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1999

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#### Recommended Citation

Martin S. Flaherty, *Are We to be a Nation?: Federal Powers vs "States' Rights" in Foreign Affairs*, 70 U. Colo. L. Rev. 1277 (1999)

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# ARE WE TO BE A NATION? FEDERAL POWER VS. "STATES' RIGHTS" IN FOREIGN AFFAIRS

MARTIN S. FLAHERTY\*\*

## INTRODUCTION

Ten years ago the United States won the Cold War. In the words of President Bush, America had at last vanquished the "evil empire" and now could create "a new world order."<sup>1</sup> The long battle against communism did much to sustain the strong national government forged during the New Deal and the Second World War. Internationally, the expansion of federal power transformed the nation into the world's leading, and in the end only, superpower. On the domestic front, the legacy has been more mixed.<sup>2</sup> Few thoughtful observers, however, would dispute that at least one windfall of Cold War nationalism was to strengthen the federal government's hand in combating a range of regional embarrassments, not least state-sanctioned racism.<sup>3</sup>

Yet with victory comes spoils. The old habit of rallying 'round the flag has more and more given way to various retreats to isolationism.<sup>4</sup> This is no less true in constitutional

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\* Cf. RICHARD B. BERNSTEIN & KIM RICE, *ARE WE TO BE A NATION? THE MAKING OF THE CONSTITUTION* (1987).

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1. See George C. Wilson, *Operation Highlights Weaknesses of U.S. Forces*, WASH. POST, Feb. 10, 1991, at A23.

2. Cold War era attacks on civil liberties, especially by the federal government, offer the most obvious examples. See, e.g., MARK TUSHNET, *CENTRAL AMERICA AND THE LAW: THE CONSTITUTION, CIVIL LIBERTIES AND THE COURTS* 45-58 (1988) (describing assaults on constitutional liberties related to foreign affairs concerns).

3. See Derek Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-25 (1980).

4. See, e.g., Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 *FORDHAM L. REV.* 371, 385 (1997) (commenting on U.S. resistance to international human rights norms); Peter J. Spiro, *The States and International Human Rights*, 66

law. With the end of the Cold War has come a fresh interest in states' rights<sup>5</sup> that challenges not only settled understandings secured by New Dealers, but also, in many ways, commitments made by the Founders. The turn to states' rights has appeared tentatively in *United States Reports*<sup>6</sup> and more insistently in the law reviews.<sup>7</sup>

Some provocative scholars have even moved beyond domestic doctrine—the traditional forum of states' rights advocates—to expand the counterreformation to foreign affairs powers—typically the domain of nationalists.<sup>8</sup> The Supreme Court, tentatively or not, has yet to endorse this type of proposal and so curtail Washington's foreign affairs power in deference to Trenton or Montgomery. Nonetheless, states' rights advocates have already scored an important achievement. In making federalism limits on foreign affairs authority a point of discussion, the movement has, in a sense, won half the battle by sidetracking serious commentators to take the time and effort to demonstrate that the received wisdom about the primacy of federal authority is indeed wise, or to demonstrate, as Harold Koh recently put it, that “[a]s so often happens, the hornbook rule . . . makes obvious sense.”<sup>9</sup>

Yet nationalist advocates of common sense need not simply go on the defensive. Nationalists have rightly argued that the standard interpretive materials of text, structure, history, and precedent demonstrate that the states' rights assault on federal foreign affairs power is as baseless as it is retrograde.<sup>10</sup> But they have yet, for the most part, to turn the tables and show how settled understandings of federal foreign affairs authority can undermine recent states' rights assertions in domestic law.

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FORDHAM L. REV. 567, 572-78 (1997) (same); George Archibald, *Past Dues Seen Hurting U.S. Bid for Seat at U.N.; Abortion Issue Led to Veto of Measure to Pay Bill*, WASH. TIMES, Nov. 5, 1998, at A4 (reporting U.S. refusal to pay U.N. dues).

5. I employ this term more for its popular currency than for its theoretical accuracy. As Charles Black used to note in his lectures, “rights” are more appropriately attributed to individuals rather than governmental units. See CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS NAMED & UNNAMED* 41-85 (1997).

6. See *infra* notes 47-56 and accompanying text.

7. See *infra* note 26.

8. See *infra* note 147 and accompanying text.

9. Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825 (1998).

10. See *infra* Part II.B.

The possibilities are only now coming into view.<sup>11</sup> One area in which recent states' rights activism appears especially vulnerable is the doctrine that the federal government may not "commandeer" state executive officials to implement national policy, a prohibition newly minted in *New York v. United States*<sup>12</sup> and expanded in *Printz v. United States*.<sup>13</sup> These holdings deftly sought to protect state governments from federal "intrusion" on the ground that the national government lacked the power to direct state officials rather than—what would have been more difficult doctrinally—on the basis that the states' sovereignty protected them from otherwise legitimate federal assertions.<sup>14</sup> This move, however, exposes the new prohibition against commandeering to still-settled commitments to national power that run even more deeply than related skepticism about state sovereignty. In particular, the Court's rationale subjects the rule against commandeering to national foreign affairs authority classically set forth in *Missouri v. Holland*,<sup>15</sup> in which Justice Holmes declared that the federal government could take action in the name of the treaty power that it might not be able to undertake through its domestic authority.<sup>16</sup> Given that all these cases remain good law, there is nothing to prevent Congress from, for example, directing local law enforcement checks of gun purchasers pursuant to a treaty or executive agreement, even though the Court held in *Printz* that the federal government lacks exactly this power when acting under its domestic authority.<sup>17</sup>

Of course, it may be objected that evolving states' rights understandings dictate that *Holland* itself should be overruled. One scholar has suggested as much, at least in part.<sup>18</sup> Yet this is where turning the tables operates on a deeper level. The states' rights assault on foreign affairs understandings has typically sought to subject such leading cases as *Holland* to close scrutiny in order to prove that expansive views of foreign

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11. See Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENTARY 33 (1997).

12. 505 U.S. 144 (1992).

13. 521 U.S. 898 (1997).

14. See *id.*; 505 U.S. 144 (1992).

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

16. See *id.*

17. See 521 U.S. 898 (1997).

18. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 458-61 (1998).

affairs authority often rest upon a basic notion of foreign affairs "exceptionalism."<sup>19</sup> Yet once such novel holdings as *New York* and *Printz* are exposed to the same harsh light, a different picture becomes clear. The bases for the Court's recent states' rights efforts begin to appear as problematic as they are novel. By comparison, the common-sense defense of settled foreign affairs understandings looks far more sensible, not to mention more faithful to constitutional text, structure, and history. This more thoroughgoing analysis thus offers a basis to refute charges of exceptionalism. In this the following critique is part of a larger project.

Accordingly, this article considers the rule against commandeering both on the level of doctrine and interpretation. It argues that federal foreign affairs authority does and should trump the prohibition against the national government enlisting state officials. Part I reviews the Court's revival of states' rights with a special eye on *New York* and *Printz*. It first focuses on how the shortcuts these cases take around unfavorable precedents subject them to established foreign affairs jurisprudence. This part then critiques the proffered bases for the Court's states' rights stance. Part II turns to foreign affairs jurisprudence, including not just *Holland* but such complementary cases as *Reid v. Covert*.<sup>20</sup> Here the analysis first seeks to show the newfound relevance of such cases and then defend their ongoing legitimacy. The article concludes by noting that every now and again constitutional doctrine and interpretation point in the direction of the more normatively appealing of two alternatives. This is one of those instances.

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19. *See id.* at 461.

20. 354 U.S. 1 (1957).

I. THE ASSAULT ON FEDERAL POWER<sup>21</sup>A. *The "Rebirth" of Federalism*

The Supreme Court's recent turn to federalism is itself part of a larger story with more than a touch of irony. For at least the past two decades, the Court has flirted with a number of doctrines associated with the Founding, sometimes involving rights, such as takings jurisprudence;<sup>22</sup> more often involving matters of governmental structure such as separation of powers and federalism. Not for nothing did the Federalist Society<sup>23</sup>—a group ostensibly dedicated to returning to the original understanding of the Constitution—devote a recent annual meeting to the topic of "The Rebirth of the Structural Constitution."<sup>24</sup> The Court's dalliance with separation of powers has been longstanding but uneven.<sup>25</sup> By contrast, the "rebirth" of federalism has been more recent, yet steadfast.<sup>26</sup> The two lines of case law nonetheless have much in common, not least of which is a fidelity to constitutional text, structure, and original

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21. The material in this part is taken from a critique of modern federalism jurisprudence that appears in Martin S. Flaherty, "American" Federalism: A Doctrine Better Shipped Overseas?, in *THE EUROPEAN UNION AND THE UNITED STATES: CONSTITUTIONAL SYSTEMS IN EVOLUTION* (Roger Goebel ed., forthcoming 1999). For an excellent complementary critique, see Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1997). I am indebted to Professor Gerald Neuman for bringing this article to my attention.

22. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994); see also William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

23. See *Fidelity Through History: Colloquy*, 65 FORDHAM L. REV. 1693, 1697 (1997) (discussing the Federalist Society's misappropriation of James Madison as its "iconographic figure").

24. See Symposium, *Reviving the Structural Constitution: The Seventeenth Annual National Student Federalist Society Symposium on Law and Public Policy*—1998, 22 HARV. J.L. & PUB. POL'Y 1-245 (1998).

25. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1724, 1732-38 (1995) (summarizing this history).

