<sup>140</sup> Thus, when the United States and one or more other States negotiate and conclude a treaty, it suggests that they share a collective understanding of the international character of their regulation, whatever they may have said about the issue in the past.<sup>141</sup>

Human rights provides the paradigmatic example of this phenomenon. Before World War II, “no rule was clearer than that a [S]tate’s treatment of its own nationals is a matter exclusively within the domestic jurisdiction of that [S]tate.”<sup>142</sup> Nazi horrors shifted the collective understanding, and in the decades following World War II, human rights issues became not just a

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140 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 302 reporters’ note 2 (1987) (citing *Nationality Decrees in Tunis and Morocco* (Gr. Brit. v. Fr.), 1923 P.C.I.J. (ser. B) No. 4, at 26 (Feb. 7) (advisory opinion)).

141 Today, the ILO Convention on the Worst Forms of Child Labour has 179 parties, including the United States. ILO Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 2133 U.N.T.S. 161; ILO, *Ratifications of C182—Worst Forms of Child Labour Convention, 1999* (No. 182), available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312327:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312327:NO) (last visited Mar. 16, 2015). In contrast, a century ago many States, including the United States, regarded child labor as a matter for local regulation, rather than federal (let alone international) attention. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding that Congress could not regulate child labor if it was used in intrastate manufacturing).

142 J. L. BRIERLY, *THE LAW OF NATIONS* 291 (Humphrey Waldock ed., 6th ed. 1963). Historically, treaties had occasionally regulated such treatment, most notably the Peace of Westphalia’s protection of religious minority rights. *Id.* at 292; Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT’L L. 20, 22 (1948) (quoting Treaty of Osnabrück).

part of, but a major agenda item in, international relations.<sup>143</sup> Since the 1966 adoption of the two core covenants on human rights,<sup>144</sup> treaty-making on human-rights-related subjects has proliferated, including the recent U.N. Disabilities Convention.<sup>145</sup> As a result, today, no State contends that human rights are still domestic matters and outside the scope of proper treaty-making.

That said, treaty negotiations can break down or splinter where States do not agree that a subject matter warrants international attention. Other States could object to a U.S. treaty proposal, for example, on the ground that it does not address a truly international subject.<sup>146</sup> Obviously, States may object to treaty proposals for reasons unrelated to the international/domestic divide. For example, the United States has objected to proposals for a new treaty to deal with climate change, not because it thinks the matter is a domestic one, but because it believes a political commitment would be a better vehicle for dealing with the issue.<sup>147</sup> Alternatively, a State may object to *how* the treaty proposes to regulate its subject matter. For example, the United States objected to the jurisdiction and operations of the International Criminal Court.<sup>148</sup> Nonetheless, the basic idea remains: those who make a treaty share an understanding that its topics are international, while negotiations can fail if participants have no such understanding.<sup>149</sup> Thus, the very process of forming a treaty provides the first vehicle for intersubjective understandings of “matters of international concern” to regulate (and perhaps limit) the subject matter of U.S. treaties.

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143 BRIERLY, *supra* note 142, at 292. Samuel Moyn has argued that human rights did not become a matter of international concern until the 1960s and 1970s. See SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).

144 ICCPR, *supra* note 103, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. EXEC. DOC. D, 95-2 (1978), 993 U.N.T.S. 3 [hereinafter ICESCR].

145 Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, S. TREATY DOC. NO. 112-7, 2515 U.N.T.S. 3 [hereinafter Disabilities Convention].

146 Colombia, for example, objected to a U.S. treaty proposal for building a canal through the Isthmus peninsula, in part because its terms intruded too deeply upon Colombian sovereignty. A U.S.-favored revolution rectified that problem by creating a new State (Panama) that went ahead with the canal. THOMAS A. BAILEY, *A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE* 490–92 (10th ed. 1980).

147 See Coral Davenport, *Obama Pursuing Climate Accord in Lieu of Treaty*, N.Y. TIMES, Aug. 26, 2014, [http://www.nytimes.com/2014/08/27/us/politics/obama-pursuing-climate-accord-in-lieu-of-treaty.html?\\_r=1](http://www.nytimes.com/2014/08/27/us/politics/obama-pursuing-climate-accord-in-lieu-of-treaty.html?_r=1). For a discussion of reasons States choose political commitments over treaties and vice versa, see Duncan B. Hollis & Joshua J. Newcomer, “Political” Commitments and the Constitution, 49 VA. J. INT’L L. 507, 526 (2009).

148 Marc Grossman, Under Secretary for Political Affairs, American Foreign Policy and the International Criminal Court: Remarks to the Center for Strategic and International Studies (May 6, 2002), <http://2001-2009.state.gov/p/us/rm/9949.htm>.

149 To complicate matters, some States may conclude a treaty they regard as international but other States regard as an inappropriate use of treaty-making. In such cases, the intersubjective understanding of “international” would seem limited to contracting States.

In this formation stage of the treaty process, the executive represents the United States.<sup>150</sup> As a result, it is the executive's belief whether a subject is (or is not) international that contributes to the intersubjective acceptance of a treaty. Executive practice has long reflected attention to the international criterion in negotiations and their aftermath.<sup>151</sup> Occasionally, the executive has informed other nations that it regarded a particular topic (e.g., armaments) as inappropriate for a U.S. treaty commitment because it was too "local" in nature.<sup>152</sup> In other cases, the executive ceased to pursue a treaty it had negotiated because it came to believe the issues were too domestic. For example, despite signing the U.N. Convention on the Rights of the Child (CRC), the executive has never sought Senate advice and consent, at least in part because that treaty focuses on areas "of almost exclusive state-level authority."<sup>153</sup> Similar concerns led the executive to back away from the International Covenant on Economic, Social and Cultural Rights.<sup>154</sup>

Sometimes, executive reluctance to negotiate is expressed in terms of the proposed treaty's impact on areas in which the states legislate. And certainly the fact that the states have regulated a subject in lieu of the federal government may inform the executive calculus on its "international" nature. But it would be a mistake to read the international concern test as any sort of proof of states' rights or Article I limitations on the treaty power. Even as it has held back on treaties it believed were not sufficiently international, the executive has readily endorsed the international nature of topics otherwise under state jurisdiction where an international connection explains the need

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150 The executive, on occasion, has allowed non-executive branch personnel to participate in treaty negotiations, including legislative representatives as well as representatives of private industry or civil society. But final authority in such negotiations lies within the executive branch.

151 I have detailed elsewhere six ways the executive addresses federalism issues in the treaty process. Hollis, *supra* note 6, at 1361–86.

152 In 1927, for example, the executive described the federal government as "powerless" to prescribe prohibitions on arms manufacture by treaty, since manufacturing was a "local issue" to be regulated by the states. See *Special Commission for the Preparation of a Draft Convention on the Private Manufacture of Arms and Ammunition and of Implements of War*, League of Nations Doc. C.219M.142 1927 IX, at 13 (1927) (statement of U.S. delegate). The executive branch reversed its position five years later, illustrating the dynamic nature of these questions. See HENKIN, *supra* note 2, at 464 n.67 (citing Bureau of Disarmament Conference, Minutes of the 30th Meeting, Nov. 18, 1932, I, at 100).

153 Peter J. Spiro, *The States and International Human Rights*, 66 *FORDHAM L. REV.* 567, 575 (1997); see Convention on the Rights of the Child, Nov. 20, 1989, 28 *I.L.M.* 1448 (1989). Today, the United States and Somalia are the only two States not to join the CRC. See *Status: Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en) (last visited Mar. 16, 2015).

