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Treaties and the Eleventh Amendment

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CARLOS MANUEL VÁZQUEZ*

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INTRODUCTION

The Supreme Court's recent invigoration of federalism doctrine has revived a question that had long lain dormant in constitutional law: whether and to what extent federalism limits apply to exercises of the Treaty Power. In the days before the famous "switch in time that saved nine," the Court in *Missouri v. Holland* upheld a statute passed by Congress to implement a treaty even though it assumed that the statute would exceed Congress's legislative power under Article I in the absence of the treaty.¹ The significance of this holding abated considerably when the Court embraced a broader interpretation of the Commerce Power.² The Court's recent decisions striking down federal statutes as exceeding the Commerce Power for the first time since the New Deal have revived the question of Congress's power to implement treaties by enacting statutes that cannot be made in the absence of a

* Professor of Law, Georgetown University Law Center. I am grateful to David Golove, Vicki Jackson, Mark Tushnet, and David Sloss for very helpful comments on an earlier version of this paper, and to Susan Bandes for her generous and thoughtful response. I am also grateful for the research assistance of Marye C. Cherry.

1. 252 U.S. 416, 432-33 (1920).

2. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942).

treaty. Scholars have argued that *Missouri v. Holland* should be rethought in the light of such decisions as *United States v. Lopez*,³ while others have defended *Missouri v. Holland*.⁴

One important branch of the Court's recent federalism jurisprudence is that relating to state sovereign immunity. In *Seminole Tribe of Florida v. Florida*,⁵ the Court held that Congress may not abrogate the states' Eleventh Amendment immunity pursuant to its Commerce Power, reversing *Pennsylvania v. Union Gas Co.*⁶ In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,⁷ the Court held that Congress's abrogation of Eleventh Amendment immunity in the federal patent laws was also unconstitutional. These decisions reaffirmed the holding of *Fitzpatrick v. Bitzer*⁸ that Congress may abrogate Eleventh Amendment immunity pursuant to the Fourteenth Amendment. But in *Florida Prepaid*, the Court held that the abrogation of immunity in the patent laws did not satisfy the "congruence and proportionality" requirement of *City of Boerne v. Flores*.⁹ The subsequent decisions in *Kimel v. Florida Board of Regents*¹⁰ and *Board of Trustees of the University of Alabama v. Garrett*,¹¹ striking down the abrogation of state sovereign immunity in the Age Discrimination in Employment Act and in Title I of the Americans with Disabilities Act, respectively, confirmed that the window left open by *Fitzpatrick* is narrow. And *Alden v. Maine*¹² established that states enjoy a constitutional immunity from suit in their own courts coextensive with their immunity from suit in federal courts.

These decisions have led some scholars to consider whether the Treaty Power provides an alternative basis for abrogating the states' sovereign immunity. An affirmative answer has been suggested with respect to intellectual property.¹³ The United States is a party to several

3. 514 U.S. 549 (1995). See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) [hereinafter Bradley, *Treaty Power and Federalism I*].

4. See, e.g., David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); Carlos Manuel Vázquez, Breard, Printz and the Treaty Power, 70 U. COLO. L. REV. 1317, 1338-1343 (1999).

5. 517 U.S. 44 (1996).

6. 491 U.S. 1 (1989).

7. 527 U.S. 627 (1999).

8. 427 U.S. 445 (1976).

9. 521 U.S. 507 (1997).

10. 528 U.S. 62 (2000).

11. 121 S. Ct. 955 (2001).

12. 527 U.S. 706 (1999).

13. See Peter S. Menell, *Economic Implications of State Sovereign Immunity from*

international agreements that require the protection of certain forms of intellectual property. The treaties also require parties to afford certain types of remedies when the protected rights have been infringed. Scholars have argued that the failure to afford certain remedies against states might violate these treaties.¹⁴ Some argue further that Congress has the power to implement these treaties by authorizing remedies against states that would be barred by the Eleventh Amendment in the absence of the treaties.¹⁵ This paper focuses on the latter question. It considers whether state sovereign immunity constrains Congress's power to authorize remedies against states pursuant to the Treaty Power.

I am among those who have defended the holding of *Missouri v. Holland* that Congress may pass laws necessary to implement treaties even if the laws would exceed Congress's legislative power in the absence of a treaty.¹⁶ Nevertheless, I conclude here that Congress's power to implement treaties is not exempt from the federalism limitations reflected in the doctrine of state sovereign immunity.

The Court's recent state sovereign immunity decisions are, to put it mildly, controversial. The four dissenting Justices have indicated that they regard those decisions as so indefensible that they will never treat them as valid precedents.¹⁷ To say that scholars, too, dispute these decisions is to understate matters severely.¹⁸ Most Eleventh Amendment scholars espouse an interpretation that would obviate the issue under discussion here. Under this view, the Eleventh Amendment does not apply at all to cases arising under federal law, and the states' sovereign

Infringement of Federal Intellectual Property Rights, 33 LOY. L.A. L. REV. 1399, 1460-64 (2000); John O'Connor, Note, *Taking TRIPS to the Eleventh Amendment: The Aftermath of the College Savings Cases*, 51 HASTINGS L.J. 1003, 1031-40 (2000). Cf. Cory Eichhorn, Comment, *Eleventh Amendment Immunity Jurisprudence in an Era of Globalization: The Tension Between State Sovereign Rights and Federal Treaty Obligations*, 32 INTER-AMERICAN L. REV. 523 (2001) (arguing more broadly for inapplicability of Eleventh Amendment to treaty-based claims). But see Mitchell N. Berman, Anthony Reese & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to "Fix" Florida Prepaid (And How Not To)*, 79 TEX. L. REV. 1037 (2001).

14. See Menell, *supra* note 13, at 1466; Berman, Reese & Young, *supra* note 13, at 1188.

15. Menell, *supra* note 13, at 1461. But see Berman, Reese & Young, *supra* note 13, at 1188-95.

16. See Vázquez, *supra* note 4.

17. See *Kimel*, 120 S. Ct. at 653 (Stevens, J., dissenting).

18. Professor Hill has recently published a rare defense of state sovereign immunity. Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485 (2001). He states that the only other academic who believes sovereign immunity to be of constitutional dimension is David P. Currie. *Id.* at 487 n.1 (citing David P. Currie, *Ex parte Young After Seminole*, 72 N.Y.U. L. REV. 547, 547-48 (1997)). For a lengthy "partial list of academics who argue that sovereign immunity has no sound basis in law," see *id.* Insofar as stare decisis can be regarded as a sound basis for a constitutional doctrine, some of us might quibble with our inclusion in the list.

immunity is at best a matter of federal common law that may be abrogated by Congress under any of its legislative powers. For the sake of our northern woods, I do not propose to reexamine that issue here.¹⁹ I will assume that, as a matter of federal constitutional law, the states are entitled to sovereign immunity even in suits based on federal law, and that this immunity may be abrogated under the Fourteenth Amendment but not under provisions of Article I unrelated to treaty implementation.²⁰ The question I discuss is, then, a conditional one: Assuming our Constitution affords such immunity, does it permit Congress to abrogate the immunity when it acts to implement a treaty?

I. BACKGROUND

The evolution of state sovereign immunity doctrine is well-trodden ground. For present purposes, it suffices to recall a few central propositions.