26. See Symposium, *Federalism in the 21st Century*, 45 U. KAN. L. REV. 971-1274 (1997); see also Martin S. Flaherty, *More Apparent Than Real: The Revolutionary Commitment to Constitutional Federalism*, 45 U. KAN. L. REV. 993, 993-94 (1997).

meaning that, for a Court ostensibly committed to judicial restraint, is more apparent than real.<sup>27</sup>

### 1. The Reach of Federal Power

As to federalism, Justice O'Connor aptly observes that "[t]hese questions can be viewed in either of two ways."<sup>28</sup> Term the first approach "distributive federalism." Here the issue turns on the division of powers between the federal and state governments over public or private activity. More specifically, in these cases "the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution."<sup>29</sup> A quirky yet classically American illustration of this analysis appears in *Federal Baseball Club v. National League*.<sup>30</sup> In that case, Justice Holmes held that Congress lacked the power under the Commerce Clause to regulate major league baseball almost literally on the grounds that "[t]he business is giving exhibitions of base ball, which are purely state affairs."<sup>31</sup>

Today, of course, the result in *Federal Baseball* seems as distant as the legal spitball.<sup>32</sup> Since then, of course, the Court increasingly weighed in on the side of federal power. This trend famously accelerated during the New Deal, when holdings such as *Wickard v. Filburn*<sup>33</sup> and *United States v. Darby*<sup>34</sup> transformed the Commerce Clause into a virtual blank check

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27. See generally Flaherty, *supra* note 26. On the lack of support for the Court's separation of powers jurisprudence, especially with regard to history, see Flaherty, *supra* note 25, at 1742-44.

28. *New York v. United States*, 505 U.S. 144, 155 (1992).

29. *Id.*

30. 259 U.S. 200 (1922).

31. *Id.* at 208.

32. Except, anomalously, with regard to baseball itself. The time is long past when any serious observer would consider major league baseball to be a purely local activity beyond the power of Congress to regulate interstate commerce. The Supreme Court, however, has declined to overrule *Federal Baseball*, largely out of a concern for reliance interests. See *Flood v. Kuhn*, 407 U.S. 258, 282 (1972). Major league baseball outlawed the spitball in 1920, though it did provide a "grandfather" clause for pitchers then practicing the art. See DAVID NEMEC, *THE RULES OF BASEBALL* 44-45 (1994) (discussing Rule 3.02, which outlawed the spitball). For an original discussion of *Federal Baseball*, see G. EDWARD WHITE, *CREATING THE NATIONAL PASTIME: BASEBALL TRANSFORMS ITSELF, 1903-1953*, at 69-81 (1996).

33. 317 U.S. 111 (1942).

34. 312 U.S. 100 (1941).

for national authority, and again when later decisions such as *Perez v. United States*<sup>35</sup> and *Katzenbach v. McClung*<sup>36</sup> extended federal commerce power still further. Since the New Deal, the Court has struck down only one federal statute as exceeding that seemingly limitless power.

But there is the one. The Court recently showed its first sign of reviving distributive federalism in *United States v. Lopez*.<sup>37</sup> In that case, the Court held—by now famously as well—that a provision of the “Gun-Free School Zones Act” that prohibited possession of a firearm within 200 yards of a primary or secondary school exceeded Congress’s reach under the Commerce Clause.<sup>38</sup> Whether *Lopez* is the beginning of a reverse trend remains to be seen.

## 2. The Scope of “State Sovereignty”

The second inquiry—less important in practice but more prominent in recent case law—might best be termed “sovereignty federalism.” Here the analysis assumes that the states themselves enjoy an immunity from power that the federal government may otherwise exercise over private activity. As Justice O’Connor put it, in these cases “the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment”<sup>39</sup> or some other constitutional source. In *National League of Cities v. Usury*,<sup>40</sup> for example, the Court held that Congress could not regulate the wages and hours of municipal transit workers, even though employees of a private transportation company would have been fair game.<sup>41</sup>

The idea of sovereignty federalism took longer to fade. Not until *Garcia v. San Antonio Metropolitan Transit Authority*<sup>42</sup> did the Court announce that it was getting out of the business of shielding state governments against federal intrusion.<sup>43</sup>

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35. 402 U.S. 146 (1971).

36. 379 U.S. 294 (1964).

37. 514 U.S. 549 (1995).

38. *See id.* at 567-68.

39. *New York v. United States*, 505 U.S. 144, 155 (1992).

40. 426 U.S. 833 (1976).

41. *See id.* at 851-52.

42. 469 U.S. 528 (1985).

43. *See id.*



Overruling *National League of Cities, Garcia* left the fate of the states to the political processes in Washington, D.C.,<sup>44</sup> where they ostensibly enjoyed various built-in advantages such as equal suffrage in the Senate.<sup>45</sup> At most, the Court hinted, it might step in if Congress directly intruded on core features of self-governance.<sup>46</sup>

Yet just as sovereignty federalism was quicker to decline than distributive federalism, it has been quicker to revive. The turnabout began with the (then) little-noted *Gregory v. Ashcroft* decision.<sup>47</sup> There the Court held that Congress could not regulate “core” state functions—in this case a prohibition against age discrimination as it applied to state supreme court judges—unless it plainly (and specifically) expressed such an intent in the text of the statute.<sup>48</sup> *New York* effectively raised the sovereignty hurdle in holding that Congress could not “commandeer” states to implement federal programs no matter how plain the statutory intent.<sup>49</sup> It should come as no surprise that the Court has meanwhile reinforced the transformation of the Eleventh Amendment from a text originally understood to advance its plain meaning of limiting federal court jurisdiction into one more state sovereignty shield.<sup>50</sup>

The Court’s most far-reaching exercise in sovereignty federalism came with *Printz*. At specific issue was a provision of the Federal Gun Control Act requiring local law enforcement officers to run background checks on certain categories of gun purchasers. Though this sort of arrangement is standard practice in the European Union,<sup>51</sup> the Court rejected federal use of

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44. *See id.* at 556-57.

45. *See* U.S. CONST. art. I, § 3, cl. 1; *id.* art. V.

46. *See Garcia*, 469 U.S. at 556.

47. 501 U.S. 452 (1991).

48. *See id.* at 467.

49. *See New York*, 505 U.S. at 188.

50. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44 (1996). On the history of the Eleventh Amendment, see William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

51. In the sense of the European Union “commandeering” the executive officials of the Member States. *See* Koen Lenaerts, *Federalism: Essential Concepts in Evolution—The Case of the European Union*, 21 FORDHAM INT’L L.J. 746, 765-66 (1998).

municipal officials in the United States.<sup>52</sup> *Printz* defended this result by pushing an analytic envelope introduced in *New York*.<sup>53</sup> There, Justice O'Connor's majority opinion noted that, in certain cases, the distributive and sovereignty inquiries are "mirror images of each other."<sup>54</sup> By this, the Justice meant that the distribution of power to the federal government runs out at just the point where a sovereignty shield arises, when the authority under consideration is a congressional power to commandeer state governmental operations.<sup>55</sup> This symmetry notwithstanding, *New York* proceeded to discuss matters purely in distributive terms—that is, whether Congress has the power to commandeer.<sup>56</sup> The majority may have taken this route because there were still not enough votes to overturn *Garcia* and bring back a *National League of Cities*-style sovereignty shield directly. This astute tactical move, however, should not obscure the doctrinal effect. The *New York* approach in reality sounded in sovereignty rather than distribution for the simple reason that a "power to commandeer states"—unlike authority to regulate hours and wages—can only affect states. In this way, the analysis ultimately turned on a trait that only states can possess, an attribute that by any other name would still amount to sovereignty. Perhaps for this reason *Printz* itself spent far less time wrapping a similar sovereignty result in distributive rhetoric.

By contrast, *Printz* could not have been more straightforward about the constitutional sources it relied on for the result it reached. Justice Scalia's majority opinion followed the course of its immediate predecessors in considering the basic interpretive troika of constitutional text, structure, and history as the means to rein in judicial caprice. *Printz* further followed its siblings by making history the first among equals of the bases for resurrecting state sovereignty limits.

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52. See *Printz v. United States*, 521 U.S. 898 (1997).

53. 505 U.S. 144 (1992).

54. *Id.* at 156.

55. Again focusing on the Tenth Amendment, the Court explained, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *Id.* This analysis contrasts with the usual *Garcia* situation, in which the reach of federal authority to regulate a matter directly is conceded, but for an arguable sovereignty barrier.

56. See *id.* at 161-66.

B. “[C]onstitutional [R]eview, [N]ot [J]udicial  
[L]awmaking, [I]s a [C]ourt’s [B]usiness [H]ere.”<sup>57</sup>

The problem is that none of these sources yields the federalism answers that the Court projects onto them. To the contrary, their very thinness reveals that many of the same Justices who ordinarily rail against “government by judiciary”<sup>58</sup> concerning rights engage in just such “activism” with regard to federalism. On this score, the main failing with *Printz*’s otherwise cogent dissents is that they did not fully expose just how weak the majority’s rationale was. A critique sufficient to the task must await a more lengthy venue. The following sketch attempts a first step.

First, consider text. Not even the *Printz* majority was so bold as to rely on any specific language for its holding. Nor could it. Justice Scalia—otherwise known for his reliance on what the Constitution expressly states—admitted that “there is no constitutional text speaking to this precise question.”<sup>59</sup> Nothing approaching a prohibition against federal direction of state executive officers to implement federal law appears anywhere in the document.

To the contrary, when the Constitution does address the issue more generally, it undercuts state sovereignty in unambiguous terms. As the Supremacy Clause famously states, federal law shall be “the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>60</sup> Ignoring the thrust of this provision, the *Printz* majority somewhat half-heartedly attempted to draw the negative inference that an express statement binding state judges to federal law implicitly freed state officers from the same duty.<sup>61</sup> As textual exegesis, the attempt failed on several grounds. For one, the document’s breadth and terseness make

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57. *Washington v. Glucksberg*, 521 U.S. 702, 768 (1997) (Souter, J., concurring).

58. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (Liberty Fund 1997) (1977).

59. *Printz v. United States*, 521 U.S. 898, 905 (1997).

60. U.S. CONST. art. VI, cl. 2.

61. In fairness, the majority here places greater emphasis on drawing negative inference from early congressional practice rather than relying on textual inference pure and simple. See *Printz*, 521 U.S. at 907.

the technique misleading at least as often as not. Elsewhere, the same Supremacy Clause states that only "Laws of the United States" be made "in pursuance" of the Constitution, without mentioning any similar limitation about treaties,<sup>62</sup> yet the Supreme Court long ago properly rejected as ahistorical and absurd the idea that treaties could therefore amend the Constitution.<sup>63</sup> For another reason, the Court's dalliance with negative inference presupposed a crisp, widespread understanding of the boundaries of judicial and executive power, which simply was not the case at the time.<sup>64</sup>

Just as the majority could not resort to specific text, neither could it rely on more general language. To paraphrase Justice Scalia's observation about a woman's right to an abortion, the Constitution says "absolutely nothing"<sup>65</sup> about state sovereignty. At no point does the document employ the term. This absence is especially glaring in the Tenth Amendment,<sup>66</sup> the text most often said to mandate substantive sovereignty limitations. It may be that this Amendment, in providing that powers not delegated to the national government were reserved to the states, merely captures the same idea in language more distinctive to the time. But here consider Article II of the Articles of Confederation, that framework's first substantive provision and the Tenth Amendment's immediate precursor. Article II stated that "Each State retains its *sovereignty, freedom, and independence, and every power, jurisdiction and right*, which is not by this confederation *expressly* delegated to the United States, in Congress assembled."<sup>67</sup> Nothing pertaining to state "freedom," "independence," "jurisdiction," "right,"—or "sovereignty"—survived in the journey from the Articles to the Bill of Rights. For all that negative inference is a risky business, it would appear least dangerous when juxtaposing parallel provi-

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62. U.S. CONST. art. VI, cl. 2.

63. See *Reid v. Covert*, 354 U.S. 1, 14 (1957).

64. See *Flaherty*, *supra* note 25, at 1774-78.

65. *Planned Parenthood v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

66. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.").

67. ARTICLES OF CONFEDERATION art. II (emphasis added).

sions addressing precisely the same subject matter—especially when the contemporaries themselves made the connection.<sup>68</sup>

Bereft of text, the *Printz* majority turned “to consideration of the structure of the Constitution to see if [it could] discern among its ‘essential postulate[s]’ . . . a principle that controlled the present cases.”<sup>69</sup> *Printz* and its siblings made a great deal of the structural fact that the Constitution clearly presupposes two levels of government, federal and state. Yet *Printz* itself never delivered the structural analytic goods, except perhaps of the conclusory sort.<sup>70</sup> At no point did the majority explain why the existence of two levels of government means—or even implies—that the higher unit cannot commandeer the personnel of the subunit.

Nor could it do this any more than it could rely on specific text. To cite one obvious case, every state in the Union establishes at least a lower tier of county government, yet no one infers from this structural fact a necessary prohibition against state commandeering of local personnel.<sup>71</sup> It may be objected that this sort of example misleads, since counties, as creations of states, have no claim to any attribute of sovereignty in contrast to the states themselves. Just here, however, comparative law comes to the rescue with an even more dispositive illustration. The European Union not only may, but most often does, implement its policies precisely through the commandeering of Member State officers.<sup>72</sup> Why this bedrock practice of European law can thrive in a two-tier structure that includes truly sovereign nation-states but must be ruled out of bounds in a two-tier structure of states that are, at best, quasi-sovereign is not immediately apparent. Perhaps for this reason, *Printz* reads as if the less actually said about structure the better, and proceeds directly to the ostensible historical understanding of what the federal-state structure ostensibly implies.

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68. See, e.g., 1 ANNALS OF CONGRESS 767, 767-78 (Joseph Gales ed., 1789) (Motion of Elbridge Gerry, House of Representatives).

69. *Printz v. United States*, 521 U.S. 898, 918 (1997).

70. The same holds for the other sovereignty federalism decisions. See, e.g., *New York v. United States*, 505 U.S. 144, 157-59, 174-77 (1991); *Gregory v. Ashcroft*, 501 U.S. 452, 457-60 (1990).

71. See, e.g., MONT. CONST. art. XI (outlining powers and obligations of Montana local governments).

72. See *Lenaerts*, *supra* note 51, at 765-66.

*Printz* confirms that history has become the first refuge of the judicial activist. In recent years, appeals to the original understanding of the Founders have served as the main source for the Court's decisions dealing with such structural doctrines as separation of powers.<sup>73</sup> Comparable turns to history have been no less prominent in the Court's attempts to resuscitate federalism.<sup>74</sup> In these and other areas, the Court has had little difficulty finding that the past yields crisp and clear Founding attitudes that provide a basis for denying Congress powers it might otherwise exercise. In the area of separation of powers, these Founding principles tend to protect the President. In the area of federalism, they shield the states.

*Printz* is no exception. Absent material analysis of text and structure, history provides the only direct source of constitutional meaning that the Court—or at least the current Court—has left.<sup>75</sup> Oddly, Justice Scalia devoted the bulk of his attention in *Printz* to a discussion of early congressional practice. Only then did the majority consider, and then in a somewhat disjointed manner, what for originalists is the logically prior and more probative issue of the Founders' understanding about the matter at the time of the Framing and ratification.<sup>76</sup>

As for the evidence that constitutes original understanding, strictly speaking, the Court advanced two basic contentions, either one of which might be the subject of a lengthy monograph. More generally it argued that the Founders' presumed that the states, in establishing the federal government, conferred upon Congress certain discrete, limited powers and reserved other key aspects of their sovereignty such as the inviolability of their borders.<sup>77</sup> The Court supported this account of residual sovereignty mainly through reliance on certain constitutional provisions and its own precedents.<sup>78</sup> As for the commandeering issue itself, the majority contended that the "Framers' experience under the Articles of Confederation had

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73. See Flaherty, *supra* note 25, at 1732-44.

74. See, e.g., *New York*, 505 U.S. at 155, 157, 162-66; *Gregory*, 501 U.S. at 457-59.

75. In addition, the Court also turns to the indirect source of previous case law. See *Printz v. United States*, 521 U.S. 898, 925-31 (1997).

76. This discussion takes up the middle portion of the opinion's Part II and then the so-called structural analysis of Part III. See *id.* at 910-15, 918-25.

77. See *id.* at 918-19.

78. See *id.*

persuaded them that using the States as instruments of federal governance was both ineffectual and provocative of federal-state conflict,<sup>79</sup> at least absent state consent.<sup>80</sup> This point rested mainly on the Court's analysis of apparently contrary passages in the tried and true *Federalist Papers* as well as, once more, the Court's own previous historical forays.

The majority nonetheless clearly believed that its true historical trump emerged from the Republic's early practice *after* the Constitution was ratified. "If," the opinion asserted, "earlier Congresses avoided the use of this highly attractive power, we would have reason to believe that the power was thought not to exist."<sup>81</sup> By the end of this discussion, what began as a potential "reason to believe" transmogrified into a dispositive rationale whereby congressional failure to commandeer state officers became a bar to exercising the option at any point under any circumstances. As the majority seemed to concede, such conclusive reliance on negative inference makes sense only if, first, Congress never actually employed the power at issue; and second, if the historical context demonstrates that this same power was so "highly attractive"<sup>82</sup> that no explanation other than a consensus that the Constitution prohibited its use appears plausible. The Court took up the first challenge, arguing that the numerous early federal statutes that direct state officials to implement national policy "establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges*"<sup>83</sup> rather than executive officers. So far as context goes, Justice Scalia relied mainly on the assertion that the power to commandeer was "highly attractive"—this despite his later point that exactly this device had proven "ineffective and provocative of federal-state conflict."<sup>84</sup>

Providing an adequate critique of even an inadequate historical account presents the same challenge as coming up with an adequate historical account in the first place. Either project will usually require more time and space than the deficient ap-

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79. *Id.* at 919.

80. *See id.* at 909-11.

81. *Id.* at 905.

82. *Id.*

83. *Id.* at 907.

84. *Id.* at 919.

peal to the past under consideration.<sup>85</sup> The best that can be offered here is an overview that may serve as a guide for a more detailed assessment down the line. As it happens, the *Printz* majority's history is so wanting that even a short prolegomenon should demonstrate that as often as not, the Court selects the helpful portions of the record and ignores the rest, projects the desired modern ideology onto the sources, or simply makes things up.

Contrary to originalism's first article of faith, the history of the Founding tends to leave open as many questions as it settles. Nowhere may this be more true than concerning original meanings of the federal structure. As I have attempted to show elsewhere, the Founding generation may have agreed on few specifics regarding such other structural mechanisms as separation of powers, but at least it shared a basic commitment to that doctrine's principal goals.<sup>86</sup> Not even this degree of agreement characterizes federalism. Instead, the Founders' views on the subject ranged from the arch-nationalism of Alexander Hamilton to the localism of Antifederalists such as Patrick Henry, with James Madison in between—far closer to Hamilton at this stage in his career—but not exactly in the middle.<sup>87</sup> The noted historian Jack Rakove has described the resulting understandings: "Within the language of the Constitution, as it turned out, there was indeterminacy enough to confirm that both Federalists and Antifederalists were right in predicting how tempered or potent a government that Convention had proposed."<sup>88</sup> That said, the Constitution's leading supporters generally began with a premise of shared "misgivings about the capacities of state government,"<sup>89</sup> misgivings that they, at best, grudgingly accommodated.