154 ICESCR, *supra* note 144, 993 *U.N.T.S.* 3. Although it pushed for ratification of the ICESCR in the Carter Administration, even then the executive acknowledged its coverage was "[i]n view of the nature of the United States federal system . . . not acceptable." Letter of Submittal from Deputy Secretary of State Warren Christopher to President Jimmy Carter (Dec. 17, 1977), S. EXEC. DOC. NOS. C–F, 95th Cong., 2d Sess., XI–XV (1978).



for doing so. Thus, the executive favored treaties on drivers' licenses and vehicle registrations—both subjects traditionally a matter of state power—where they involved foreigners.<sup>155</sup> It supported a treaty superseding state contract law for “international” contracts.<sup>156</sup> It supplanted state criminal processes for diplomats, consuls, and officials of international organizations like the United Nations.<sup>157</sup> And we should not forget its view in *Missouri v. Holland* that migratory birds were an entirely “proper” subject for negotiation.<sup>158</sup> The better view, therefore, is that instead of some strict states' rights approach, the executive operates on an understanding of what matters *it* will regard as international and those it will not.

So far, I have treated a treaty's subject matter as singular to focus attention on the ways shared understanding may (or may not) emerge among the negotiating parties. In practice, however, treaties are more like Swiss Army knives, capable of addressing multiple subjects and regulating any single subject in manifold ways.<sup>159</sup> The U.N. Charter offers a paradigmatic example of a treaty addressing multiple subjects (e.g., security, human rights, economic, and social issues) for multiple functions (to prohibit conduct, to empower behavior, and to constitute an international organization).<sup>160</sup> In contrast, the Law of the Sea Convention focuses on a single subject—the maritime environment—but does so via manifold sub-issues, from freedom of the high seas to deep seabed mining to environmental protection.<sup>161</sup> As a result, the international concern test can (and should) operate on an issue-by-issue basis rather than a treaty-by-treaty one.

International law and practice have developed a number of tools at the formation and ratification stages to allow for this more surgical approach.<sup>162</sup> Most obviously, a State may seek to negotiate the text in ways that avoid impermissible subjects. For example, in the Tobacco Convention negotiations, early drafts would have required the United States to regulate subjects it regarded as insufficiently international (e.g., secondhand smoke in all

155 Convention on Road Traffic, Sept. 19, 1949, 3 U.S.T. 3008, 125 U.N.T.S. 22.

156 United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 98-9 (1986), 1489 U.N.T.S. 3.

157 Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 3416, 11 U.N.T.S. 11.

158 See *supra* note 60 and accompanying text. Attorney General John Griggs took a similar position with respect to treaties on fisheries, notwithstanding that in the absence of a treaty, their regulation within the states' territorial limits was a matter of state law. 22 Op. Att'y. Gen. 214, 217 (1898).

159 See Hollis, *supra* note 105, at 36.

160 *Id.* at 39–40 (analyzing U.N. Charter).

161 See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

162 See *infra* notes 177–88 and accompanying text, for a discussion of how reservations, understandings, and declarations accommodate this more precise approach to establishing agreement, and thus intersubjectivity.

indoor workplaces, public transport, and indoor public places).<sup>163</sup> It renegotiated those provisions to avoid reaching to such a local level by having the treaty only require regulation in “areas of existing national jurisdiction as determined by national law.”<sup>164</sup>

Alternatively, a treaty text may include an escape clause (known as a “federal-state clause”) allowing federal States to opt out of commitments that they cannot meet because of their federal structure.<sup>165</sup> These clauses generally equate federal and non-federal State obligations for provisions within each federal State’s “legislative jurisdiction,” but require federal States merely to recommend to their constituent units provisions that fall within the constituent units’ “legislative jurisdiction.”<sup>166</sup> These provisions effectively keep the treaty’s reach out of areas of state law that the executive deems warrant protection. The executive has the lead in drawing these lines or deciding that they are unwarranted. Thus, the United States has joined some treaties (e.g., the New York Arbitration Convention) that have a federal-state clause, but has not taken advantage of that clause on the theory that the treaty’s subject is entirely proper, notwithstanding some interference with state laws.<sup>167</sup>

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163 World Health Organization [WHO], *Chair’s Text of a Framework Convention on Tobacco Control*, Part G, at 3, WHO Doc. A/FCTC/INB2/2 (Jan. 9, 2001) available at <http://www.who.int/gb/fctc/PDF/inb2/e2inb2.pdf>.

164 WHO Framework Convention on Tobacco Control art. 8, May 21, 2003, 2302 U.N.T.S. 166. Of course, efforts to negotiate around federalism will not always succeed. Evidently, the executive invoked interference with state law to oppose foreign monitors of prisons in the Torture Convention negotiations, but its objections were rebuffed. See Swaine, *supra* note 7, at 406. And, as yet, the executive has not sent the Tobacco Convention to the Senate, suggesting that even the negotiated changes were insufficient to remove all executive objections to that treaty.

165 One year before *Missouri v. Holland*, in negotiations for a constitution to the International Labour Convention, the United States invoked the Tenth Amendment to suggest that certain labor matters were reserved to its states, leading to the first “federal-state” clause, allowing federal States to treat as recommendations those matters where its treaty power was “subject to limitations.” Pitman B. Potter, *Inhibitions upon the Treaty-Making Power of the United States*, 28 AM. J. INT’L L. 456, 456–57 (1934); Robert B. Loooper, *Federal State’ Clauses in Multilateral Instruments*, 32 BRIT. Y.B. INT’L L. 162, 167 (1955–1956). The United States never consented to the provision (it ended up as part of the Treaty of Versailles). Thereafter, however, the United States and other federal States (e.g., Canada, India, Australia) sought similar clauses in other treaties. HENKIN, *supra* note 2, at 192.

166 Protocol Relating to the Status of Refugees art. VI, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (Article VI incorporates Article 41 of the 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, which contains the actual federal-state clause); see also The Constitution of the International Labor Organization Instrument of Amendment art. 19(7) (b), Oct. 9, 1946, 62 Stat. 3485, 3526, 15 U.N.T.S. 35 (requiring a federal state to recommend to its constituent units action for treaties “which the federal government regards as appropriate under its constitutional system, in whole or in part, for action by the constituent States”).

167 Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. XI(a)–(b), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3. The executive viewed arbitration as appropriate given existing federal legislation, the Federal Arbitration Act. See S. EXEC.

Federal-state clauses have been relatively infrequent in recent years, largely due to resistance from non-federal States who object to the unequal commitments they create.<sup>168</sup> Nonetheless, the executive has sought them successfully in a few cases, most notably the Budapest Convention on Cybercrime.<sup>169</sup> Article 41 of that treaty allowed the United States to limit its obligations for “a narrow category of conduct regulated by U.S. [s]tate, but not federal, law,” provided that doing so did not “exclude entirely or substantially diminish” its criminalization obligations under the treaty.<sup>170</sup> These clauses allowed the United States to modify the treaty such that, as modified, it could join other contracting parties in the belief that it was a proper subject for international negotiation.

## 2. Treaty Ratification

Under the Constitution, the executive shares with the Senate the power to consent to treaties. The decision whether to ratify a treaty thus provides a second—and key—inflexion point where an intersubjective understanding of the treaty’s international subject matter is required.<sup>171</sup> The executive, in sending the treaty to the Senate, already understands the treaty to address matters of international concern. The Senate may share that view and, assuming no other objections, offer the requisite advice and consent to U.S. ratification of the treaty.