The Constitution does not mention state sovereign immunity. It provides that the jurisdiction of the federal courts extends to cases between a state, or citizens thereof, and foreign states, citizens or subjects.²¹ Relying on the latter provision, the Supreme Court in *Chisholm v. Georgia* held that a South Carolina citizen seeking to recover a debt could maintain an action in the Supreme Court against the state of Georgia.²² That holding produced a "shock of surprise,"²³ and the Eleventh Amendment was speedily adopted in response. The Amendment provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State."²⁴

It is apparent that the Amendment means either more or less than what it says.²⁵ There would appear to be no reason to prohibit suits in federal court by citizens of a different state but to permit such suits if

19. Cf. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 688 (1999) (stating that the "now-fashionable revisionist accounts of the Eleventh Amendment" have been set forth in Supreme Court opinions "in a degree of repetitive detail that has despoiled our northern woods").

20. The power to implement treaties may be regarded as an Article I power insofar as it is based on the Necessary and Proper Clause.

21. U.S. CONST. Art. III, § 2.

22. 2 U.S. 419 (1793).

23. *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

24. U.S. CONST. amend. XI.

25. *But cf.* Lawrence Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989) (defending a literal interpretation of the Amendment).

brought by a state's own citizens. A suit against a state by its own citizens could be maintained in federal court only if there existed a non-diversity basis of jurisdiction, such as federal question jurisdiction. But if the Constitution permitted a state's own citizens to maintain in federal court an action arising under federal law, why would it prohibit a citizen of a different state to maintain such an action? Either the Amendment permits suits arising under federal law even when brought by citizens of another state or of a foreign state, despite the text appearing to prohibit such suits, or it prohibits suits arising under federal law even if brought by a state's own citizens, even though the Amendment's text does not reach such suits.

The Court faced this question in *Hans v. Louisiana*,²⁶ and it opted for the broader interpretation. The Court's holding that the Amendment applies to suits arising under federal law is the source of the great controversy surrounding the Amendment. The holding appears to be in tension with the basic maxim of political science that the judicial power of any well-constructed government must be coextensive with the legislative.²⁷ The Constitution imposes a number of legal obligations on the states, and it authorizes the enactment of laws and the conclusion of treaties placing additional obligations on the states.²⁸ Under *Hans*, however, states cannot be sued in federal court without their consent for violation of these obligations.

Largely because of this problem, scholars have argued forcefully that *Hans* was wrongly decided. The prevailing view among scholars is that the Amendment was never intended to reach suits arising under federal law.²⁹ *Chisholm v. Georgia*, after all, was a diversity action. Under the so-called diversity interpretation, the Amendment withdraws the jurisdiction that Article III conferred over suits between a state and citizens of another state (or of a foreign state), leaving intact the clause

26. 134 U.S. 1 (1890).

27. See THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

28. The scope of this power under current doctrine turns on the case law that has developed under *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). These cases appear to hold that statutes imposing obligations on the states are valid as long as the same obligations are imposed on similarly situated individuals. Whether a statute would be invalid if it singled out the states for regulation was left open in *Reno v. Condon*, 528 U.S. 141, 151 (2001). Whether the doctrine of these cases applies to exercises of the Treaty Power is addressed, and an affirmative answer tentatively reached, in *Vázquez*, *supra* note 4. *But cf.* Martin S. Flaherty, *Are We To Be a Nation?*, 70 U. COLO. L. REV. 1277 (1999) (concluding otherwise).

29. For a partial list of scholars who embrace the so-called diversity interpretation, see Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1685-86 n.7 (1997).

of Article III authorizing jurisdiction over suits arising under federal law. The Amendment, so construed, would have no application to a suit brought against a state based on federal law, whether brought by the state's own citizen or a citizen of a different state. State sovereign immunity might nevertheless exist as a common law doctrine quite separate from the Eleventh Amendment, but, according to adherents of the diversity view, this immunity would in any event be subject to repeal by Congress under any of its powers. The judicial power would be potentially coextensive with the legislative.

At one point, the Supreme Court was evenly divided on whether to overrule *Hans* and adopt the diversity interpretation. Newly-appointed Justice Scalia reserved judgment on the issue, noting that the question was complex.³⁰ In *Pennsylvania v. Union Gas Co.*, he decided to adhere to *Hans*. The question, as he viewed it, was whether a waiver of state immunity in federal question cases was "implicit in the constitutional scheme."³¹ He emphasized that "[u]ndoubtedly the Constitution envisions the necessary judicial means to assure compliance with the Constitution and laws,"³² but it does not follow, in his view, that the Constitution authorizes private suits against the states. He noted that the Amendment had long been construed to permit suits against states by the United States, as well as private suits against state officers seeking prospective relief from violations of federal law, and private suits seeking damages from state officers.³³ These other remedies were, in his view, all that was "necessary" to assure the states' compliance with their federal obligations. He went on to note that, even if he was wrong about what was implicit in the constitutional plan, "the question is at least close,"³⁴ and the case for overruling *Hans* fails on stare decisis grounds.³⁵ Thus, Justice Scalia did not so much defend the correctness of *Hans* as an original matter as hold that overruling the decision was unjustified given its pedigree and the fact that its effects were not problematic in light of the other available mechanisms for enforcing the federal obligations of the states.

In *Union Gas*, Justice Scalia was writing in dissent. The majority in that case held that Eleventh Amendment immunity could be abrogated by Congress under any of its Article I powers, thus virtually adopting

30. *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 496 (1987) (Scalia, J., concurring).

31. 491 U.S. at 33.

32. *Id.*

33. *Id.* at 34.

34. *Id.*

35. *Id.* at 34-35.

the diversity interpretation. This holding was short-lived, however. With the replacement of Justice Marshall by Justice Thomas, there were five votes for the *Hans* view, and a five-Justice majority quickly overruled *Union Gas* in *Seminole Tribe of Florida v. Florida*,³⁶ endorsing Justice Scalia's analysis.³⁷ The Court reaffirmed the holding of *Fitzpatrick v. Bitzer* that Congress may abrogate Eleventh Amendment immunity pursuant to its power to enforce the Fourteenth Amendment, but it held that this abrogation power did not extend to "antecedent" provisions of the Constitution, such as the Commerce Power.

Seminole Tribe was followed by *Alden v. Maine*, in which the Court held that the states enjoy a constitutional immunity from being subjected to suit in their own courts without their consent. The Court made it clear that the Eleventh Amendment, which in its terms restricts only federal jurisdiction, reflects a broader, preexisting doctrine of state sovereign immunity having constitutional stature. As noted above, the Court went on in *Florida Prepaid*, and later in *Kimel* and *Garrett*, to strike down a series of statutes as exceeding the congressional power to abrogate state sovereign immunity pursuant to Section 5 of the Fourteenth Amendment. The Court's narrow construction of that clause has led some scholars to ask whether the Treaty Power supplies a more promising basis for congressional abrogation of state sovereign immunity.

II. *MISSOURI V. HOLLAND* AND FOREIGN AFFAIRS EXCEPTIONALISM

The best doctrinal case for exempting exercises of the Treaty Power from state sovereign immunity relies on a reading of *Missouri v. Holland*³⁸ as establishing that federalism-based constitutional limits do not apply to the Treaty Power. *Missouri v. Holland* has been described as an example of foreign affairs exceptionalism: the idea that ordinary constitutional principles do not apply in the area of foreign affairs.³⁹ Critics of such exceptionalism have argued that *Missouri v. Holland* should be rethought. The federalism limits that the Court articulated in such cases as *United States v. Lopez* and *United States v. Morrison*, they have argued, should apply equally to exercises of the Treaty Power.⁴⁰

36. 517 U.S. 44 (1996).