Yet true to most originalists—or at least those whom James Fleming has usefully termed "narrow originalists"<sup>90</sup>—

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85. See Martin S. Flaherty, *History "Lite" and Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 555-56 (1995).

86. See Flaherty, *supra* note 25, at 1755-810.

87. For a recent authoritative overview, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 161-202 (1996).

88. *Id.* at 201.

89. *Id.* at 162.

90. James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1337 (1997); see also James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 5 (1995).



Justice Scalia appears to assume that just about everyone in the Founding generation, but for a few renegades, agreed on key points. The *Printz* opinion, for example, boldly asserted that on the subject of federal commandeering of state officers, "it was Madison's—not Hamilton's—[view] that prevailed . . . at the Constitutional Convention and in popular sentiment," offering neither specific support nor any criteria for what would count as prevailing in popular sentiment.<sup>91</sup> Especially with regard to federalism, such bald statements at worst point in the wrong direction and at best are woefully simplistic.<sup>92</sup>

Even on these terms, the *Printz* Court's originalism tended toward the worst. Recall the majority's preliminary presumption that the states established a federal government of carefully circumscribed powers, a trope that underlies other areas of recent jurisprudence as well.<sup>93</sup> However carefully or not these powers were circumscribed, virtually no serious historian would today argue that the Founders stood united on the belief that the states as sovereign entities created the government of the United States. To the contrary, modern scholarship on the period emphasizes the mistrust of the state governments that led the Federalists to bypass them through the ratification conventions, to say nothing of proposing the new federal Con-

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91. *Printz v. United States*, 521 U.S. 898, 915 n.9 (1997). Justice Scalia's reliance on Clinton Rossiter and Farrand's *Records of the Federal Convention* at best supports the commonly known proposition that Hamilton was comparatively far more nationalistic than most of the other Founders, *not* that his views on the commandeering of state executive officials failed to "prevail." See CLINTON ROSSITER, *ALEXANDER HAMILTON AND THE CONSTITUTION* 44-47, 194, 196 (1964); 1 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 366 (Max Farrand ed., 1911).

92. The majority's reductionism amidst the Founding's complexity enables it to ignore the very real question of who in the past should count when there exist many contradictory voices. One option would look to a simple majority (or supermajority?) understanding of the American populace when a relevant text was ratified. Another possibility would be to rely on the evidently more deliberative analyses of the Madisons, Wilsons, and Hamiltons (not to mention Bingham and Roosevelt). Still another tack might look to the general direction given constitutional solutions suggest, along with any limiting principles, in light of the types of problems which a given provision or doctrine addressed as well as its internal logic. This greatly undertheorized area takes on greater importance in matters such as this in which the Founding generation was almost literally all over the chart. Perhaps needless to say, the majority nowhere considers either this problem or the possibilities. For a thoughtful discussion on different historical viewpoints and sources, see RAKOVE, *supra* note 87, at 3-22.

93. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

stitution in the first place.<sup>94</sup> Typical is Gordon Wood's observation that: "Only by shifting the arena of reform to the federal level, it seemed, could the evils of American politics be finally remedied."<sup>95</sup> In contrast to his modern counterparts, an earlier Justice anticipated this interpretation, perhaps because he lived through the process. "The government proceeds directly from the people; is 'ordained and established' in the name of the people," wrote Chief Justice John Marshall, which, his reliance on the Preamble makes clear, means "the people" of the United States.<sup>96</sup> As he famously continued:

The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The [C]onstitution, when thus adopted, was of complete obligation, and bound the State sovereignties. . . . The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. . . . The government of the Union, then . . . is, emphatically, and truly, a government of the people.<sup>97</sup>

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94. See, e.g., FORREST McDONALD, *NOVUS ORDO SECLORUM* 142-83 (1987); EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 267-77 (1988); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 463-67, 519-36 (1969). These and other historians, moreover, tend to assume that the Founders took the Preamble at face value and assumed that the ratification conventions spoke cumulatively in the name of "We the People of the United States," not of the several states. For an alternative view on this point, see Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996).

95. WOOD, *supra* note 94, at 463.

96. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819).

97. *Id.* at 404-05. Coming from the opposite, Antifederalist end of the political spectrum, Patrick Henry earlier made the same point more succinctly, asking: "[W]hat right had [the Framers of the Constitution] to say, *We, the People*. . . . [W]ho authorised them to speak the language of *We, the People*, instead of *We, the States*?" Patrick Henry, *Patrick Henry's Opening Speech: A Wrong Step Now and the Republic Will Be Lost Forever*, reprinted in 2 *THE DEBATE ON THE CONSTITUTION* 595, 596 (Bernard Bailyn ed., 1993).

Marshall's is not the only plausible account, then<sup>98</sup> or now.<sup>99</sup> As a significant, if not dominant, contemporary understanding, the *Printz* Court ignored it at the risk of appearing ignorant at best, result-oriented at worst.

The majority fared only slightly better with its other originalist point about the perceived liabilities of federal commandeering. As noted, *Printz* contended that the Founders' experience under the Articles convinced them that using state officers to implement federal policy was not only ineffective, but provoked federal-state conflict as well. This supposition does not necessarily conflict with the Federalist mistrust of state government that is the cornerstone of recent scholarship. But it is a large additional step to conclude that the Federalists, or Founders generally, would forego the option altogether.

Not surprisingly, Justice Scalia offered no direct evidence of an understanding that the Constitution somehow made federal authority over the states the price to be paid for federal authority over individuals.<sup>100</sup> The closest he came was an ear-

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98. Madison suggested that:

[I]t appears on the one hand that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation; but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves. The act therefore establishing the Constitution will not be a *national* but a *federal* act.

THE FEDERALIST NO. 39, at 253-54 (James Madison) (Jacob E. Cooke ed., 1961). Madison's exact views on federalism, at least in *Federalist No. 39*, were so complex as to be obscure. See RAKOVE, *supra* note 87, at 162. Note further that even here Madison was careful to distinguish between the states as embodied by special conventions of the people, as creators of the Constitution, from the states as represented by ordinary state government. See *id.* at 244 (elaborating this point). This matters for the reason that the Founders, dissatisfied with the existing state governments, resorted to such conventions in the first place—such special bodies were more likely to accord power to the federal government than were the state legislatures. In failing to make this distinction, the *Printz* Court's repetition of the "We the States" theory implies a far more state-oriented result.

99. See Monaghan, *supra* note 94.

100. The majority offers no evidence, that is, apart from two out-of-context quotations, including one from the same Alexander Hamilton whom the opinion asserts did not prevail on this issue. See *Printz v. United States*, 521 U.S. 898, 919-20 (1997) (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 91, at 9); THE FEDERALIST NO. 15, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

lier discussion of several passages from the *Federalist Papers* that expressly state that the federal government *will* be able to make use of state officers for various purposes.<sup>101</sup> Justice Scalia got around these embarrassing statements with the novel contention that none of them necessarily implies “that Congress could impose these responsibilities *without the consent of the States*.”<sup>102</sup> This “implied consent” proviso, which supposedly clarifies the passage, apparently rests on the assumption that the Founders rejected federal commandeering, which is the very point that the passages are employed to demonstrate in the first place. Perhaps a better way to avoid such circularity would be to rely on a contextual point that is clearly demonstrable, namely, the Federalists’ contempt for the recent record of the state legislatures. In *this* light, it makes far more sense to read the *Federalist Papers* as meaning what they say, and so leaving the possibility of using state officers in certain instances to the better-framed federal government.

Specific evidence, moreover, corroborates the point. Patrick Henry, for example, inveighed against the specter of state agents collecting state *and* federal taxes.<sup>103</sup> Henry’s remarks clearly assume that the federal government would have the power to commandeer state officials in that most inflammatory of executive functions. Given his horror at the prospect, not even Justice Scalia would be able to project an “implied consent” proviso here. This is not to say that this passage proves that the Founders all shared Henry’s view. Comments directly on point are simply too few and far between. And even more than most Antifederalists, Henry tended to puff up federal powers, the better to stoke opposition to the proposed Constitution. That said, Henry’s assumption—which all of the Justices somehow missed—does square with what we know of the Founding’s context, comports with the more natural reading of the contested passages of *The Federalist*, and at the very least

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101. See *Printz*, 521 U.S. at 911.

102. *Id.* at 910-11.

103. See Patrick Henry, *Patrick Henry Replies to Governor Randolph*, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 97, at 635. Earlier in the same speech, Henry considered the possibility of two sets of tax collectors, Federal and state, to rail against the potential expense: “Double sets of collectors will double the expense.” *Id.* at 633. Henry, however, also took at face value the contention, which he attributed to the Federalists, that “one collector may collect the Federal and State taxes,” and assumed that such a person would be the local “Sheriff.” *Id.* at 635.

challenges the Court's implication of a Founding consensus on the power at issue.

Similar problems plague treatment of early practice. Recall here that the *Printz* majority relied on the negative inference that failure to use such a highly attractive mechanism means repudiation. Like all negative inferences, it is another leap to argue that failure to utilize a power means affirmative repudiation of it. Yet ignore this and for the moment concede that no such statutes were enacted, other than those pertaining to the judiciary. That still leaves the contextual problem of showing that commandeering was so "highly attractive."<sup>104</sup> Here again, the *Printz* Court supplied no evidence for this contention—and here again ignored the demonstrated contextual point of abhorrence of the states. It is on such shaky foundations that the Court's recent and innovative attempts to construct sovereignty federalism barriers proceed.