But just as States can scuttle negotiations if they think a matter is too domestic, so too can the Senate obfuscate U.S. ratification for a treaty failing

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REP. 10, 90th Cong., 2d Sess. (testimony of Amb. Kearney, Department of State). Although there is no comparable explanation, the United States declined to take advantage of a similar federal-state clause in the Convention Concerning the Protection of the World Cultural and Natural Heritage art. 35(1)–(2), Nov. 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151.

168 Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 345 (1995). Thus, many human rights treaties deny federal States the ability to limit or except their obligations. ICCPR, *supra* note 103, art. 50, 999 U.N.T.S. at 185. Henkin also suggested that *Missouri v. Holland’s* endorsement of treaty subjects beyond Congress’s legislative powers undercut any U.S. need for federal-state clauses. HENKIN, *supra* note 2, at 192. For more information, see Hollis, *supra* note 6, at 1374–77.

169 Convention on Cybercrime, Nov. 23, 2001, T.I.A.S. No. 13,174, 2296 U.N.T.S. 167.

170 Convention on Cybercrime: Letter of Transmittal from Secretary of State Colin Powell, U.S. Dep’t of State, Nov. 17, 2003, S. TREATY DOC. NO. 108-11, *available at* <http://www.gpo.gov/fdsys/pkg/CDOC-108tdoc11/html/CDOC-108tdoc11.htm> [hereinafter Cybercrime Convention Submittal Letter]. The executive also recommended an understanding that, given its modified obligations, “the Convention does not warrant the enactment of any legislative or other measures” such that the United States would “rely on existing federal law” to meet its obligations. *Id.*

171 I use ratification here as a stand-in for all forms of treaty consent, in order to avoid confusion with the usage of “consent” in describing the Senate’s role. But ratification is only one means of establishing U.S. treaty consent; it can also join treaties by signature, acceptance, approval, or accession. See George Korontzis, *Making the Treaty*, in THE OXFORD GUIDE TO TREATIES, *supra* note 105, at 177, 195–201.

its understanding of the international concern test.<sup>172</sup> As Professor Spiro has emphasized, there is substantial evidence suggesting that the Senate has done this in areas traditionally regulated by the states (e.g., criminal and family law).<sup>173</sup> Senate resistance may be based on other grounds, whether party politics, substantive objections, or different constitutional issues (e.g., interference with the Bill of Rights).<sup>174</sup> As a collective, moreover, senators may have an incompletely theorized reason for resisting a treaty; that is, a sufficient number of senators may stall or reject a treaty without agreeing on why they are doing so.<sup>175</sup> But when the Senate *agrees* to give advice and consent, it can generate intersubjectivity; that approval indicates Senate concurrence with the executive's view that the matters in question are international.

For its part, the executive has an opportunity to confirm its views of the treaty after Senate advice and consent in deciding whether or not to ratify it. Nor is this a mere rubber stamp, as the executive's earlier view of the treaty may no longer hold (if, for example, a new executive has come into office with a different view of the treaty or its subject matter).<sup>176</sup> U.S. ratification of a treaty thus adds another layer of evidence of intersubjectivity to the international concern question.

Moreover, as in the treaty formation stage, the executive and the Senate have tools—RUDs, or reservations, understandings, and declarations—that allow them to apply the international concern test on an issue-by-issue basis. Reservations allow a State to unilaterally exclude or modify its obligations in

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172 The Senate most often simply refuses to vote on a treaty it disfavors; outright Senate rejection is rare—it has only occurred twenty-two times since the Founding. *The Senate's Role in Treaties*, U.S. SENATE, <http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm> (last visited Mar. 16, 2015).

173 See Spiro, *supra* note 153, at 576–78.

174 For example, many senators indicated opposition to the new U.N. Arms Trade Treaty out of concern that it would conflict with the Second Amendment, a charge the Obama Administration has vigorously disputed. See, e.g., Larry Bell, *The U.N. Arms Trade Treaty: Are Our 2nd Amendment Rights Part of the Deal?* FORBES (July 10, 2012, 12:45 PM), <http://www.forbes.com/sites/larrybell/2012/07/10/the-u-n-arms-trade-treaty-are-our-2nd-amendment-rights-part-of-the-deal/>; Rick Gladstone, *Arms Treaty Now Signed by Majority of U.N. Members*, N.Y. TIMES, Sept. 25, 2013, [http://www.nytimes.com/2013/09/26/world/arms-treaty-now-signed-by-majority-of-un-members.html?\\_r=0](http://www.nytimes.com/2013/09/26/world/arms-treaty-now-signed-by-majority-of-un-members.html?_r=0).

175 Here, I am drawing on Cass Sunstein's theory of incompletely theorized agreements. Cass R. Sunstein, *Incompletely Theorized Agreements in Constitutional Law*, 74 SOC. RES. 1 (2007). In an example from the U.S. context, Sunstein noted that

[p]eople may believe that it is important to protect religious liberty while having quite diverse theories about why this is so. Some people may stress what they see as the need for social peace; others may think that religious liberty reflects a principle of equality and a recognition of human dignity; others may invoke utilitarian considerations; still others may think that religious liberty is itself a theological command.

*Id.* at 2.

176 Alternatively, world conditions may shift or the executive may balk at Senate conditions for advice and consent.

consenting to a treaty.<sup>177</sup> Understandings allow a State to clarify otherwise ambiguous text, while declarations do not speak to the treaty text itself but may proclaim a policy or some indication of how the State will perform those obligations that it has assumed.<sup>178</sup> Together, RUDs provide a mechanism for calibrating a State's understanding of what subjects the treaty covers, and, in doing so, dealing with the international concern problem.

In the United States, RUDs may emerge at the behest of either the executive or the Senate. Ultimately, however, for U.S. ratification to occur, the two sides must reach some intersubjective agreement on whether and how to condition U.S. consent. RUDs thus create conditions for—and serve as evidence of—intersubjectivity on the propriety of a ratified treaty.<sup>179</sup> As a practical matter, the political branches have increasingly deployed these tools to redress problem areas under the international concern test while still allowing U.S. participation in the treaty itself.

Recently, the executive has proposed—and the Senate acceded to—reservations in certain criminal law treaties that adjust the treaties' criminalization obligations to accommodate "fundamental principles of federalism."<sup>180</sup> The U.N. Convention Against Transnational Organized Crime (TOC Convention) requires States parties to criminalize certain conduct (e.g., participation in an organized criminal group, money laundering, bribery of domestic public officials, and obstruction of justice).<sup>181</sup> In ratifying the treaty, the United States attached a reservation excluding any obligation to

177 The VCLT admits reservations so long as the treaty does not expressly prohibit them, and on the condition that if a treaty restricts them, any reservation must comport with those restrictions. Where a treaty is silent, reservations are admissible, provided that they are not inconsistent with the treaty's object and purpose. Both the meaning and effectiveness of the international law on reservations have proven controversial, leading to recent efforts by the International Law Commission (ILC) to offer a new guide to reservations practice. *Guide to Practice on Reservations to Treaties*, 75, 63d Sess., U.N. Doc. A/66/10 (2011), ¶ 75, available at [http://legal.un.org/ilc/texts/instruments/english/draft%20articles/1\\_8\\_2011.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/1_8_2011.pdf); see also Edward T. Swaine, *Treaty Reservations*, in *THE OXFORD GUIDE TO TREATIES*, *supra* note 105, at 277 (discussing the topic of reservations generally).