37. 517 U.S. at 62-66.

38. 252 U.S. 416 (1920).

39. See generally Curtis Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1104-07 (1999).

40. See Bradley, *Treaty Power and Federalism I*, *supra* note 3.

Anti-exceptionalism in foreign affairs law has much to commend it.⁴¹ The Constitution in some respects explicitly addresses matters of foreign affairs differently from domestic matters. For example, it establishes a different method for making treaties than for making statutes. But, where it does not, there would appear to be little justification for resolving legal issues under wholly different standards just because they touch upon foreign affairs. My conclusion here that the Treaty Power is not exempt from state sovereign immunity is based on my conviction that our Constitution is anti-exceptionalist with respect to mechanisms for ensuring compliance with treaties. In this section, I explain why I defend the holding of *Missouri v. Holland* despite my basic agreement with the anti-exceptionalism of its critics.

Missouri v. Holland was decided in the days when the Court interpreted the Commerce Clause comparatively narrowly. The Court upheld a statute regulating the taking of migratory birds as an implementation of a treaty addressing the same subject, even though similar statutes had been struck down by lower courts before there was such a treaty, and the Court assumed for purposes of argument that the statute would not be valid in the absence of the treaty.⁴² The decision in *Missouri* thus stands for the proposition that a statute may be a valid exercise of the Treaty Power even if it is not a valid exercise of Congress's other Article I powers.

Critics of the decision have characterized the holding as exceptionalist, describing it as a holding that the federalism limitations that apply to other constitutional provisions do not apply to the Treaty Power.⁴³ But this characterization is inapt. *Missouri* simply recognized that the Treaty Power is a separate head of federal legislative power. The Court in *Missouri* treated the Treaty Power in exactly the same way as Congress's other legislative powers. In no other context are the limits of one power applicable to another power. In *United States v. Lopez*,⁴⁴ for example, the Court held that a statute does not fall within the Commerce Power on the basis of the regulated activity's effect on interstate commerce unless the regulated activity itself is commercial.⁴⁵ There is no reason to regard this limitation on the Commerce Power as applicable to the Patent and Copyright Power or the Bankruptcy Power

41. See Carlos Manuel Vázquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259, 1304 & n.245 (2001).

42. 252 U.S. at 433-35.

43. See Bradley, *Treaty Power and Federalism I*, *supra* note 3, at 393.

44. 514 U.S. 549 (1995).

45. See Vázquez, *supra* note 4, at 1330-31 & n.42.

or any other head of legislative power. Accordingly, in *United States v. Morrison*, after holding that the Violence Against Women Act exceeded the Commerce Power, the Court went on to examine whether the statute fell within Congress's power to enforce the Fourteenth Amendment.⁴⁶ The fact that the statute exceeded the Commerce Power did not obviate the Fourteenth Amendment issue. If the statute had been defended as an exercise of the Treaty Power, the Court should similarly have gone on to examine whether the statute was valid under that power.⁴⁷ There would have been no greater reason to regard the Commerce Clause holding as dispositive of the Treaty Power issue than of the Fourteenth Amendment issue. The three are separate and independent powers. *Missouri* thus does not treat the Treaty Power exceptionally by holding that it is not subject to the limits found in the other heads of federal legislative powers. It would have been exceptional to hold otherwise.⁴⁸

The Treaty Power does appear to differ from the other powers in that it does not appear to be subject to any substantive (i.e., subject matter) limits.⁴⁹ Unlike the other powers, the limits of the Treaty Power are limits of form (there must be an international agreement) and structure (the treaty must receive the consent of two-thirds of the Senate). The absence of subject matter limitations has given rise to a concern that the Treaty Power might be used to circumvent the carefully crafted limitations on federal legislative power reflected in the other provisions of Article I, Section 8.⁵⁰ There have been proposals to read subject matter limitations into the Treaty Power. Some have relied on the statement in *Missouri* that the statute in that case involved "a national interest of very nearly the first magnitude"⁵¹ to suggest that a statute is valid under the Treaty Power only if it regulates a matter of national rather than local interest. Others have said that the Treaty Power extends only to matters that are properly the subject of international negotiation⁵² or matters of international concern.⁵³ Even if these limits

46. *United States v. Morrison*, 529 U.S. 598 (2000).

47. An amicus brief did argue that the Violence Against Women Act was a valid exercise of the Treaty Power, see Brief of Amici Curiae on Behalf of International Law Scholars and Human Rights Experts at 2, *United States v. Morrison*, 529 U.S. 598 (2000) (No. 99-0029), but the Court disregarded the argument, presumably because it was not raised by a party.

48. When the parallel argument was advanced with respect to the Spending Power, it was rejected there as well. See *United States v. Butler*, 297 U.S. 1 (1936).

49. *But cf.* the Spending Power.

50. See Bradley, *Treaty Power and Federalism I*, *supra* note 3.

51. 252 U.S. at 435.

52. *Geofroy v. Riggs*, 133 U.S. 258, 296 (1890).

53. Charles Evans Hughes, Remarks, *Limitations of the Treaty-Making Power of the United States in Matters Coming within the Jurisdiction of the States*. 23 PROC. AM. SOC'Y INT'L LAW

were read into the Constitution, I doubt that they would properly be regarded as judicially enforceable. If a matter is addressed in a treaty negotiated by the President with another nation and approved by two-thirds of the Senate, the courts likely would (and should) regard it as a matter of national and international concern.

If the absence of subject matter limits does make the Treaty Power exceptional, the exceptional treatment is no doubt related to another textual difference between treaties and statutes. Statutes require the affirmative approval of the President and a majority of both Houses of Congress, or of two-thirds of both Houses without the President. Treaties, on the other hand, require the approval of the President plus two-thirds of the Senate. The requirement of the consent of a supermajority of the Senate is a structural safeguard for treaties that does not exist for statutes. This safeguard protects the states (and the nation) from abuse of the Treaty Power. It obviously served as a particular protection of state interests in the years before the Seventeenth Amendment was adopted, when Senators were appointed by state legislatures. Even today, however, the requirement of consent by two-thirds of the Senate makes it highly unlikely that the Treaty Power will be used to circumvent otherwise applicable limitations on federal legislative power. Indeed, the effect of the supermajority requirement has been to make it more difficult to conclude treaties than statutes on matters clearly within the federal legislative power. As a result, some important international agreements, including many in the area of international trade, have not taken the form of Article II treaties, but have instead attained their legal force through the enactment of an ordinary statute passed under the Commerce Power. Additionally, the Senate's solicitude for state interests is reflected in the federalism understandings it has attached to numerous treaties, stating that the treaties will be implemented by the states to the extent that they relate to matters over which the states have traditionally exercised legislative jurisdiction.⁵⁴

In defending *Missouri v. Holland*'s basic holding that there are no federalism-based subject matter limitations on Congress's power to implement treaties, I do not mean to suggest that the decision is wholly unproblematic from a federalism perspective. Some aspects of the decision may require doctrinal refinement. Specifically, the Court in *Missouri* upheld the statute even though the treaty involved did not require the United States to enact any statute at all. The treaty merely

194 (1929).