## II. THE PERSISTENCE OF FOREIGN AFFAIRS POWER

### A. *Foundations of Foreign Affairs*

However dubious the state sovereignty crusade may be domestically, doubly radical are attempts to extend it to foreign affairs. Here such attempts proceed despite case law that is not only well settled, but which has yet to be questioned even by the present activist Court. They go forward, moreover, even though the federal primacy that the settled case law establishes—if not always the reasoning of such case law—passes interpretive muster far more convincingly than the domestic sovereignty innovations on which they rely. So radical is the campaign that it even means to outdo previous eras when states' rights notions truly ruled by rolling back federal foreign affairs authority that flourished at the time and that the Court recognized as a corrective to overly expansive states' rights doctrine in the first place.

In this light, at least the "commandeering" component of the state sovereignty project falls victim to its own cleverness. As with domestic authority, foreign affairs law draws a basic distinction between the reach of federal power and limits on power already determined. The outcome on either side of this

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

distinction, however, is comparatively more nationalist. As for power, what the established case law establishes is that the reach of federal power in foreign affairs extends beyond what it may be domestically. Conversely, what limits have been recognized turn on the rights of individuals, not the sovereignty of state governments, an aspect of foreign affairs doctrine conspicuous by its absence. Since *New York* and its progeny are couched in terms of federal power, or lack of it, they invite analysis of whether the federal government can commandeer state officers in the name of its more extensive authority in foreign affairs. If, despite the Court's own rhetoric, commandeering doctrine is treated as a sovereignty barrier, it at best remains debatable whether limits that pertain to the nation's internal affairs apply to its external concerns.

### 1. The (Further) Reach of Federal Power

The foreign affairs counterpart to *Federal Baseball* is *Holland*. Both decisions appeared shortly after the First World War, a period well before federalism "began to be a wasting force in U.S. life generally."<sup>105</sup> Both cases feature a majority opinion of the Court by Holmes that was typically terse and grandiloquent. Most importantly, *Holland*, like the baseball case, sounds primarily in distributive federalism.

Here the similarities end. As noted, *Federal Baseball* illustrates the restrictive view that any number of cases accorded grants of federal power in domestic affairs prior to the New Deal. The Holmes of *Holland* famously offered a very different perspective on federal authority in foreign affairs. The well-known facts of the case could scarcely furnish a sharper contrast. On the domestic front, two lower federal courts invalidated a 1913 federal act regulating the hunting of migratory birds<sup>106</sup> on the grounds "that Congress had no power to displace" state authority in this area.<sup>107</sup> As an end run around this problem, the federal government concluded a treaty with the United Kingdom under which the United States and Can-

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105. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 149 (2d ed. 1996).

106. See *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915); *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914).

107. *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

ada would enact statutes regulating the hunting of migratory birds.<sup>108</sup> The state of Missouri challenged the resulting federal statute and regulations, claiming

that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do.<sup>109</sup>

This argument Holmes rejected in certain terms. Noting first that “[w]e do not mean to imply that there are no qualifications to the treaty-making power,” Holmes nonetheless proclaimed that any qualifications “must be ascertained in a different way” from determining the reach of federal authority under the Constitution’s grants of power in domestic matters.<sup>110</sup> Both the opinion and judgment make clear that this “different way” is self-evidently more expansive. “It is obvious,” Holmes continued, “that there are many matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could.”<sup>111</sup> It was no less obvious that regulating birds was just such an exigent matter. In this way the Treaty Clause readily supplied what the interstate Commerce Clause could not.<sup>112</sup>

How far this enhanced power extends is another matter. But far. Or—what is more relevant here—*further* than it does in the domestic arena. For all the statutes it has invalidated for exceeding federal authority, the Supreme Court has never meted out the same fate to a treaty. *Holland*, in subsequently repudiated dicta, goes so far as to hint that treaties need only comport with the Constitution’s procedural rather than substantive requirements.<sup>113</sup> Elsewhere, Holmes did suggest that otherwise valid treaties may run afoul of the Constitution’s express and presumably substantive provisions.<sup>114</sup> Conceivably these might even include such states’ rights protections as the

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108. *See id.* at 431.

109. *Id.* at 432.

110. *Id.* at 433.

111. *Id.*

112. *See id.* at 435.

113. *See id.* at 433-34.

114. *See id.*

Guarantee Clause. Yet, clearly, one type of limiting analysis that deserves continuing interment is the notion that treaties must deal only with matters of "international," that is external, concern. Several factors prevent this idea from graduating into a doctrine. In the first instance, the Supreme Court has never adopted it. Nor could it without undoing innumerable treaties that commonly deal with "internal" affairs. No less important, just as the application of "interstate commerce" has expanded in the last fifty years, so too has the scope of international law, in no area more dramatically than international human rights.<sup>115</sup> Even if, finally, the Court nonetheless applied the "international concern" suggestion, *Holland* would still require that any such limits be more distant than parallel limitations on domestic powers. That means, among other things, that whatever *Lopez* signifies for the interstate Commerce Clause, any analogous restriction of the treaty power would have to be correspondingly weaker.

Not that there is any such *Lopez* analog on the horizon. Since (and even before) *Holland*, the Court has not offered any hint that it would invalidate a treaty—or indeed international agreements generally—for reaching matters not within the treaty power. Professor Peter Spiro rightly points out that the Senate has in effect restricted the reach of this power through its questionable practice of making reservations to treaties, especially human rights treaties, the better to safeguard national and state authority over certain traditionally "internal" affairs.<sup>116</sup> The Senate's ongoing perception that it needs to make such reservations merely serves to underscore the general understanding that without them, the Supreme Court would do nothing to stand in the way.

## 2. W(h)ither Sovereignty?

No more on the foreign affairs horizon are there—or should there be<sup>117</sup>—the judicially enforceable barriers of sovereignty federalism. This gap comports with more nationalist orientation of foreign affairs law generally, the treaty power in particular. Just as that power expands federal authority that

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115. For a trenchant discussion, see HENKIN, *supra* note 105, at 196-98.

116. See Spiro, *supra* note 4, at 572-78.

117. See *infra* Part II.B.



otherwise might not exist, sovereignty hurdles that enjoy at least a tenuous existence on the national side remain unknown on the international front. Not even a diluted analog to cases such as *National League of Cities*, which directly created such hurdles, or *Printz*, which accomplished the same task more slyly, exists. What "sovereignty" barriers the Supreme Court has recognized deal with the sovereignty of individuals rather than political subunits.

At least in the context of international agreements, that recognition came in modern form with *Reid v. Covert*.<sup>118</sup> In this sense, *Reid* was the foreign affairs counterpart to countless cases upholding rights against domestic powers. In contrast to those cases, the issue of individual rights limitations on foreign affairs powers merits mention at all mainly because it illustrates just how extensive colorable—if erroneous—claims for such powers may be. *Reid* resolved the issue in favor of rights. At least five Justices agreed that neither international agreements nor measures implementing them could trump the Constitution's rights-bearing provisions.<sup>119</sup> This conclusion meant specifically that court-martial jurisdiction over civilians pursuant to an executive agreement with the United Kingdom nonetheless violated Article III, Section 2, as well as the Fifth and Sixth Amendments. More generally, the decision has helped lay to rest expansive foreign affairs claims based on misreading of the Treaty Clause<sup>120</sup> or on notions of inherent national sovereignty.<sup>121</sup>

No parallel authority supports states' rights, at least as embodied in nontextual or general notions of federalism. To the contrary, dicta in *Reid* repudiates the idea. Justice Black's plurality opinion expressly reaffirmed *Holland*, stating:

There is nothing in *State of Missouri v. Holland* which is contrary to the position taken here. There the Court carefully noted that the treaty involved was not inconsistent with any specific provision of the Constitution. The Court was concerned with the Tenth Amendment which reserves

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118. 354 U.S. 1 (1957).

119. A plurality consisting of Chief Justice Warren and Justices Black, Douglas, and Brennan recognized this point expressly. *See id.* at 15-19. Justice Frankfurter assumed it in a concurrence. *See id.* at 41 (Frankfurter, J., concurring).

120. *See infra* notes 127-28 and accompanying text.

121. *See infra* notes 130-34 and accompanying text.

to the States or the people all power not delegated to the National Government. To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.<sup>122</sup>

Justice Black did not fudge. *Holland* clearly stated that “[t]he treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.”<sup>123</sup> Ironically, Holmes dismissed the idea of invisible radiations protecting states in much the same way that many advocates of state sovereignty scoff at the idea of “penumbras” and “emanations”<sup>124</sup> safeguarding individuals. Instead, he wrote:

If we are to be accurate we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by the officers of the United States within the same territory, and that but for the treaty the State would be free to regulate the subject itself.<sup>125</sup>

In this “accurate,” radiation-free light, the Court had no difficulty concluding that “[n]o doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.”<sup>126</sup>

Nor has the Court suggested any retreat from its central analysis about the longer reach of the treaty power and foreign affairs authority more generally. Then again, a majority could theoretically determine that principles of distributive federalism carve out exceptions to national power in international matters, much as the *Printz* majority did with regard to commandeering domestically. Precedent aside, nothing stops the Court from handing down an analog to *Printz* in foreign affairs.

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122. *Reid*, 354 U.S. at 18.

123. *Missouri v. Holland*, 252 U.S. 416, 433-34 (1920).

124. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

125. *Holland*, 252 U.S. at 434. Apart from Tenth Amendment radiations, the Court also dismissed the assertion that Missouri had an exclusive title to migratory birds within its borders. *See id.*

126. *Bradley*, *supra* note 18, at 461.

Nothing, that is, other than sound application of the standard interpretive techniques questionably employed in *Printz* itself.