178 Swaine, *supra* note 177, at 279–80. Declarations may be published in the instrument of ratification that constitutes U.S. international legal consent to a treaty, or they may only appear in the Senate Resolution of Advice and Consent.

179 Although the issue remains understudied, several lower courts have enforced reservations, understandings, and declarations appended to U.S. treaties. In the only opinion to examine their validity in detail, the Third Circuit held (in a decision joined by then-Judge Alito) that "for purposes of domestic law, the understanding proposed by the President and adopted by the Senate in its resolution of ratification are the binding standard to be applied in domestic law." *Auguste v. Ridge*, 395 F.3d 123, 142 (3d Cir. 2005).

180 U.N. Convention Against Transnational Organized Crime: Letter of Transmittal from President George W. Bush, Dec. 13, 2000, S. TREATY DOC. NO. 108-16, at iv; *U.N. Convention Against Transnational Organized Crime and Its Protocols: Signatories*, U.N. OFFICE ON DRUGS & CRIME (Sep. 26, 2008), <https://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html> [hereinafter TOC Status List].

181 U.N. Convention Against Transnational Organized Crime arts. 5, 6, 8, 23, Nov. 15, 2000, T.I.A.S. No. 13,127, 2225 U.N.T.S. 209 [hereinafter TOC Convention]. The United States also joined two of three protocols to the TOC Convention, one of which included

criminalize conduct in a “narrow category of highly localized activity,” which it described as of a “purely local character.”<sup>182</sup> The two branches shared the same approach for the U.N. Corruption Convention.<sup>183</sup>

The executive and the Senate agreed on understandings instead of reservations to facilitate U.S. ratification of three human rights conventions: the Torture Convention, the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>184</sup> In all three cases, the understandings indicated that the federal government would implement the treaty “to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments.”<sup>185</sup> In other words, the United States understood itself to be accepting all of these treaty’s provisions, thus confirming that they constituted matters of international concern.

What purpose did these shared understandings serve if they did not modify or clarify the scope of U.S. obligations under these treaties?<sup>186</sup> They indicated that a collective understanding of human rights as a matter of

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the same reservation as used for the TOC Convention itself. *See* TOC Status List, *supra* note 180.

182 151 CONG. REC. 22,643 (2005). The Senate Resolution approving the TOC Convention indicated that “current United States law, including the laws of the [s]tates of the United States, fulfills the obligations of the Convention . . . . Accordingly, the United States of America does not intend to enact new legislation to fulfill its obligations under the Convention.” *Id.*

183 U.N. Convention Against Corruption: Letter of Transmittal from President George W. Bush, Oct. 31, 2003, S. TREATY DOC. NO. 109-6, at 2–3.

184 140 CONG. REC. 14,326 (1994) [hereinafter CERD RUDs] (U.S. reservations, declarations, and understandings, International Convention on the Elimination of All Forms of Racial Discrimination); 138 CONG. REC. 8068 (1992) [hereinafter ICCPR RUDs] (U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights); 136 CONG. REC. 36,192 (1990) [hereinafter Torture RUDs] (U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85; ICCPR, *supra* note 103, 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, S. EXEC. DOC. C, 95-2, 660 U.N.T.S. 195 [hereinafter CERD].

185 *See* CERD RUDs, *supra* note 184; ICCPR RUDs, *supra* note 184; Torture RUDs, *supra* note 184, at 36194.

186 A number of commentators have complained that these understandings are meaningless. *E.g.*, Henkin, *supra* note 168, at 346 (indicating that understandings “serve no legal purpose”); Neuman, *supra* note 115, at 51–52 (same). *But see* Brad R. Roth, *Understanding the “Understanding”: Federalism Constraints on Human Rights Implementation*, 47 WAYNE L. REV. 891 (2001) (arguing that ICCPR federalism understanding precludes Congress from enacting implementing legislation beyond its enumerated powers); David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1202 (1993) (noting that understandings signal that “the federal government will remove any federal inhibition to the states’ abilities to meet their obligations”).

international concern does not correlate to a commitment to extend federal power to implement or apply such treaties. For example, the executive explained the CERD understanding would preserve “a fairly substantial range of action” for state regulation to comply with the treaty, which the federal government believed would be “inappropriate” to preempt.<sup>187</sup> In the context of the ICCPR, it “emphasize[d] domestically that there is no intent to alter the constitutional balance of authority between the [s]tate and Federal governments or to use the provisions of the Covenant to ‘federalize’ matters now within the competence of the [s]tates.”<sup>188</sup> Such efforts reveal that the political branches may understand a treaty to pass the international concern test without mandating any particular means of enforcement.

### 3. Treaty Implementation

Treaty implementation provides a third stage in which intersubjectivity on the treaty’s subject matter may arise. Not every treaty will have a separate implementation stage. “Self-executing” treaties operate in and of themselves as federal law.<sup>189</sup> But other treaties, such as those whose subjects involve powers vested exclusively in the U.S. Congress (e.g., appropriating funds and criminalizing behavior), require federal implementing legislation as a constitutional matter.<sup>190</sup> Sometimes the executive may even opt to seek federal legislation as a discretionary matter instead of pursuing self-executing status. To implement a non-self-executing treaty, Congress may be asked to pass new legislation, or *preexisting* statutes may be cited as the source for satisfying the treaty’s requirements, as was the case for the Cybercrime Convention.<sup>191</sup> Moreover, as the human rights treaty examples above suggest, a mix of

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187 INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, S. EXEC. REP. NO. 103-29, at 8 (1994).

188 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 102-23, at 9, 17–18 (1992) (Bush Administration views). In a more recent example, in joining the Optional Protocol to the Rights of the Child Convention on the Sale of Children, Child Prostitution and Child Pornography, the executive took the view that the United States could employ both federal and state law to meet the treaty’s requirement that prohibited conduct be “covered by its criminal law” since it did not require the United States to establish “crimes *per se* or that specific crimes be established under national law.” Protocols to the Convention on the Rights of the Child: Letter of Transmittal from President William J. Clinton, July 25, 2000, S. TREATY DOC. NO. 106-37, at 12, 15-16.

189 Debates as to which treaties are self-executing, who gets to make such decisions, and what effect a treaty’s self- or non-self-executing status has are as longstanding (and more complicated) than those relating to the nature and scope of the treaty power. *See, e.g.*, Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT’L L. 540 (2008); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008).

190 HENKIN, *supra* note 2, at 203; Sloss, *supra* note 189, at 30.

191 *See, e.g.*, Cybercrime Convention Submittal Letter, *supra* note 170, at xxii (The “Convention does not warrant the enactment of any legislative or other measures;” instead, the United States would “rely on existing federal law” to meet its obligations).

approaches is possible, whereby implementation may depend on both federal and state sources.<sup>192</sup>

In cases in which new legislation is sought, another actor—the Congress as a whole—has an opportunity to participate in the existing intersubjective understanding by enacting the legislation sought, or to defect from that view by not doing so.<sup>193</sup> As with the Senate, Congress may opt not to pass implementing legislation for various reasons, including, but not limited to, a view that the treaty does not properly address matters of international concern. Whatever the reason, congressional failure to act can forestall a treaty's approval, particularly in light of U.S. policy to not ratify a treaty until such time as it has in place all the necessary domestic legislation.<sup>194</sup>

Where Congress *does* pass implementing legislation that the President signs into law, it operates like Senate advice and consent to signal acceptance of the treaty's subject matter as a matter of international concern. And although it has not relied on *Missouri v. Holland* frequently, Congress has passed statutes suggesting that it understands a treaty may require intrusion on topics previously understood as only of local concern so long as a rationale exists for tying it to international affairs. In joining the Hostage Taking Convention, for example, Congress passed implementing legislation that criminalized intrastate hostage taking so long as it involved a foreign national.<sup>195</sup> *Bond* does not undercut this approach. By passing the Chemical Weapons Convention Implementation Act, Congress clearly signaled it shared the President and Senate's view that the treaty addressed a matter of international concern.