54. On these understandings, see Vázquez, *supra* note 4, at 1354-59.

required the parties to “propose” legislation to their legislatures.⁵⁵ When a treaty does not require the enactment of legislation, but merely encourages it, it may be defensible to hold that the relevant legislation must be proposed to the *state* legislatures unless it would fall within the federal government’s legislative jurisdiction in the absence of a treaty. The principal reason the Founders made treaties the supreme law of the land was to avoid violations of international law by the United States.⁵⁶ It was presumably for the same purpose that Congress was given the power to implement non-self-executing treaties. The failure of Congress to pass implementing legislation would not produce a violation of a treaty that merely required the United States to “propose” such legislation.⁵⁷

This problem is more acute today than it was when the Court decided *Missouri v. Holland*. Today, the United States is party to many treaties that include provisions that are highly general and aspirational. The UN Charter, for example, establishes as one of the organization’s purposes the encouragement and promotion of respect for human rights.⁵⁸ Would a treaty provision committing the United States in general terms to promote respect for human rights authorize Congress to enact any law in the area of human rights intended to promote such rights?⁵⁹ Perhaps today such a treaty would not be ratified without a federalism understanding. But the effect of such understandings is disputed, and, in any event, many treaties were ratified in the days before *Lopez* and *Morrison* without such understandings.

Thus, even if *Missouri* survives *Lopez*, the Court will very likely have to articulate doctrine concerning the circumstances in which a treaty will support a statute. What that doctrine should look like is a topic for another day.⁶⁰ The point here is simply that *Missouri v.*

55. See 252 U.S. at 431.

56. See Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1160-61 (1992).

57. On the other hand, the Founders also allocated the treaty-making and treaty-implementing power to the federal government to harness the negotiating power of the nation as a whole the better to extract beneficial commitments from other countries. To hold that a certain category of treaty may only be implemented by the states could hamper the nation’s ability to extract such promises, to the ultimate detriment of the nation as a whole. I do not here endorse any particular doctrinal answer to the problem identified in the text.

58. UN CHARTER art. 1, para. 3.

59. For an affirmative answer, see Eichhorn, *supra* note 13.

60. For the reason discussed in note 57, *supra*, the Court may well settle on a line between vague provisions (such as our hypothetical provision based on the UN Charter) and specific provisions (such as that involved in *Missouri*), rather than between mandatory and non-mandatory provisions. Professors Berman, Reese and Young appear to assume that, even if the Eleventh Amendment did not apply to exercises of the Treaty Power, a statute would be valid under the

Holland was right in declining to read the limitations of the other heads of legislative power into the Treaty Power.

III. TREATIES AND STATE SOVEREIGN IMMUNITY

Relying on a broad reading of *Missouri v. Holland*, some scholars have maintained that the Treaty Power should no more be subject to the federalism limits reflected in the Eleventh Amendment than to the limits articulated in such cases as *Lopez* and *Morrison*. Thus, they argue, Congress should be free to abrogate the states' Eleventh Amendment immunity and subject states to monetary liability for infringing intellectual property rights to the extent such remedies are required by treaties such as the Berne Convention and TRIPS.⁶¹ Because the argument has yet to be affirmatively presented in any detail, I shall begin in section A with a presentation of what I regard as the strongest case for concluding that Congress may abrogate state sovereign immunity pursuant to the Treaty Power. I shall then explain in section B why I do not in the end endorse that conclusion.

I present the pro-abrogation argument in its most limited, and hence presumably its strongest, form. Thus, the argument I provisionally defend in this section is that Congress has the power to abrogate state sovereign immunity under the Treaty Power, not that state sovereign immunity is categorically inapplicable to exercises of the Treaty Power. I assume that the same clear-statement rule applies to abrogation under the Treaty Power as to abrogation under the Fourteenth Amendment. Additionally, to avoid the problem I noted at the end of Part II, I shall assume that the relevant treaty explicitly requires remedies that would be barred by state sovereign immunity. As noted above, however, under some readings of *Missouri*, a statute affording remedies for treaty violations might be valid even if the treaty being implemented did not technically require the specific remedy. Indeed, the statute providing the remedy might be valid even if the treaty said nothing about remedies, as long as the remedies could be regarded as a "necessary and proper"

Treaty Power only to the extent the statute affords a remedy required by the treaty. This may be a desirable rule, but the Court has yet to articulate the need for such a tight nexus between the treaty and the implementing statute. *Missouri v. Holland* seems to reject the requirement, for it upheld a statute that was not required by the treaty.

61. The obligations imposed by these agreements are discussed in detail in Menell, *supra* note 13, and Berman, Reese & Young, *supra* note 13. I shall assume here that the agreements require the United States to afford remedies that would be barred by state sovereign immunity doctrine, if the latter doctrine were applicable. *But cf.* Berman, Reese & Young, *supra* note 13 (suggesting that alternative remedies not barred by state sovereign immunity doctrine, such as suits by the federal government, may well suffice under these agreements).

means to enforce the primary obligations set forth in the treaty.⁶²

Most importantly, I shall assume that the treaty being implemented is an Article II treaty, ratified by the President with the consent of two-thirds of the Senate. Many of the “treaties” often invoked as sources of a congressional power to abrogate state sovereign immunity are actually congressional-executive agreements. They are international agreements that have not received the consent of two-thirds of the Senate, but have been given legal force through the enactment of a statute signed by the President with the affirmative votes of a majority of both Houses. The constitutionality of this mechanism for concluding and giving force to international agreements has been the subject of extensive scholarly commentary.⁶³ I do not dispute here the prevailing view that congressional-executive agreements are constitutional. I do, however, question the broad claim that such agreements are interchangeable with Article II treaties in all respects. In my view, such agreements are valid only to the extent they fall within one of the heads of legislative power other than the Treaty Power. I have defended the holding of *Missouri v. Holland* in part on the ground that federalism is sufficiently protected by the structural safeguard of consent by two-thirds of the Senate. The strongest argument for exempting exercises of the Treaty Power from the strictures of state sovereign immunity also relies on this safeguard. Because this safeguard does not operate with respect to congressional-executive agreements, the case for exempting such agreements from state sovereign immunity is weaker than the case for exempting Article II treaties.

Scholars have suggested broadly that the Eleventh Amendment does not apply in the area of foreign affairs.⁶⁴ The Executive Branch has advanced this argument in the lower courts.⁶⁵ It has also advanced the

62. I shall also assume that the treaties at issue are non-self-executing and thus require implementation by statute. My conclusion here that Congress may not abrogate state sovereign immunity in implementing non-self-executing treaties means *a fortiori* that the treaty-makers may not abrogate state sovereign immunity pursuant to self-executing treaties.

63. See, e.g., Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001); David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791 (1998); Michael D. Ramsey, *Executive Agreements and the (Non) Treaty Power*, 77 N.C. L. REV. 134 (1998); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995); Bruce Ackerman & David M. Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801 (1995).

64. See Mennell, *supra* note 13, at 1460-61.

65. See Brief of the United States as Amicus Curiae at 30-32, *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998) (No. 96-2770), *cert. denied sub nom. Breard v. Greene*, 523 U.S. 371 (1998). Cf. Carlos Manuel Vázquez, *Breard and the Federal Power to Require Compliance*

somewhat more limited argument that the Eleventh Amendment does not apply to the War Power.⁶⁶ The First Circuit adopted the latter position in upholding an abrogation of state sovereign immunity, post-*Seminole Tribe*.⁶⁷ The Seventh Circuit has expressly rejected the position.⁶⁸ I will not comment here on the argument that there is a broad exception from ordinary state sovereign immunity principles for statutes that relate to foreign affairs, except to note that the reasons that lead me to reject a narrower exception for exercises of the Treaty Power appear to doom the broader argument *a fortiori*.