*B. Unexceptionable Exceptionalism*

*Holland* may yet be good law, but it may also be no better than *Printz*. Holmes did not waste much time defending the treaty power with close analysis of text, structure, or history, a tack that at least on the surface seems even more imperious than making the attempt poorly. He believed he could do this, in part, by relying on the notion that foreign affairs powers derived not so much from ordinary constitutional interpretation as from the exceptional requirements of national sovereignty.<sup>127</sup> Scholars have rightly called such a rationale into question, few more effectively than Professor Curtis Bradley.<sup>128</sup> Given such a basis, it might well follow that the commandeering exemption in *Printz*—whatever its own problems—should modify the foreign affairs power of *Holland* rather than the other way around, if for no other reason than the more recent decision should prevail.

Such a conclusion, however, would be a *non sequitur*. Neither Holmes's Delphic performance, nor his reliance on "foreign affairs exceptionalism," means that the principle *Holland* enunciated cannot be justified. Standard interpretive techniques instead furnish ample material for a "revised opinion."<sup>129</sup> As has been seen, the same cannot be said for the doctrine against commandeering or the recent nascence of states' rights more generally. What followed as a matter of doctrine, therefore, also follows as a matter of interpretation. So long as the current Court creates sovereignty limitations in the language of absent federal powers, those limitations cannot constrict enhanced federal authority in foreign affairs.

The Holmes opinion nonetheless merits consideration, and not just because it is by Holmes. Rather, it illustrates a type of justification for expansive foreign affairs authority that previous generations have too often advanced and that critics rightly question. Recall that, for Holmes, *Holland's* central claim was

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127. See *id.* at 460.

128. See *id.* at 434-35, 440-41, 459-61.

129. Cf. Louis Henkin, *Shelly v. Kraemer: Notes for a Revised Opinion*, 100 U. PA. L. REV. 473 (1963).

that limitations on the treaty-making power "must be ascertained in a different way" from limitations on the power to enact domestic statutes.<sup>130</sup> The answer lay in national sovereignty:

It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found.<sup>131</sup>

The opinion underscored this rationale when applying it to the case at hand. In tones more reminiscent of Cassandra than Olympos, Holmes wrote that with regard to migratory birds,

a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. . . . We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed.<sup>132</sup>

Holmes did suggest that even national exigency was not plenary, noting that the Court "[did] not mean to imply that there are no qualifications to the treaty-making power."<sup>133</sup> It remains, however, that the opinion made no attempt to defend enhanced treaty-making authority on the ground of textual command, structural implication (besides, perhaps, the brute fact that the United States is a sovereign country), or historical understanding.

Certainly Holmes made no attempt to justify his justification on any of these grounds. That is, the *Holland* Court at no point sought to argue that its conception of an exceptional power inherent in national sovereignty—the rationale for a comparatively expansive reading of the treaty power—was it-

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

131. *Id.* (citing *Andrews v. Andrews*, 188 U.S. 14, 33 (1903)).

132. *Id.* at 435.

133. *Id.* at 433; see also Forrest Revere Black, *Missouri v. Holland—A Judicial Milepost on the Road to Absolutism*, 25 ILL. L. REV. 911, 914-16 (1931); Thomas Reed Powell, *Constitutional Law, 1919-20*, 19 MICH. L. REV. 1, 13 (1920).

self a function of constitutional text, structure, or history. A full critique of this failure is best left for other venues. Suffice it to say that the doctrine must be conclusory to the extent that it validates itself without reliance on other constitutional materials. Likewise, the doctrine is unsupported to the extent those materials are examined, as witness the near-laughable attempts to discover some interpretive basis for the doctrine by Justice Van Devanter in *United States v. Curtiss-Wright Export Corp.*<sup>134</sup>

On this much, both modern nationalists and states' rights advocates can and should agree. Yet, perhaps ironically, nationalists have additional reasons for caution. One is that a noninterpretivist doctrine such as exigent national sovereignty authority almost necessarily cashes out in a highly restrictive fashion. Return to Holmes. As if acknowledging the doctrine's shaky basis, the *Holland* opinion repeatedly states that enhanced treaty-making authority should be implied only in the rarest of occasions. It arises, suggested the Court, "where the States are individually incompetent to act,"<sup>135</sup> or "when a national interest of very nearly the first magnitude is involved."<sup>136</sup> Even in our more environmentally aware times, the Court's effort to equate the fate of migratory birds with the fate of the Republic seems a jarring attempt to puff up the facts to accord with the test. This in turn leaves those remaining to make sense of the case question whether the precedent lies in the standard as articulated or as applied.

Yet the greater problem, at least from a nationalist viewpoint, is that *Holland's* problematic rationale undermines its sound conclusion. It implies that the exigencies of national sovereignty must support enhanced foreign affairs authority if only because little else can. But in truth—and in contrast to the states' rights revival—straightforward interpretive methods do furnish a compelling alternative basis. This point doubly applies given the appropriate constitutional burden of

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134. 299 U.S. 304 (1936); see also THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 14-18 (1992); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 94 (1990); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973).

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

136. *Id.* at 435.

proof. As critics of judicial activism never cease to preach,<sup>137</sup> the Court presumes that the President and Congress act constitutionally unless demonstrated otherwise.<sup>138</sup> This tenet may or may not be honored in the breach when considering “prohibitory words.”<sup>139</sup> Even today, however, it still largely holds when the Court considers whether the President or Congress has exceeded its authority.<sup>140</sup>

Return, then, to the text. First of all, there is some. In contrast to states’ rights theories, expansive federal authority with regard to treaty-making and corollary powers rests on provisions that are express and on point. On one hand, those clauses granting authority in this area are, on their face, as broad or broader as any other such provisions in the document. The Treaty Clause itself simply states that the President “shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties.”<sup>141</sup> In fact the Supremacy Clause famously—if misleadingly—implies that treaties may not need to be made “in pursuance” of the Constitution at all.<sup>142</sup> Like-

137. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 1-11, 143-60 (1990) (advocating judicial restraint based upon original understanding).

138. See, e.g., *Bush v. Vera*, 517 U.S. 952, 991 (1996) (statutes presumed constitutional); *United States v. Carolene Products*, 304 U.S. 144, 152 (1938) (same); *Fairbank v. United States*, 181 U.S. 283, 285 (1901) (same).

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

140. The fact remains that since the New Deal the Court has very rarely invalidated statutes for exceeding constitutionally granted powers. Recently, of course, there have been a few, and just a few, much heralded examples to the contrary. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act was beyond Congress’s powers); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating aspects of the Gun-Free School Zones Act). Whatever excitement these decisions may have generated in academic and in certain political circles, the Court’s fundamental stance of deference has yet to change.

141. “[P]rovided two thirds of the Senators present concur.” U.S. CONST. art. II, § 2, cl. 2.

142. See U.S. CONST. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.* The argument proceeded from the negative inference that the text implied that treaties need not be made “in Pursuance” of the Constitution since that requirement expressly applied only to “the Laws of the United States.” See HENKIN, *supra* note 105, at 185.

wise, Congress may make "all Laws which shall be necessary and proper for carrying into Execution" this power insofar as it is "vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."<sup>143</sup>

Much has been written on limitations implied in either the Treaty Clause or simply in the term "treaty."<sup>144</sup> A number of limitations are widely accepted yet effectively trivial. No one questions that the power applies to treaties as defined in international law. Few would dispute that requirement, early on articulated by Thomas Jefferson, that treaties not be pretextual but instead concern the nations that are part of a given agreement. Of more relevance is the proposed limitation that treaties relate to "international" matters rather than domestic concerns. Whatever else can be said for this requirement, it can be found nowhere in the Constitution's text. Even if it could, the requirement would offer little comfort for the cause of states' rights. While treaties have dealt with domestic matters for as long as the Republic has existed, never have they done so more extensively than since the development of international human rights law after the Second World War. It may be objected that such a change in degree—like the emergence of a national industrial economy—could not have been foreseen at the time the text was written and ratified. Barring a theory that would also require the Court to return the nation to pre-Depression Commerce Clause jurisprudence, limitations to the treaty-making power cannot be implied on the ground that the legitimate scope of treaties has evolved along with much else.

Conversely, when the text does refer to the states in this area, it proclaims the exclusivity of federal power in no uncertain terms. The first prohibition on state power that the Constitution specifies declares that "[n]o State shall enter into any Treaty, Alliance, or Confederation,"<sup>145</sup> allowing only that a state may enter an "Agreement or Compact" with a foreign power subject to congressional approval.<sup>146</sup>

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143. U.S. CONST. art. I, § 8, cl. 18.

144. For an overview, see HENKIN, *supra* note 105, at 185-98.

145. U.S. CONST. art. I, § 10, cl. 1.

146. *See id.* cl. 3.

A number of scholars have observed that a power does not become limitless merely by virtue of being exclusive.<sup>147</sup> This observation is correct as far as it goes, though an outright prohibition on state authority does suggest that few limits on the exclusive power will sound in states' rights. More importantly, the observation misses a central point. *Holland* stands for the proposition that federal treaty-making authority may be more extensive than domestic powers, even under such ample grants of power as the Commerce Clause. The exclusive grant of treaty-making authority does nothing to undermine this contention when contrasted with domestic grants, which, even with regard to commerce power, allow for the national and state governments to exercise significant concurrent power.<sup>148</sup> Commandeering doctrine, moreover, is especially vulnerable to this analysis since it is couched as an absence of a grant of power rather than as a limit on power that might otherwise be exercised. The more emphatic the express grant of power, the more difficult it becomes to imply significant exceptions to that grant.