What the *Bond* majority's clear statement rule does suggest, however, is that the international concern test may apply to a treaty and its implementing legislation separately. The *Bond* majority essentially questioned whether Congress had understood that its statute would treat local prosecutions without any ties to foreign nationals or foreign territory as matters of international concern. By concluding from the absence of a clear statement that

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192 See *supra* note 188 and accompanying text.

193 The implications of "executing" a non-self-executing treaty via preexisting legislation are complicated and require further study. Duncan B. Hollis, *Treaties—A Cinderella Story*, 102 AM. SOC. INT'L L. PROC. 412 (2008).

194 For example, the Senate gave advice and consent to the Basel Convention on Transboundary Movement of Hazardous Waste in 1992, but the United States has not joined it at present, two decades later, because Congress has yet to enact the requisite amendments to the Resource Conservation and Recovery Act of 1976 (RCRA). See *Basel Convention on Hazardous Wastes*, U.S. DEP'T OF STATE, <http://2001-2009.state.gov/g/oes/env/c18124.htm> (last visited Mar. 16, 2015).

195 18 U.S.C. § 1203(b)(2) (2012). In contrast, in the Terrorist Bombings Convention, Congress's implementing legislation—at the executive's behest—did not cover the intrastate conduct that the treaty required the United States to criminalize since the executive relied on preexisting state law instead. 18 U.S.C. § 2332f(d)(3) (2012) (exempting offenses committed within the United States where jurisdiction is predicated solely on the nationality of the victims or the alleged offender and the offense has no substantial effect on interstate or foreign commerce).



Congress lacked such an understanding, the Court managed to overturn Ms. Bond's prosecution without undercutting congressional acquiescence in the international character of the Chemical Weapons Convention itself.<sup>196</sup> Justice Alito's concurrence reflects a similar approach: faulting implementing legislation for reaching matters not of international concern without suggesting that the underlying treaty did so.<sup>197</sup>

#### 4. Treaty Application

Fourth and finally, when specific cases present treaty questions, the Court has an opportunity to participate in (or dissent from) the intersubjective understanding of the earlier stages that the treaty and/or its implementing legislation comprise matters of international concern. By applying a treaty, the Court could either expressly or impliedly accept its international character. Or the Court could dissent from prior intersubjective meanings and denounce a treaty (or its implementing legislation) for not limiting itself to matters of international concern.

Even if the Court *could* participate in the intersubjective process, *whether* it should do so remains contested. Some scholars have suggested that the Court should defer to the treaty-makers' collective understanding of what comprises the "international."<sup>198</sup> They argue that the required interaction among the treaty-makers along with the electorate's check on perceptions of overreaching constitute what Herbert Wechsler dubbed "political safeguards of federalism" sufficient to delineate the proper international subjects for treaty relations.<sup>199</sup> Others are less sanguine about excluding distinct "judicial safeguards" from the process, arguing that the Court should have an independent voice to protect federalism.<sup>200</sup> They cite the Court's new federalism jurisprudence and the changing nature of treaty-making to make descriptive and normative claims for judicial review of the treaty power.<sup>201</sup>

My own view is more nuanced. As I have described the treaty process, intersubjective understandings involve different sets of relevant actors at different stages of the process. Nothing requires judicial participation in the question at each and every stage. On the contrary, for foreign affairs pur-

196 *Bond v. United States*, 134 S. Ct. 2077, 2093–94 (2014).

197 *Id.* at 2111 (Alito, J., concurring in the judgment). Justice Scalia, in contrast, would have tied Congress's power to implement treaties (as opposed to support making them) to its enumerated powers. *Id.* at 2101–02 (Scalia, J., concurring in the judgment).

198 *See supra* note 67 (quoting Justice Chase for his reluctance to have the Court exercise a power to declare treaties void).

199 HENKIN, *supra* note 2, at 441; Sloss, *supra* note 9, at 1975; Healy, *supra* note 9, at 1753; *see also* JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954).

200 *See, e.g.*, Swaine, *supra* note 7, at 441; Bradley I, *supra* note 7, at 441; Bradley II, *supra* note 7, at 110.

201 Bradley I, *supra* note 7, at 441–42; John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

poses, judicial deference may be warranted in the early stages, allowing States to decide what treaties to conclude and the President and the Senate to decide whether to ratify them.<sup>202</sup> At later stages, however, the questions are more familiar to the judicial function. The Court is well equipped to opine on the nature and scope of implementing *legislation* as part and parcel of the function of judicial review (and it is in reviewing legislation that the Court has focused on elaborating greater federalism-related boundaries). The case for judicial involvement becomes even stronger for individualized treaty questions, i.e., whether the prosecution of Ms. Bond involves those matters of international concern on which the Chemical Weapons Convention and its implementing legislation rest. Thus, I support the Court allowing political actors to control the intersubjective meaning associated with treaty formation and ratification, but encourage including the judicial voice in matters of implementation and application. This would necessarily limit the Court's ability to declare an entire treaty unconstitutional, but it would endorse the more careful analysis of legislation and prosecutions raised by cases like *Bond*.

### B. Contextualizing Intersubjectivity

In searching for evidence of intersubjectivity at the various stages of the treaty process, context comes to the fore. As my discussion of political and judicial safeguards suggests, we should not expect an intersubjective understanding of the international concern test to operate free of the context in which the test applies. For example, forming a treaty puts its subject matter squarely on the international agenda, but that alone may not matter to the President and the Senate, as they operate in the very different context of determining whether to support the treaty's ratification *for the United States*.

The judiciary, in particular, is likely to encounter treaties in different contexts. Most often, by virtue of its judicial function, the Supreme Court will assess the international concern test in its *application* to specific cases instead of the more general *ex ante* analysis of those forming or ratifying a treaty. As such, we should expect that the Court may answer the international concern question differently depending on the particular application at issue.

The *Bond* case provides a very useful illustration of how the application of the same treaty may clearly be understood as international in one context and clearly not international in another. In *Bond*, none of the Justices' opin-

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202 I am not persuaded that the "changing" nature of treaty-making warrants a greater judicial role. Treaties continue to essentially regulate interstate relations even if the object of those regulations is occasionally to protect individuals in lieu of States. As I have detailed elsewhere, I also believe the executive has demonstrated sufficient sensitivity to federalism concerns in order to preclude the Court from invalidating treaties whole-cloth. Hollis, *supra* note 6, at 1361–86. The recent reduction in treaty-making more generally suggests that concern with the potential for abuse by the political branches may be overwrought. Emily Cumberland, *The End of Treaties? An Online Agora*, AJIL UNBOUND (Apr. 18, 2014), <http://www.asil.org/blogs/end-treaties-online-agera>.

ions challenged the “global need to prevent chemical warfare” that formed the subject matter of the Chemical Weapons Convention.<sup>203</sup> As such, it seems fair to conclude that they all shared the understanding that the Convention addressed matters of international concern.