A. *The Strongest Case for Concluding that Congress May Abrogate State Sovereign Immunity Under the Treaty Power*

There is little support in state sovereign immunity doctrine for an exemption for exercises of the Treaty Power. The Court held in *Fitzpatrick v. Bitzer* that Section 5 of the Fourteenth Amendment gives Congress the power to abrogate state sovereign immunity to “enforce” that Amendment. In *Union Gas*, the Court recognized an abrogation power under the Commerce Power as well, but this decision was overruled in *Seminole Tribe*. The Court said that the abrogation power does not extend to “antecedent” provisions of the Constitution (meaning provisions that antedate the Eleventh Amendment). Because the Treaty Power was conferred in the original unamended Constitution, the recent state sovereign immunity decisions do not support a Treaty-based abrogation power.⁶⁹ Support for a treaty-based abrogation power must

With *ICJ Orders of Provisional Measures*, 92 AM. J. INT’L L. 683, 688 (1998) (characterizing this argument as “bold”).

66. See Brief of the United States as Intervenor at *5-15, *Velasquez v. Frapwell*, 994 F. Supp. 993 (S.D. Ind. 1998) (No. IP 96-0557-C H/G); Brief of the United States as Intervenor at 6-17, *Velasquez v. Frapwell*, 165 F.3d 593 (7th Cir. 1998) (Nos. 98-1547, 98-2034); Brief of the United States as Intervenor at 6-17, *Palmatier v. Michigan Dept of State Police* (6th Cir. Dec. 15, 1997) (No. 97-1982); Reply Brief for the United States as Intervenor at 2-5, *Palmatier v. Michigan Dept. of State Police* (No. 97-1982) (6th Cir. Feb. 18, 1998).

67. See *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 616 (1st Cir. 1996); see also *In re Sacred Heart Hospital*, 133 F.3d 237, 245 (3d Cir. 1998) (Roth, concurring).

68. *Velasquez v. Frapwell*, 165 F.3d 593 (7th Cir. 1998).

69. Susan Bandes writes that my interpretation of the recent sovereign immunity cases as distinguishing between pre- and post-Eleventh Amendment provisions of the Constitution, while “defensible,” is “by no means the only possible” one. Susan Bandes, *Treaties, Sovereign Immunity, and “The Plan of the Convention,”* 42 VA. J. INT’L L. 743, 745-46 (2002). In her view, the recent decisions might require instead a clause-by-clause determination of Congress’s power to abrogate state sovereign immunity. Such an approach seems to me to be hard to square with the Court’s approach in these recent cases. In holding in *Seminole Tribe* that the abrogation power does not extend to the Indian Commerce Clause, the Court did not pause to ask whether there was any special federal interest in Indian Commerce that warranted an abrogation power under that clause. This is particularly noteworthy in light of the fact that, in rejecting the State’s argument

be found instead in Treaty Power doctrine.

The case for concluding that Congress may abrogate state sovereign immunity pursuant to the Treaty Power derives some doctrinal support from *Missouri v. Holland*. Some scholars have described the holding of that case in broad terms, suggesting that it holds that there are no federalism-based limits on the Treaty Power.⁷⁰ State sovereign immunity is of course a federalism-based limit on federal legislative power.

Justice Holmes, writing for the majority in *Missouri v. Holland*, said, among other things, that the Treaty Power is not limited by any “invisible radiation from the general terms of the Tenth Amendment.”⁷¹ The Eleventh Amendment is, of course, not “invisible,” nor is it part of the Tenth Amendment. But, as has often been noted, the text of the Eleventh Amendment covers far less ground than does the constitutional doctrine of state sovereign immunity contemplated in such cases as *Seminole Tribe* and *Alden*. The Court has made it clear that the Eleventh Amendment reflects a preexisting principle of sovereign immunity that is far broader than that described in the Amendment’s text. It has said that the term “Eleventh Amendment immunity” is merely shorthand for this broader, preexisting immunity.⁷² To the extent that state sovereign immunity goes beyond the text of that Amendment, it might be described as an “invisible radiation” of our Constitution. Although one might argue that it is a radiation from the Eleventh rather than the Tenth

that *Union Gas* should be limited to the Interstate Commerce Clause and not extended to the Indian Commerce Clause, the Court emphasized that the States “have been divested of virtually all authority over Indian Commerce and Indian tribes.” 517 U.S. at 62. The Court held, nevertheless, that the States’ “virtually total cessation of authority over [Indian commerce]” did not include “cessation of immunity from suit.” *Id.*; see also *id.* at 72 (stating that, “[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States”). Having overruled *Union Gas*’s holding that Congress may abrogate pursuant to the Interstate Commerce Clause, the Court gave no reason for extending that holding to the Indian Commerce Clause, despite the concededly greater federal interest in the latter clause, other than the fact that both clauses predated the Eleventh Amendment. Similarly, in holding in *Florida Prepaid* that Congress may not abrogate pursuant to the Patent Clause, the Court offered no reason other than that it had held in *Seminole Tribe* that Congress may not abrogate state sovereign immunity under Article I. *Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank*, 527 U.S. 627, 636 (1999). The Spending Clause is not a counterexample, as that clause merely empowers Congress to encourage waivers of immunity; such waivers are consistent with, rather than an abrogation of, state sovereign immunity. I agree with Bandes that the chronological line the Court has drawn is highly problematic, see Vázquez, *supra* note 29, at 1749-50, but it seems to me that Bandes’s interpretation of these cases as embracing a clause-specific inquiry amounts to wishful thinking.

70. I have done this myself. See Vázquez, *supra* note 4, at 1343.

71. 252 U.S. at 434.

72. See *Alden*, 527 U.S. at 713. I use the term in this sense in the title of this article.

Amendment, it is probably more accurate to say that the Eleventh Amendment is a reflection of the broader doctrine of state sovereign immunity. The doctrine of state sovereign immunity might thus be regarded as an invisible radiation from the Tenth Amendment, the catch-all federalism clause. Indeed, scholars have argued that the state sovereign immunity decision in *Alden* is merely one facet of the Court's anti-commandeering jurisprudence,⁷³ which is in turn widely regarded as an invisible radiation from the Tenth Amendment.

The doctrinal case for a treaty-based abrogation power can be buttressed by a structural argument. Treaties require the consent of two-thirds of the Senate, the branch of the government most responsive to state interests. Thus, just as the Constitution provides the states with a structural safeguard against infringement of their regulatory jurisdiction, it also protects them structurally from being subjected to federal remedies for the violation of such regulations. Evidence of the efficacy of this safeguard can be found in the federalism understandings that the Senate has insisted on attaching to numerous treaties the United States has recently ratified, primarily, though not exclusively, those relating to human rights.⁷⁷

To the doctrinal and structural arguments might be added an argument based on original intent. The Founders were united in their concern about state violations of treaties during the era of the Articles of Confederation. The inability of the federal government to deter or remedy such violations was one of the principal vices of the Articles of Confederation and a principal animating cause of the Founders' decision to write a new Constitution. As Judge Gibbons has argued,⁷⁸ the Founders' clear intent to establish a governmental system that would be effective at deterring and correcting state violations of treaties of the United States makes it highly unlikely that they intended states to be

73. See, e.g., Richard Seamon, *The Sovereign Immunity of States in Their Own Courts*, 37 BRANDEIS L.J. 319 (1999); John Allotta, Note, *Alden v. Maine: Infusing Tenth Amendment and General Federalism Principles into Eleventh Amendment Jurisprudence*, 51 CASE W. RES. L. REV. 505 (2001).