Structural considerations lend *Holland* further support. As with federalism, constitutional design provides limited guidance when compared to other sources. In contrast to federalism, however, the guidance that structure offers is significant. There, the existence of a two-tiered form of government may indicate that the lower level cannot be destroyed or fundamentally altered, but it suggests nothing about whether the upper level can utilize officers to implement its policies.<sup>149</sup> Here, built-in advantages that the states enjoy in federal decision making necessarily weaken arguments for other types of limits on national authority and nowhere do so more clearly than with regard to formal treaty making.

The states' built-in advantages have long been celebrated under the banner of political process protections. According to such eminent scholars as Herbert Wechsler<sup>150</sup> and Jesse Cho-

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147. See Bradley, *supra* note 18, at 436; William E. Mikell, *The Extent of the Treaty-Making Power of the President and Senate of the United States (Pt. II)*, 57 U. PA. L. REV. 528, 539-40 (1909).

148. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978) (setting forth the modern "dormant" Commerce Clause test for permissible state regulation having interstate economic effects).

149. See *supra* notes 71-72 and accompanying text.

150. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role*



per,<sup>151</sup> the Constitution principally safeguards state interests not through judicially enforceable sovereignty federalism barriers, but through various mechanisms that give states a disproportionate voice in framing federal policy. The devices most frequently mentioned included initial state authority over federal election districts, the Electoral College, and, most of all, equal state suffrage in the Senate. This analysis famously afforded the Supreme Court its main rationale for rejecting sovereignty federalism limits in *Garcia*.<sup>152</sup>

*Garcia* notwithstanding, the celebration of political process safeguards may well have been too boistrous. As Larry Kramer has pointed out, some mechanisms—such as state control of federal elections—have greatly diminished over time while the effectiveness of others—such as the Electoral College—were always overstated.<sup>153</sup> *Garcia* therefore remains correct not so much because structural considerations obviate sovereignty barriers as because those barriers themselves lack constitutional foundation. It follows that structure provides a similarly limited justification for expansive federal authority in foreign affairs to the extent that Washington makes policy through congressional-executive agreements or by legislation implementing treaties when considered on its own footing. This is not, however, to say that no justification exists. Equal Senate suffrage, one of the Constitution's more undemocratic features,<sup>154</sup> remains to give the states an unfair advantage even here.

With treaties, however, the structural justification appears with special force. Article II's supermajority requirement means that one-third of the Senators plus one wields an effective veto on all formal treaties. The exclusivity of Senate advice and consent further means that only the branch that is malapportioned out of deference to state borders participates in

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*of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

151. See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

152. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 & n.11 (1985).

153. See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1508-10 (1994).

154. See Suzanna Sherry, *Our Unconstitutional Senate*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 95 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

the process, to the exclusion of the proportionally democratic House.<sup>155</sup> *Holland*—especially when narrowly read to apply to federal treaty-making authority rather than foreign affairs generally—thus makes sound structural sense. Whatever fears states may have about ordinary legislative practices necessarily diminish given the advantage they enjoy in Senate approval of treaties. In this way, allowing for a comparatively more expansive reading of treaty-making authority beyond domestic authority directly follows the logic of constitutional design.

So too does it follow history—or at least so it appears pending a full length scholarly inquiry. The qualification is important. As noted, a credible historical account should comport with at least the most basic standards that historians themselves pursue if the claim is to possess the external authority for which it is invoked in the first place.<sup>156</sup> Apart from not simply making things up, these standards at a minimum mean avoiding the usual lawyerly practice of rushing straight to various primary documents for supporting quotations with little sense of the circumstances in which they were first uttered.<sup>157</sup> By contrast, a plausible account should seek to

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155. This feature in part accounts for the practice of submitting human rights agreements as formal treaties rather than as executive agreements. See Spiro, *supra* note 4, at 572-78.

156. See *supra* note 85 and accompanying text; see also Flaherty, *supra* note 85, at 551-52.

157. An example directly relevant to the treaty debate is Thomas Jefferson's *Manual on Parliamentary Practice*, which he compiled while Vice President and where he advances various limitations on the treaty power, including constraints sounding in power reserved to the states. See THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE, reprinted in JEFFERSON'S PARLIAMENTARY WRITINGS 420 (Wilbur S. Howell ed., 1988). This document has received close scrutiny from both nationalists, see HENKIN, *supra* note 105, at 189, as well as those more sympathetic to federalism claims. See Bradley, *supra* note 18, at 415-16.

As almost any historian of the Founding would point out, the *Manual*—like Jefferson's letter to the Danbury Baptists, see *Everson v. Board of Educ.*, 330 U.S. 1 (1947)—is a highly problematic source for insight on the Founding. For starters, it was written over a decade after the Constitution's ratification. The passage of time matters first because inferring attitudes backward over 10 years simply assumes ideas remain static. This point applies with special rigor to the late eighteenth century, a period in which American constitutional understandings changed at a rate almost unparalleled before or since. See Flaherty, *supra* note 25, at 1774-75. Moreover, Jefferson himself is among the most problematic of Founders. Not only was he out of the country during the Federal Convention and ratification debates, he was among the leading supporters of the Constitution with perhaps the least sympathy for the Federalist ideas and assumptions that the document reflected. But for Madison's persistent lobbying, he might well have cast his lot with such Virginia Antifederalists as Patrick Henry and Richard

reconstruct the general context in which specific constitutional matters were considered, and only then attempt to examine how those matters may or may not have been resolved. Constructing this type of historical claim takes more time than lawyers care to invest, even given the not-so-shortcut of relying on the work of actual historians rather than starting to rebuild a given period from scratch. No surprise, then, that many lawyerly appeals to history receive not just mediocre but dismal grades from historians themselves.<sup>158</sup>

In this instance, the state of the available scholarship compounds the problem. Today, anyone undertaking a good-faith examination of domestic constitutional development during the Founding benefits from several generations of recent historical work. Such historians as John Phillip Reid, Bernard Bailyn, Edmund Morgan, Gordon Wood, and Jack Rakove have done much to reconstruct the basic framework of constitutional development with regard to internal issues between the independence and ratification.<sup>159</sup> The same does not hold for the Constitution and foreign affairs, which remains comparatively understudied.<sup>160</sup> This is not to say that the field lacks important and useful works,<sup>161</sup> but that those works do not add up to the same comprehensive picture. This difficulty, together with the noted constraints of time and space, make any suggestions advanced here less dispositive conclusions than invitations for further work.

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Henry Lee. Certainly, his reaction to the drift of the early Republic's government to the perceived influence of Hamilton confirmed many of his doubts about the Constitution having gone too far. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 257-302 (1993).

158. See Flaherty, *supra* note 85, at 552-55.

159. See *id.* at 535-49.

160. See generally William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 *CORNELL L. REV.* 695 (1997).

161. See generally FELIX GILBERT, *TO THE FAREWELL ADDRESS: IDEAS OF EARLY AMERICAN FOREIGN POLICY* (1961); FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* (2d ed. Scholarly Resources Inc. 1986) (1973); RICHARD B. MORRIS, *THE AMERICAN REVOLUTION RECONSIDERED* (1967); PAUL A. VARG, *FOREIGN POLICIES AND THE FOUNDING FATHERS* (1963). The classic—and “primarily historical”—work on the treaty power specifically predates these works, yet in many ways both anticipates and accords with them. See EDWARD S. CORWIN, *NATIONAL SUPREMACY: TREATY POWER VS. STATE POWER* (Peter Smith ed., 1965) (1913). I am indebted to R.B. Bernstein for his guidance in this area.

This much is safe. Nothing in the Founding record plainly undercuts *Holland*—which is supported by text and structure—in part for the same reasons that nothing conclusively supports *Printz*—which is not. Recall that, for the Founding generation, federalism, at least on the domestic plane, remained a contested matter on even the most abstract level when compared to other mechanisms such as separation of powers.<sup>162</sup> Foreign affairs disagreements to varying degrees echoed these differences. Nationalists, who almost necessarily became Federalists, also tended to be internationalists. Hamilton, John Jay, Robert Livingston, and, for these purposes, the Madison of the 1780s, fell into this category. States' rights advocates, who more often became Antifederalists, were inclined to be isolationists. Richard Henry Lee, Elbridge Gerry, Hugh Williamson, Arthur Lee, and Stephen Higginson, among others, made up this contingent.<sup>163</sup> To the extent that these domestic and foreign divisions reflected one another in constitutional terms, the Founding provides only limited guidance on even the most general level.

But only to that extent. Scholarship and sources further reveal a greater Founding commitment to nationalism in the realm of foreign affairs that is entirely consistent with the similarly greater commitment to nationalism under the treaty power set forth in *Holland*. The outpouring of constitutional history over the last several decades has emphasized the Founders' disenchantment with state government domestically as a principal reason leading to the Federal Convention. In recovering this theme, historians have largely ignored, though hardly challenged, another reason for the Constitution that most of us learn in high school—that the national government under the Articles of Confederation was hopelessly weak, especially in international affairs. Despite his own admitted emphasis on the problems of state government, one of the most eminent historians of the period recently stated, "I have always believed that both sets of problems—national and state—were important to the reform of the national government in 1787."<sup>164</sup>

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162. See Flaherty, *supra* note 25, at 177-78.