Yet all the Justices also agreed that the application of the treaty (or its implementing legislation) to Carol Anne Bond’s poisoning of her husband’s lover was *not* a matter of international concern. As the majority noted, “there are no apparent interests of the . . . community of nations in seeing Bond end up in federal prison.”<sup>204</sup> In this respect, they shared an understanding that the executive had also offered during oral argument.<sup>205</sup> Thus, *Bond* illustrates how intersubjectivity around matters of international concern may vary depending on the level of generality at which the inquiry is made; a treaty may be understood to address matters of international concern generally, but a specific application of the same treaty may run afoul of this constitutional requirement.

### C. Accounting for the Dynamic Potential of Intersubjectivity

Over the last decade, international law has increasingly focused on the question of dynamic treaty interpretation—i.e., whether a treaty should retain the meanings shared among its parties originally or if that collective meaning may shift over time.<sup>206</sup> In acknowledging the capacity for meaning to change, international law has begun to accommodate the dynamic capacity of intersubjectivity.

A similar appreciation is necessary when it comes to the international concern test. Early and longstanding cases of shared understanding about which subjects are appropriate for treaty regulation can lead relevant actors to treat their international status as “obvious” rather than the product of social construction. Today, the “international” quality of subjects such as

203 See *Bond v. United States*, 134 S. Ct. 2077, 2093 (2014).

204 *Id.*; see *id.* at 2111 (Alito, J., concurring in the judgment) (reasoning that Bond’s conviction should be overturned because implementing legislation did not address a matter of international concern in regulating conduct “typically . . . regulated by the [s]tates,” even if the Chemical Weapons Convention reflected an issue of “great international concern”); *id.* at 2109 (Thomas, J., concurring in the judgment) (“Nothing in our cases . . . suggests that the Treaty Power conceals a police power over domestic affairs.”).

205 See Transcript of Oral Argument at 46, *Bond*, 134 S. Ct. 2077 (No. 12-158) (Solicitor General Verrilli: “[N]obody would—we’re not saying—and I don’t think anybody would say that—that whether or not Ms. Bond is prosecuted would give rise to an international incident. The question is whether Congress has the authority to pass a comprehensive ban.”).

206 See, e.g., ALEXANDER ORAKHELASHVILI, *THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW* 291 (2008); TREATIES AND SUBSEQUENT PRACTICE (Georg Nolte ed., 2013); Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences*, 9 L. & PRAC. INT’L CTS. & TRIBUNALS 443 (2010); Malgosia Fitzmaurice, *Dynamic (Evolutive) Interpretation of Treaties (Part I)*, 21 HAGUE Y.B. INT’L L. 101 (2008); Malgosia Fitzmaurice, *Dynamic (Evolutive) Interpretation of Treaties (Part II)*, 22 HAGUE Y.B. INT’L L. 3 (2009).

trade or navigation is treated as almost inherent to the concept itself. Thomas's concurrence in *Bond* makes this point, as he emphasized how early U.S. treaty practice targeted only "genuinely international matters such as war, peace, and trade between nations."<sup>207</sup> Similar instantiation may occur on matters States or constitutional actors collectively view as "purely" domestic in nature. Whatever else treaties may do, for example, the idea that they could regulate secondary education in the United States is currently (and widely) accepted to be verboten.

At the same time, intersubjectivity can be dynamic; shifting conditions, changed identities, new information, or events may lead relevant actors to review *de novo* the appropriateness of treaty regulation.<sup>208</sup> Matters previously thought to be solely the province of domestic jurisdictions can be collectively recast into topics of international concern. Nor, despite the generally progressive account of constructivist literature, are such changes a one-way street. The shared appreciation of a subject's international status can reverse course.<sup>209</sup> Three examples from U.S. treaty practice help illustrate this dynamic phenomenon: (1) human rights, (2) private international law, and (3) Native American relations.

## 1. Human Rights

I have already explained the shift that occurred after World War II to incorporate human rights within the boundaries of acceptable treaty-making.<sup>210</sup> A similar shift occurred within the United States. In (successfully) resisting Senator Bricker's constitutional amendment to the treaty power, Secretary of State Dulles effectively promised *not* to seek ratification of the Genocide Convention and future human rights treaties because of their subject matter.<sup>211</sup> Dulles testified to the Senate that treaty-making should occur within "traditional limits" and denied that "treaties should, or lawfully can, be used as a device to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern."<sup>212</sup>

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207 *Bond*, 134 S. Ct. at 2103–04 (Thomas, J., concurring in the judgment) (emphasis added).

208 The causal factors leading to change are obviously important to our understanding of intersubjectivity and an appropriate subject for further research. Time and space constraints preclude me from doing so in this Article. My goal here is merely to demonstrate such change occurs, not necessarily *why* it occurs. Similarly, I have not attempted to offer a theory for when and how actors develop their own views on questions of international character that then contribute to or undermine the generation of intersubjective meaning.

209 Finnemore & Sikkink, *supra* note 126, at 403–04 (noting constructivism does not require progressive evolution, only that its scholars have focused their attention on such subjects).

210 See *supra* notes 142–45 and accompanying text.

211 John Foster Dulles, *The Making of Treaties and the Conduct of Foreign Affairs*, 32 DEP'T STATE BULL. 820, 822 (1955).

212 1953 *Senate Judiciary Committee Hearings*, *supra* note 63, at 825 (Dulles's testimony); 1955 *Senate Judiciary Committee Hearings*, *supra* note 63, at 183 (Dulles testified that treaties

The executive would not maintain that view, however, as the Kennedy Administration reversed course and pushed for ratification of conventions on slavery, forced labor, and the political rights of women.<sup>213</sup> By the Carter Administration, Warren Christopher was adamant that human rights *were* now a matter of international concern:

Although there have in the past been differences of opinion as to what is and is not a matter of “international concern,” it seems clear today that no matter how widely or narrowly the boundaries of “international concern” be drawn, a treaty concerning human rights falls squarely within them.<sup>214</sup>

Since then, the executive branch has continued to advocate for human rights treaty subjects, supporting RUDs to account for its views on their appropriate limits. In the modern era, no administration would openly deny the capacity for treaties to address human rights generally.

Whatever the shift in executive views, intersubjectivity requires the assent of all relevant actors, and it took the Senate more time to come around. And even as the Senate began to share the executive’s view that certain human rights treaties were appropriate, it did not do so for all of them. Of the three Kennedy sent to the Senate, only the Slavery Convention proceeded to ratification while the Senate also—“[i]nexplicably,” according to Henkin—unanimously consented to the 1967 Protocol to the Refugee Convention.<sup>215</sup> In the 1980s and early 1990s, the Senate gave advice and consent to several more key human rights treaties, including the Genocide Convention, the ICCPR, the CERD, and the Torture Convention, albeit with extensive RUDs in each case. Other treaties died in the Senate’s hands, such as the International Covenant on Economic, Social and Cultural Rights and the American Convention on Human Rights, while the executive itself held back on the Convention on the Rights of the Child.<sup>216</sup>

Today, the United States may have come full circle. Senate recalcitrance suggests the absence of a collective understanding that additional human rights subjects warrant the treaty attention received by their foundational predecessors. The Senate has refused to act on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>217</sup> On December 4, 2012, for only the fifth time since 1935, the Senate rejected a treaty—the U.N. Convention on the Rights of Persons with Disabilities (Dis-

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cannot reach “purely internal” affairs, but must “essentially affect the actions of nations in relation to international affairs.”).