74. Uruguay Round Agreements Act (URAA), § 102(c)(1), 108 Stat. 4818, 19 U.S.C. §§ 3512(b)(2)(A), 3512(c)(1); see also "Statement of Administrative Action" (SAA), reprinted in H.R. Doc. No. 103-316, at 656, 675-677 (1994).

75. See 530 U.S. 363, 386 & n.24 (2000).

76. See generally Christopher McCrudden, *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws Under the WTO Government Procurement Agreement*, 2 J. INT'L ECON. L. 3 (1999).

77. See *supra* note 54 and accompanying text.

78. See generally John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

immune from suits arising under treaties.

Finally, one can make a straightforward policy argument in support of a treaty-based abrogation power. Although it is important that the states comply with their obligations under federal statutes, compliance with treaties is arguably even more important. Violation of a statute results in the loss of whatever domestic benefit Congress intended to advance when it passed the statute. Violation of treaties produces problems of a different order entirely. Violations of treaties have an effect on the nation's reputation for keeping its promises, thus making it more difficult to conclude other treaties. This problem was a particular concern of the Founders. The states' violations of the peace treaty with Great Britain was cited by that country to excuse its own violations of the treaty and as a reason not to conclude a treaty of commerce with the United States.⁷⁹

Moreover, treaty violations are violations of international law. As such, they subject the nation as a whole to retaliation by the offended foreign nations. The Founders were concerned that violations of treaties could lead to war.⁸⁰ The risk of war as a result of treaty violations seems more remote today; the United States, as the world's superpower, is less vulnerable to military or other forms of pressure than the nation was at the time of the Founding. Nevertheless, it is still largely true that violation of promises made to other nations by treaty is of potentially far greater concern to the nation than violation of commitments made to private parties through legislation, as foreign states remain, for the most part, more powerful adversaries than private parties whose rights are violated by the states. Because, under international law, such retaliation need not be directly related to the violation that precipitated it, treaty violations place at risk interests of the United States not directly related to the treaty. For example, the United States' violation of an obligation to provide consular notification might result not just in the denial of the corresponding right to U.S. citizens, but also in the violation by other states of international legal duties having nothing to do with consular notification. Because manifold national interests are placed at risk when a state violates a treaty, it might be argued, Congress must have the power to take steps to remedy violations of treaties by the states, including the creation of judicial remedies. This sort of argument has often been advanced to support a total exclusion of states from the foreign relations area.⁸¹ Although the broad exclusion of states from

79. *See id.* at 1918.

80. *See Vázquez, supra* note 56, at 1103.

81. *See* Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999)

matters international may be difficult to maintain in this era of globalization, when practically any activity has international ramifications,⁸² the argument may nevertheless support a distinction between statutes and treaties for purposes of abrogation of state sovereign immunity.

The appeal of the pro-abrogation position is enhanced by the weakness of the case for a doctrine of state sovereign immunity that applies at all to federal claims. As noted, the prevailing view among scholars is that the Eleventh Amendment merely withdraws one diversity basis of federal jurisdiction, leaving untouched the arising under grant, and that state sovereign immunity is at best a common law doctrine subject to plenary repeal by Congress under any of its legislative powers. Four members of the Court are committed to this view. At least some of the five members who adhere to *Hans* have explained that they view the question of *Hans*'s correctness as an original matter as a difficult question, but that they nevertheless adhere to *Hans* for stare decisis reasons. If the case for adhering to *Hans*, and thus for concluding that state sovereign immunity applies to federal claims at all, rests on stare decisis, then the case for declining to extend the decision to the Treaty Power would appear to be at its strongest.⁸³ Indeed, if the Court has yet to rule that state sovereign immunity applies to exercises of the Treaty Power, then the anti-abrogation position is not even supported by *stare decisis*. In the absence of countervailing arguments, the arguments outlined above would appear to be sufficient to support the conclusion that Congress has the power to abrogate state sovereign immunity pursuant to the Treaty Power.

B. *The Weakness of the Case For a Treaty-Based Abrogation Power*

Before presenting the countervailing arguments, I shall offer a brief rebuttal of some of the pro-abrogation arguments. First, the doctrinal support in *Missouri v. Holland* is weak. As discussed in Part II, *Missouri* is best understood as a holding that the limits on congressional power found in the various clauses of Article I, Section 8 are not applicable to Congress's Treaty Power, as the latter is a wholly separate head of power with limits of its own. This should be no more

(offering rebuttal of such arguments).

82. See Berman, Reese & Young, *supra* note 13, at 1189.

83. See Carlos Manuel Vázquez, *Night and Day: Coeur d'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 88 (1998).

controversial than a recognition that the limits of the Commerce Power do not apply to the Patent Power or the Bankruptcy Power. It does not follow that general limitations found elsewhere in the Constitution do not apply to the Treaty Power. For example, the Constitution provides that “[a]ll bills for raising revenue shall originate in the House of Representatives.”⁸⁴ This provision obviously applies whether the Bill is an exercise of the Commerce Power or some other Article I power. It is generally agreed that this limit applies as well to exercises of the Treaty Power.⁸⁵ For similar reasons, *Missouri* need not be read to exempt the Treaty Power from the generally applicable limits reflected in the Tenth or Eleventh Amendments. I have argued elsewhere that the anti-commandeering principle of *Printz* and *New York* may well apply to the Treaty Power. The case for applying the doctrine of state sovereign immunity is even stronger.

It is true that some commentators have made broad statements suggesting that *Missouri v. Holland* stands for the proposition that there are no federalism-based limits on the Treaty Power. These comments, however, were made in the context of discussions of Congress’s power to implement treaties regulating individuals, and clearly were not meant to address the applicability of federalism-based limits such as state sovereign immunity. This is true, at least, of the broad statement made by me. I once wrote that, in the light of *Missouri v. Holland*, “it appears that there are no limits on the treaty power grounded in state sovereignty.”⁸⁶ That this was an overstatement when made is apparent, given the conclusion I reached in that article that the anti-commandeering rule of *New York v. United States* and *Printz v. United States* might well limit the Treaty Power.⁸⁷ Indeed, it is an overstatement insofar as one can regard the requirement of consent by two-thirds of the Senate as a federalism-based limit. What I should have said is that *Missouri v. Holland* holds that the Treaty Power places no judicially enforceable federalism-based subject-matter limits on Congress’s power to regulate individuals.

It is also true that the Court in *Missouri v. Holland* suggested that the Treaty Power is not limited by invisible radiations from the Tenth Amendment. But to conclude that the Court meant to say that the Treaty Power is exempt from all non-textual federalism limitations is a stretch.

84. U.S. CONST. art. I, § 7, cl. 1.

85. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. i.

86. Vázquez, *supra* note 4, at 1343.

87. *Id.* at 1360.

The Court apparently meant to refer to, and reject, the claim that the Tenth Amendment carves out certain spheres for exclusive state regulation, whether or not they would otherwise fall within an enumerated power. If the Court meant to go further, the statement would to that extent be pure dictum. I have never regarded the statement as a strong basis for concluding that the anti-commandeering doctrine is inapplicable to exercises of the Treaty Power, and I regard it as even less of an obstacle to the conclusion that the Treaty Power is subject to the doctrine of state sovereign immunity.