163. See MARKS, *supra* note 161, at 153-54.

164. Gordon S. Wood, "Motives at Philadelphia": A Comment on Slonim, 16 L. & HIST. REV. 553, 555 (1998). Wood's remarks, moreover, came in response to a critique arguing that national—and thus, international—concerns played a larger role than modern scholarship implies. See Shlomo Slonim, *Motives at*

Scholars who have concentrated on foreign affairs during this period disagree only as to whether national and international concerns played simply an important or dominant role. As Frederick Marks argues, "foreign policy was not only important in shaping constitutional reform, but it was also of *overwhelming* significance."<sup>165</sup> In particular, both direct and indirect state actions handcuffed the nation's international relations in numerous ways, including failure to comply with congressional requisitions for revenue, intrusion into military matters, contradictory trade regulation, and, not least, treaty violations. Individual texts, even iconic ones, should be employed with caution, but two are suggestive when taken in context. Madison's famous memorandum *Vices of the Political System of the United States* devotes three of its eleven points to problems within the states only after devoting the first eight to the impotence of the Confederation in the face of state encroachments in national and foreign affairs.<sup>166</sup> Likewise, Madison, Jay, and Hamilton focused upon national weakness in twenty-five of the first thirty-six essays in *The Federalist*.<sup>167</sup>

In many cases, the available historical materials do not clearly point to conclusions that are much more precise than the general context, but this is not one of them. Specifically, the Founding concern with treaty violations sheds substantial light on the proposition that the treaty power provides for assertions of domestic authority that the national government may not otherwise exercise. This concern dated back to the nation's "first"<sup>168</sup> international compact, the 1783 Treaty of Paris, which ended the Revolutionary War and secured recognition of American independence by Great Britain. Among other things,

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*Philadelphia, 1787: Gordon Wood's Neo-Beardian Thesis Reexamined*, 16 L. & HIST. REV. 527 (1998).

165. MARKS, *supra* note 161, at x. Marks continues: "Taken as a whole, problems relating to the conduct of foreign affairs far outweighed any other combination of issues facing the Confederation. A more advantageous position vis-à-vis the world was the overriding concern of the Federalists, the *sine qua non* of political change." *Id.*

166. See THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 57 (Marvin Meyers ed., rev. ed., Univ. Press of New England 1981) (1973).

167. See MARKS, *supra* note 161, at 169-70.

168. "First" in the sense that, notwithstanding earlier treaties with France and the Netherlands, for example, it took the peace treaty with Great Britain before the United States could claim undisputed international recognition as a sovereign nation.

the Treaty obliged the United States to allow British merchants to collect prewar debts<sup>169</sup> and prohibited postwar confiscations of loyalist property.<sup>170</sup> Numerous state governments, friends of neither British creditors nor loyalists, flouted these provisions. These violations in turn provided the British government the legal basis for refusing to fulfill its own treaty obligations to withdraw from forts that effectively controlled the Great Lakes and Ohio Valley. Confederation diplomats such as John Adams were the first, but only the first, to realize that this type of problem could never be solved so long as the Confederation Congress lacked the means to insure that the states would abide by treaties.<sup>171</sup> The nature of the violations at issue, moreover, made clear that enforcement would have to apply to matters—such as property and creditor-debtor law—that even the most ardent nationalist viewed as quintessentially local.

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169. See Definitive Treaty of Peace, Sept. 3, 1784, U.S.—Gr. Brit., art. IV, 8 Stat. 80, 82 (“It is agreed that creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted.”).

170. See *id.* art. V, at 82-83.

It is agreed that the Congress shall earnestly recommend it to the legislatures of the respective states, to provide for the restitution of all estates, rights and properties, which have been confiscated, belonging to real British subjects, and also of the estates, rights and properties of persons resident in districts in the possession of his Majesty’s arms, and who have not borne arms against the said United States. And that persons of any other description shall have free liberty to go to any part or parts of any of the thirteen United States, and therein to remain twelve months unmolested in their endeavours to obtain the restitution of such of their estates, rights and properties, as may have been confiscated; and that Congress shall also earnestly recommend to the several states a reconsideration and revision of all acts or laws regarding the premises, so as to render the said laws or acts perfectly consistent, not only with justice and equity, but with that spirit of conciliation, which on the return of the blessings of peace should universally prevail. And that Congress shall also earnestly recommend to the several states, that the estates, rights and properties of such last mentioned persons shall be restored to them, they refunding to any persons who may be now in possession the bona fide price (where any has been given) which such persons may have paid on purchasing any of the said lands, rights or properties since the confiscation. And it is agreed, that all persons who may have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights.

*Id.*

171. See MARKS, *supra* note 161, at 14-15.

Federalist reformers had several ways to address this problem. One was to make treaties—including treaties that predated the new Constitution—the supreme law of the land over state law and make them judicially enforceable. This the Supremacy Clause expressly achieved.<sup>172</sup> That tack took care of the Treaty of Paris problem specifically, since the Supreme Court had no difficulty either in treating its relevant provisions as self-executing or in concluding that its provisions trumped contrary state law.<sup>173</sup> What Edward Corwin said long ago of the Treaty itself applied no less to the decisions upholding it: “What more impressive demonstration could be required of the competence of the treaty-power to regulate relations that would otherwise fall within the province of the States, and to displace State authority in doing so?”<sup>174</sup>

Complementary demonstrations of national authority soon followed. From its earliest years, the new Republic entered into an array of treaties that likewise regulated matters that at the time would have been seen as otherwise exclusively matters for the states. Consular conventions, for example, at least from 1788, typically authorized foreign consuls to estates of deceased fellow nationals to exercise police power over their nation’s vessels and crews docked in U.S. ports, and even to adjudicate civil disputes arising between fellow nationals.<sup>175</sup> Treaties of reciprocal residency rights likewise trumped what were clearly internal matters of state law by mandating that foreigners could own property on the same terms as U.S. citizens.<sup>176</sup> Extradition treaties, again from the nation’s earliest days, have done much the same in mandating that the signatory nations deliver foreign fugitives from the host country to the country of the individual’s citizenship for crimes committed in either jurisdiction.<sup>177</sup> Insofar as *Holland* assumed that the treaty power itself could exceed domestic grants of authority, the history confirms that assumption.

172. See U.S. CONST. art. VI, cl. 2.

173. See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Ware v. Hylton* 3 U.S. (3 Dall.) 199 (1796); *Brailsford v. Georgia*, 3 U.S. (3 Dall.) 1 (1794).

174. CORWIN, *supra* note 161, at 63.

175. One such early example was a 1788 Consular Convention with France concluded by none other than Jefferson. See CORWIN, *supra* note 161, at 84-86.

176. See *id.* at 86-91.

177. See *id.* at 91-95.

Yet this solution did not address the problem of treaties that dealt with matters ordinarily handled by state law but that were not self-executing. Treaties of this sort also dated back to the nation's early days. For this task, the Constitution afforded Congress authority under the Necessary and Proper Clause, which augments federal authority not only for those powers granted to Congress in Article I, Section 8, but for "all other Powers vested by this Constitution in the Government of the United States."<sup>178</sup>

Congress may not have gotten around to this until as late as 1829, with a statute implementing consular convention provisions, and then not in a significant way until 1848, with an act dealing with extradition.<sup>179</sup> Corwin long ago explained the delay. First, at least extradition treaties were "exceptional in those early days."<sup>180</sup> In addition, the President commonly exercised the authority to implement treaties directly without the aid of Congress.<sup>181</sup> One further explanation arguably reflects the practice that many early treaties affecting "internal" state matters were straightforward enough to draft in self-executing terms, as witness Article IV of the Treaty of Paris.<sup>182</sup>

Moreover, to discount these factors and conclude that Congress lacks authority to enact laws necessary and proper to implement treaties only creates larger difficulties. Inferring a constitutional absence of power from the failure to exercise a power—especially absent an inquiry into the reasons for the failure—leads to the same conclusory analysis that plagues *Printz*. More importantly, such a conclusion leads to the structural anomaly that the President and two-thirds of the Senate can make treaties that extend beyond domestic powers, and that the President can implement them, but that a majority of the national legislature, including the House as the most democratic branch of government, has nothing to say on such matters. Neither the Founding's general context, nor specific

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178. U.S. CONST. art. I, § 8, cl. 18.

179. Here I rely on Corwin. See CORWIN, *supra* note 161, at 277. I say "may" pending the type of separate, fresh, full length historical treatment that this topic deserves. See *supra* notes 156-58 and accompanying text.

180. CORWIN, *supra* note 161, at 277.

181. The reason for early presidential implementation was less because treaties were self-executing and so did not require implementing legislation than because presidential implementation was seen as a ministerial duty that fell to the Executive in the absence of congressional action. See *id.* at 278-80.

182. See *supra* note 169.



evidence, indicates that this result in any way follows, much less follows dispositively, from original understandings.

## CONCLUSION

Elsewhere I have argued that federalism, at least in terms of state sovereignty, has been a "backward-looking" doctrine since its inception. Federalism was in large part an inheritance from their imperial past, and the Founders employed this conception even as they marginalized it with much more effective innovations as separation of powers and direct representation to the capitol of their new continental empire.<sup>183</sup> This is not to say that states' rights, whatever its wisdom or legitimacy, is not persistent. *Holland* would have remained that irrelevant curiosity that it was had not the Court resuscitated states' rights.

Yet looking forward, *Holland* suggests that it will be states' rights that at the end of the day will be reduced to irrelevance. Either the Court will take interpretation in this area seriously and cabin the doctrine of its own accord. Or, more likely, *Holland* and the commitment to foreign affairs that it represents will do the job. As Barry Friedman has observed, the march of globalization cannot help but have an overall nationalizing effect on our polity.<sup>184</sup> In the end, the sovereignty of New Jersey simply makes less sense in the new world order.

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183. See Flaherty, *supra* note 26, at 1011-12.

184. See Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1471-82 (1998). Friedman allows, as do I, a role for multiple layers of government in an increasingly internationalized world, but anticipates that what will matter is local participation rather than "on the legal order and questions such as whether *Garcia* will be overturned." *Id.* at 1482.