213 HENKIN, *supra* note 2, at 477.

214 *International Human Rights Treaties: Hearings Before the S. Committee on Foreign Relations*, 96th Cong. 30 (1979).

215 HENKIN, *supra* note 2, at 477–78.

216 *See supra* notes 153–54, 184–88 and accompanying text.

217 This, despite the proposal of extensive RUDs. *See* CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: REPORT, S. EXEC. REP. NO. 107-9 (2002); CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: REPORT, S. EXEC. REP. NO. 103-38 (1994).

bilities Convention).<sup>218</sup> Objections included claims (not necessarily well-founded) that the treaty would interfere with homeschooling, a matter that opponents characterized as too local for international regulation. Both CEDAW and the Disabilities Convention are also criticized for the amount of sovereignty that would be sacrificed to foreign expert treaty bodies.<sup>219</sup>

The human rights narrative offers several lessons for our understanding of subject matter limits on the treaty power. First, the fact that nation States collectively understand human rights as a matter appropriate for treaty-making does not mean that the United States Constitution does so. The staged nature of intersubjectivity requires overlapping consensus in *both* international and domestic processes, leaving room for the political branches to limit which treaties are acceptable. Second, the refusal to accept certain treaties (and thus their subjects) reveals that there *are* limits on the treaty power in practice. Moreover, contrary to Professor Henkin's assertion that the practice is inexplicable, intersubjectivity provides a mechanism for comprehending which treaty subjects are treated as international (or not) even in the absence of objective rationales.

## 2. Private International Law

It may seem strange that a subject such as private *international* law would ever have failed the international concern test, but that is exactly what happened for several decades around the turn of the twentieth century. In the late nineteenth century, nation States began to contemplate treaties harmonizing domestic laws and granting national treatment on subjects such as contracts, marriage, and civil rights. The United States, however, declined to join these efforts, claiming that these were not proper subjects for treaties (at least in the U.S. system).<sup>220</sup> Charles Evans Hughes was among the most prominent voices to suggest that these topics were not matters of international concern as a constitutional matter.<sup>221</sup> As with human rights, however,

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218 Disabilities Convention, *supra* note 145, 2515 U.N.T.S. 3; Ramsey Cox & Julian Pecquet, *Senate Rejects United Nations Treaty for Disabled Rights in a 61-38 Vote*, THE HILL (Dec. 4, 2012, 5:29 PM), <http://thehill.com/policy/international/270831-senate-rejects-un-treaty-for-disabled-rights-in-vote>.

219 Such sovereignty objections provide another example of how the international concern test is not synonymous with states' rights claims. Certain "national" issues regulated by the federal government may be understood as inappropriate for *international* regulation even if they are appropriate for *national* regulation.

220 Kurt H. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 U. PA. L. REV. 323, 326 (1954). For example, Secretary of State Fish declined a Dutch request to negotiate a treaty on recognition of judgments on the grounds that it posed too many difficulties given the federal-state relationship. *Id.* at 324. For some years, U.S. officials would continue to insist on a constitutional incapacity for U.S. participation in private international law treaties. *Id.* at 330 (describing a U.S. diplomat's statements at the 1890 International American Conference that the subject matter of such treaties fell entirely within the jurisdiction of the states that could not be regulated by federal law or treaty).

221 See HENKIN, *supra* note 2, at 471.

executive views changed over time, and it has come to now accept that some—but not all—private international law topics deserve treaties. The Senate has agreed so that today, the United States is party to four such treaties.<sup>222</sup>

Although the executive has long favored ratification, the United States has yet to join a fifth treaty: the 1973 Convention Providing a Uniform Law on the Form of an International Will (Wills Convention).<sup>223</sup> Unlike human rights treaties in which the key intersubjective inflection point was between the President and the Senate, the Wills Convention has faltered because of Congress. To date, Congress has failed to enact the necessary federal implementing legislation. Among the objections is a perception that wills and estates are matters for state rather than federal law, let alone a treaty.<sup>224</sup> As such, the Wills Convention illustrates how the absence of intersubjectivity at later stages in the treaty process—in this case, implementation—can delimit subject matter boundaries for the U.S. treaty power.

### 3. Native American Relations

The internationalization of human rights and private international law subjects might suggest that the international concern test operates as a one way ratchet; offering an inevitable, progressive inclusion of more and more topics. But that is not always the case; it is possible for a subject to lose its “international” status. The most notable examples of this phenomenon are treaties with Native Americans.

In the nation’s early years, regulating U.S. relations with Native Americans was among the most important topics of international concern to the federal government. From 1778 to 1868, the United States ratified 367 Native American treaties.<sup>225</sup> Despite special interpretative accommodations, the Court generally regarded these treaties as equivalent to treaties with

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222 See, e.g., Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, Oct. 5, 1961, 33 U.S.T. 883, 527 U.N.T.S. 189; Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163; Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231; Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89. In 2009, the United States consented to the Hague Choice of Courts Convention, although that treaty is not yet in force internationally. Convention on Choice of Court Agreements, June 30, 2005, available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98).

223 Convention Providing a Uniform Law on the Form of an International Will: Letter of Transmittal from President Ronald Reagan, Oct. 26, 1973, S. TREATY DOC. NO. 99-29 (1986).

224 Recent proposals to revive the treaty’s chances have thus involved avoiding Congress entirely and having the states enact uniform laws that would accommodate U.S. consent to the Wills Convention. *Why States Should Adopt UIWA*, UNIFORM LAW COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UIWA> (last visited Mar. 17, 2015).

225 FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES* 1 (1994).

European powers.<sup>226</sup> It was undoubtedly a significant and important subject matter for the treaty power.

As the threat from Native Americans subsided and the federal government came to regard them more paternally, attitudes towards treaty-making with Native Americans shifted. In 1823, Chief Justice Marshall famously labeled Native American tribes “domestic dependent nations.”<sup>227</sup> Congress began to assert more direct authority to govern Native American relations via legislation in lieu of treaties.<sup>228</sup> In 1871, Congress put that policy into law when the House of Representatives added a rider to an appropriations bill that ceased to recognize individual tribes within the United States as independent nations “with whom the United States may contract by treaty.”<sup>229</sup> Executive acquiescence in this move ended the nearly 100-year-old practice of treaty-making between the federal government and Native American tribes. As a result, what was once collectively accepted as a core topic of international concern has today become a matter understood to warrant domestic regulation instead.

These examples reveal how international concern test outcomes are time-sensitive. We may be able to say at Time 1 that a shared understanding accepts the international character of subjects *A*, *B*, and *C* for treaty-making. But a conclusion about Time 1 does not guarantee replication at Time 2. The collective meaning of some subjects (e.g., *A*) could remain unchanged; others (e.g., *B*) may have reversed, while still others (e.g., *C*) could be confused and in transition. To offer a modern example, the United States currently accepts marijuana production and supply as an appropriate subject for treaty regulation.<sup>230</sup> It is not clear, however, if it will remain so, given recent efforts to localize regulation at the state level, regulatory experiments that could lead to new views by the President, the Senate, Congress, or some combination, which might flip the existing intersubjective understanding.

That “international” has a dynamic meaning should not be surprising. Concepts and labels are necessarily socially constructed, and it is the process of social interaction among relevant actors that dictates which meanings are settled or obvious and which may evolve. Nor is this only a phenomenon for the treaty power. Indeed, looking at the Court’s own jurisprudence, there are many examples of the meaning of a concept (e.g., interstate commerce) changing as a result of changes in the intersubjective views of the majority of its members.