There is some force to the policy argument that relies on the idea that compliance with treaties is more important than compliance with statutes. It was for similar reasons that some Founders took the position that a later statute should not trump an earlier inconsistent treaty.⁸⁸ The doctrine that prevails today, however, is to the contrary. It is well established that, in the event of a conflict between a statute and a treaty, the last in time prevails. Statutes and treaties are lexically equivalent. The last-in-time rule makes it difficult to defend the pro-abrogation position on the theory that compliance with treaties is categorically more important than compliance with statutes. Indeed, a plurality of the Court drew precisely the opposite inference from the last-in-time rule in *Reid v. Covert*. In concluding that Congress's power to implement treaties was subject to "constitutional prohibitions" such as those found in the Bill of Rights, the plurality reasoned that "[i]t would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument."⁸⁹

The structural argument relying on the constitutional requirement that treaties receive the consent of two-thirds of the Senate is stronger. It might support the conclusion that the Treaty Power is not constrained by state sovereign immunity if the latter doctrine were supported only by judicial precedent not quite on point and if there were no countervailing arguments. In my view, however, there is a strong countervailing argument based on constitutional text. This countervailing argument rebuts as well the argument based on original intent. Discussion of this countervailing argument will show, further, that the policy arguments for a congressional power to abrogate state sovereign immunity are weaker than they appear.

It is true that one of the principal vices of the Articles of

88. See Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1099 (1985) (describing position of John Jay).

89. *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion).

Confederation, in the view of the Founders, was the lack of any mechanism for enforcing state compliance with treaties. The Founders were very concerned about such violations, and they clearly intended to establish a federal governmental with the power to prevent such violations or remedy them if they should occur. But the mechanism they adopted for this purpose consisted of the Supremacy Clause, which provides that treaties “shall be the supreme Law of the Land” and instructs the judges in every state to give them effect, and Article III, which authorizes federal jurisdiction over claims arising under treaties. Significantly, these provisions of the Constitution make no distinction between statutes and treaties. The texts of the Constitution that most directly address the role of courts in enforcing treaties thus strongly support the conclusion that this role is the same with respect to treaties and statutes.

Indeed, Judge Gibbons’s examination of the Founders’ intent to avoid state violations of treaties led him to conclude that the Eleventh Amendment does not apply to *any* federal claims.⁹⁰ He argued based on this history that the Amendment should instead be read to withdraw a diversity basis for jurisdiction, leaving intact the federal question provision, which provides for federal jurisdiction over cases arising under the Constitution and federal statutes and treaties alike. If the Supremacy Clause and Article III support the (as yet) unsuccessful effort to convince the Court to adopt the diversity view, these constitutional texts also pose a significant obstacle to any attempt to distinguish treaties from statutes for purposes of state sovereign immunity.

IV. THE SUPREMACY CLAUSE AND STATE SOVEREIGN IMMUNITY

As I have written elsewhere, the relationship between the Supremacy Clause and state sovereign immunity doctrine is underappreciated.⁹¹ The principal problem with the Eleventh Amendment, insofar as it applies to federal claims, is the tension between the doctrine of state immunity and the supremacy of federal law. State sovereign immunity constrains the courts’ ability to enforce the undoubted federal obligations of the states. The diversity theory, as defended by some scholars and Justices, seeks to alleviate this tension.

The Court majority that has until now rejected the diversity theory has not denied the importance of the supremacy of federal law. Instead,

90. Gibbons, *supra* note 78.

91. Vázquez, *supra* note 29, at 1777-85.

it has decided to retain the *Hans* interpretation of the Eleventh Amendment because, in its view, the doctrine does not impair such supremacy. Thus, in *Union Gas*, Justice Scalia spoke for four of the current five Justices that comprise the majority on Eleventh Amendment issues when he said that, "undoubtedly, the Constitution envisions the necessary judicial means to assure compliance [by the states] with the Constitution and laws."⁹² The Eleventh Amendment, in his view, is not inconsistent with this proposition. That is because the Amendment does not preclude the judicial enforcement of federal law at the behest of the federal government, or in suits by private parties seeking prospective relief against state officials or seeking damages from such officials.

The case law relating to suits for prospective relief relies explicitly on the Supremacy Clause. The seminal case of *Ex parte Young* relies on the Supremacy Clause in explaining why the Eleventh Amendment is not a bar to a suit against a state officer alleging the officer is violating federal law:

The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.⁹³

This was no innovation. The role of the Supremacy Clause as the basis of the remedy against individual officers had earlier been made clear in *Poindexter v. Greenhow*:

Of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battle-field and the scaffold,

92. *Pennsylvania v. Union Gas Co.*, 491 U.S. at 33 (1989) (Scalia, J., dissenting).

93. 209 U.S. 123, 159-60 (1908).

if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them . . . And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political constitutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple, and naked; and of communism, which is its twin; the double progeny of the same evil birth. . . . [The Constitution] creates a government in fact, as well as in name, because its Constitution is the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding;" and its authority is enforced by its power to regulate and govern the conduct of individuals, even where its prohibitions are laid only upon the States themselves. The mandate of the State affords no justification for the invasion of rights secured by the Constitution of the United States; otherwise, that Constitution would not be the supreme law of the land.⁹⁴

The Court continues to recognize the Supremacy Clause as the basis of this line of cases. In *Pennhurst State School and Hospital v. Halderman*, for example, the Court wrote that

"Ex parte Young was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.⁹⁵

The Court accordingly held that the *Ex parte Young* doctrine authorizes prospective relief against state officers only where the officer is alleged to have violated federal law.

The Court similarly cited the Supremacy Clause as the justification for awards of prospective relief, notwithstanding the Eleventh Amendment, in *Green v. Mansour*: "[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy

94. 114 U.S. 270, 291-92 (1885).

95. 465 U.S. 89, 105 (1984).

Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."⁹⁶

I have cited these cases and others as support for a reading of the Supremacy Clause as the source of a self-executing constitutional law of remedies for the violation of federal law,⁹⁷ the source not only of prospective relief against state and federal officials, but also of monetary relief against such officials.⁹⁸ As this paper is not about self-execution, however, it suffices here to maintain that the Supremacy Clause (in conjunction with the Necessary and Proper Clause) is at least the source of a congressional power to establish effective remedies for the violation of federal law. It is, in other words, the source of the principle that "the Constitution envisions the necessary judicial means to assure compliance with the Constitution and laws,"⁹⁹ at least if Congress authorizes those means.

As noted above, Justice Scalia and his colleagues who decided to adhere to *Hans* did so even while acknowledging that the question of its correctness was not free from doubt. They adhered to it in large part for reasons of stare decisis, reasoning that its effects were not so bad from the perspective of federal supremacy. In particular, they concluded that the Eleventh Amendment as construed in *Hans* was not inconsistent with the constitutional need for "judicial means to assure compliance [by the states] with the Constitution and laws" because the Amendment left available effective methods of enforcing these obligations in court. Specifically, the Court mentioned not only suits for prospective relief against state officials, but also suits by the United States for any form of relief and personal-capacity suits against individual officers by private parties.¹⁰⁰

In a pre-*Alden* article anticipating the holdings of *Alden* and *Florida Prepaid*, I described at some length the remedies that would remain available for enforcing patent rights against states.¹⁰¹ I concluded that the problems created by these decisions would not be severe as long as suits by the federal government and private suits for prospective relief

96. 474 U.S. 64, 68 (1985).