226 *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *The Kansas Indians*, 72 U.S. (1 Wall.) 737, 760 (1866); *Worcester v. Georgia*, 31 U.S. (1 Pet.) 515 (1832).

227 *Cherokee Nation v. Georgia*, 30 U.S. (1 Pet.) 1, 17 (1831); see also *Johnson v. M’Intosh*, 21 U.S. (1 Wheat.) 543, 589–90 (1823).

228 Congress did so pursuant to its power to regulate “Commerce . . . with the Indian tribes.” U.S. CONST. art. I, § 8.

229 The Indian Appropriation Act of 1871, Pub. L. 41-120, 16 Stat. 566 (1871).

230 See United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances arts. 3, 14, Dec. 20, 1988, 32 U.S.T. 543, 1582 U.N.T.S. 95; Single Convention on Narcotic Drugs sched. 1, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 280.



Still, the dynamic potential of an intersubjective international concern test belies the current claims of those—most notably Justices Thomas and Alito—who assume that a definitive line can be drawn perpetually separating international matters from domestic ones. The international quality of a treaty does not depend on some line imposed on the treaty’s subjects, but rather emerges from the shared understandings of those who form, ratify, implement, and apply it.

### CONCLUSION

The Constitution requires the U.S.’s treaties to address only matters of international concern. Despite current (and widespread) assumptions that this test no longer holds, there is strong and abundant evidence in its favor. Although the constitutional text contains no such qualification, the very concept of a treaty, particularly as it was understood at the Framing, incorporates the idea that its subjects are international in nature. That understanding has continued as a matter of both historical practice and Supreme Court doctrine. As a structural matter, the test reinforces the concept of the treaty power as an enumerated, rather than inherent, power. Prudentially, it promises to bridge the need for the United States to succeed in its foreign relations without sacrificing the core federalism principle of limited powers on which the constitutional system rests.

The Constitution’s international concern test, however, is neither the static and fixed version on offer by Justices Alito and Thomas in *Bond*, nor that of Charles Evans Hughes in 1929. The decision to label a subject as “international” comes not from some objective criterion but as a product of interactions *within* the treaty process itself. The relevant actors have to decide for themselves whether they think something is (or is not) a proper subject of a treaty. Whether human rights is (or is not) a matter of international concern depends on what you think of human rights; subjectivity cannot be ruled out of the interpretative process. Contrary to Henkin and Bradley, however, the subjective nature of the international concern test does not make it unlimited. Intersubjectivity provides a vehicle for accommodating the reality that “matters of international concern” are what we make of them, by emphasizing that the “we” not only constructs what “international” means, but also necessarily limits its meaning in the process. In cases of approval, individual views coalesce into a shared understanding, while the absence of intersubjectivity effectively limits which subjects the treaty power can regulate.

The staged nature of the treaty process reinforces the limits of intersubjectivity on U.S. treaty-making. Unless States agree collectively that a subject matter deserves a treaty, the President and the Senate have nothing to ratify, and absent ratification, the views of neither Congress nor the courts matter. As I have argued elsewhere, this process has structural implications for the distribution of the treaty power, as the executive can keep certain topics off

the table by refusing to bring them into the domestic process.<sup>231</sup> But it also reflects a limit on the treaty power generally; only where a subject matter is deemed appropriate at *both* treaty formation and ratification stages (not to mention its implementation or application) does it constitute a matter of international concern. RUDs provide a means to calibrate more precisely the lines between proper and improper subjects. But the basic message remains the same: intersubjectivity limits the subject matter of the treaty power to those subjects that relevant actors accept as international at all stages of the treaty process.

The contextual and dynamic nature of intersubjectivity provides further explanatory value in understanding the limits of U.S. treaty practice. Differentiating the international concern test for a treaty generally from its application in a specific case (e.g., *Ms. Bond*) allows us to see treaty limits in action. Moreover, the test's dynamic nature helps explain the back-and-forth acceptance or rejection of treaty subjects like human rights, private international law, and Native American relations.

Identifying this dynamic, intersubjective limit on the treaty power has at least three significant implications. First, it provides a doctrinal answer to one of the longest running questions of U.S. foreign affairs law by endorsing the view that there are subject matter limits on U.S. treaty-making even if they cannot be encapsulated in some originalist or otherwise objective laundry list. Second, an intersubjective treaty power offers an explanatory lens for understanding the history of U.S. treaty practices that others have found incoherent. Understanding that the presence or absence of shared beliefs about using the treaty vehicle dictates which treaties are made allows us to accept otherwise apparently inconsistent behavior as simply a regular feature of the process of social interaction and the search for collective meaning.

Third, an intersubjective understanding of the treaty power highlights the importance of authority in evaluating the power's exercise going forward. If intersubjectivity dictates when a matter rises to the level of international concern, the key issue becomes whose views on such limits matter. Certainly, international and constitutional treaty-making procedures establish the authority of certain actors (e.g., States, the President, the Senate). The question becomes whether or when other actors (e.g., the Court) should have authority to participate in (and thus have the ability to contest) otherwise shared beliefs. I have argued that the Court should not have such a role in issues relating to treaty formation and ratification, but I concede, as *Bond* itself illustrates, that there may be occasions involving treaty implementation or application for the Court to contribute its own views to the equation. Ultimately, whether the Court tracks this approach will itself be an intersubjec-

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231 *Hollis*, *supra* note 6, at 1390–91 (emphasizing that the executive can employ its subjective view to avoid adhering to treaty subjects it deems inappropriate, and, in doing so, preempt the ability of other government actors to second guess its views; noting that the “Supreme Court will not have an opportunity to opine on whether the [ICESCR] falls within the bounds of the treaty power because the president’s decision not to proceed with ratification preempts any role it might have”).

tive question; it will depend on what the “Court,” as represented by the shared understanding of five or more of its members, understands its role as, and the willingness of other governmental actors to respect such decisions.

Thus, intersubjectivity is a critical, if as yet unheralded, vehicle for the construction of not just the international concern test but the treaty power more generally. As such, it bears closer attention. Foreign relations scholars are traditionally comfortable wrestling with issues of text, history, and doctrine. But once we think about the treaty power in intersubjective terms, new questions arise that these methods do not answer: Why do particular actors view a matter as international (or not)? What causes actors to change their views? Under what conditions should we expect intersubjective meanings to arise or falter?

These questions lead me to two final calls—for action and method. In terms of action, we need to do more research to understand and explain intersubjective understandings and their impact on the treaty power. To do so will require foreign relations scholars to employ new methods for assessing constitutional meaning.<sup>232</sup> But we should not shy away from such efforts. Otherwise, we risk making the sorts of mistakes that led scholars to dismiss the international concern test in the first place.

Foreign relations law is not just what the Court says it is; in many contexts, it depends on and functions via the views of actors in the political branches. The views of those actors matter, not just for historical purposes or as a lever for influencing judicial doctrine, but as a means to arrive at collective understandings of what our Constitution means. By focusing on intersubjectivity and how it operates, we gain a new lens to think not just about subject matter limits on the treaty power, but also a more accurate and coherent construction of U.S. foreign relations law generally.

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232 Constructivists in international relations have employed a variety of such mechanisms to date, including discourse analysis, process tracing, etc. See Finnemore & Sikkink, *supra* note 126, at 395.