97. See Vázquez, *supra* note 29, at 1777-1785; Carlos Manuel Vázquez, *The Constitution as Law of the Land: The Supremacy Clause and Constitutional Remedies* (unpublished manuscript, on file with The Virginia Journal of International Law).

98. Cf. Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1995).

99. *Union Gas*, 491 U.S. at 33 (Scalia, J., dissenting).

100. 491 U.S. at 33-34.

101. Vázquez, *supra* note 29, at 1790-1804.

and personal capacity damage suits remained available.¹⁰² In post-*Alden* articles, I and others have elaborated on this question.¹⁰³ An extensive analysis of the remedies these decisions leave open seems unnecessary, but a brief discussion of the avenues left open by the Eleventh Amendment might help dispel some of the concerns that underlie the policy argument in favor of a treaty-based abrogation power.

First, it is important to recall that the Eleventh Amendment does not limit the federal government's power to impose primary obligations on the States. It merely denies the federal government the power to give efficacy to those obligations by subjecting States to certain forms of remedial obligations. Thus, the Eleventh Amendment does not call into question the states' obligation not to infringe patent rights, or their obligation to afford arrested aliens of their right to consult with their consuls.¹⁰⁴ There are constitutional limits on the federal government's power to impose obligations on the states, but these limits do not have their basis in the doctrine of state sovereign immunity.¹⁰⁵

If a treaty imposes primary obligations on states, but does not specifically address remedial issues, then Congress would be free to create a wide array of remedies even if the Eleventh Amendment applied.¹⁰⁶ Congress would be able to authorize suits against the states by the federal government, as Eleventh Amendment immunity is inapplicable to such suits. Congress would also be able to authorize suits for prospective relief against state officers who are violating obligations imposed by treaties. Congress could also authorize suits for damages against state officers who have violated treaty-based obligations. Under current doctrine, state officials are entitled to a qualified immunity which protects them from damage liability unless they violated clearly established federal law, but this immunity is widely regarded as sub-constitutional and thus alterable by Congress.¹⁰⁷

102. *Id.*

103. See Berman, Reese & Young, *supra* note 13; Menell, *supra* note 13; Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 YALE L.J. 1927 (2000); Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859 (2000) [hereinafter Vázquez, *Schizophrenia*].

104. The latter right is conferred by article 36(1) of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

105. For a discussion of these limits and their applicability to the Treaty Power, see Vázquez, *supra* note 4.

106. Some of these remedies may be available even without affirmative congressional action. See generally Vázquez, *supra* note 56, at 1141-61. Here, I consider the more limited question of Congress's power to create remedies to give efficacy to treaties. For a more complete discussion of the remedies not barred by the Eleventh Amendment, see Vázquez, *Schizophrenia*, *supra* note 103; Vázquez, *supra* note 29, at 1790-1804.

107. *But see infra* note 114.

The only suits effectively barred by state sovereign immunity are suits brought by private parties or foreign states or Indian tribes seeking damages against the states themselves.¹⁰⁸ I doubt that the absence of this remedy could be said to contravene a treaty that imposes primary obligations on states but does not address remedial issues, or one that addresses remedial issues in a general manner, such as by requiring unspecified “effective” or “enforceable” remedies. Even a treaty that specifically requires that states make available an “enforceable right to compensation”¹⁰⁹ may be satisfied by a private right of action for damages against state officers, as opposed to the state itself.

In the unlikely event that a treaty specifically required that private parties be granted a right to damages from state governments, as opposed to state officials, Congress would be able to implement the treaty, without running afoul of the Eleventh Amendment, by empowering the federal government to bring suit on behalf of such individuals seeking damages from the states. That such suits are permitted by the Eleventh Amendment appears to be a settled aspect of the Court’s state sovereign immunity jurisprudence.¹¹⁰ If a treaty for some reason required that private parties have the power to initiate and prosecute the action, Congress would be able to satisfy that obligation by assuming the liability itself, waiving its own sovereign immunity to permit private parties to sue it to recover the amount for which states would be liable under the treaty, and subsequently seeking reimbursement from the state. In the exceedingly unlikely event that a treaty specifically required that the state government as opposed to the federal government be held liable, the United States could, as a last resort, ratify the treaty with a reservation making it clear that states would not themselves be subject to suit by private parties, but alternative remedies would be provided. It is difficult to conceive of a situation in which such a reservation would be invalid because contrary to the object and purpose of the treaty.¹¹¹

In short, according to the Supreme Court, the Eleventh Amendment

108. On whether suits against state officials seeking non-monetary relief is barred, see generally Vázquez, *supra* note 83.

109. See International Covenant on Civil and Political Rights, art. 9(5), Dec. 16, 1966, 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

110. See *Alden*, 119 S. Ct. at 2269; Vázquez, *Schizophrenia*, *supra* note 103, at 870-71 & n.52. But see *United States v. Mississippi Dept. Pub. Safety*, 159 F. Supp. 2d 374 (S.D. Miss. 2001) (suit by United States seeking compensation for private parties barred by the Eleventh Amendment).

111. See Vienna Convention on the Law of Treaties, art. 19(c), opened for signature May 23, 1969, 1155 U.N.T.S. 331 (reservation to treaty invalid under international law if incompatible with the object and purpose of the treaty).

does not bar the remedies that that are necessary to ensure state compliance with the primary obligations imposed on it by supreme federal law.¹¹² To the extent the Amendment were interpreted consistently with this principle, the policy arguments discussed above for a treaty-based abrogation power would not be compelling. That violations of treaties are of greater concern to the nation than violations of statutes, and that dissing foreign states is more dangerous to the nation than dissing private litigants, would be beside the point because the Eleventh Amendment would not be producing violations of treaties.

V. DEPARTURES FROM THE SUPREMACY IDEAL

If the Court's jurisprudence of state sovereign immunity is based on the recognition that the Constitution envisions the necessary judicial means for assuring compliance by the states with their federal obligations, then a distinction between statutes and treaties seems unnecessary for the reasons discussed in Part IV. The textual basis for such a principle in the Supremacy Clause provides strong support for applying the same rule in the two contexts, and, in any event, a remedy would be barred on this view only if it were unnecessary. Numerous commentators have argued that the doctrine of state sovereign immunity does in fact preclude remedies that are necessary for the effective enforcement of federal laws.¹¹³ If so, the appropriate response would appear to be to argue that state sovereign immunity doctrine should be reformulated because it is inconsistent with the Court's own standard, which calls for the availability of the judicial means necessary to assure

112. David Golove has suggested to me that the potential problem with applying the Eleventh Amendment to the Treaty Power is not that it frustrates the ability of the United States to comply with its treaty obligations, but rather in that it limits the power of the treaty-makers to make potentially beneficial treaties in the first place. Of course, if I am right about the applicability of state sovereign immunity principles to exercises of the Treaty Power, the treaty-makers should not conclude treaties that specifically call for remedies that the Eleventh Amendment would bar. Still, I think it is fair to say that the question I address in this article primarily concerns the ability of the nation to ensure compliance with its treaty obligations. Historically, treaties have not addressed the question of domestic judicial remedies, at least not with any specificity. International law has concerned itself with the parties' compliance with their primary obligations, and left the question of domestic remedies to the states-parties. Although this has been changing to some extent, treaties that address domestic judicial remedies remain the exception and not the rule. Moreover, few treaties address such remedies in any detail, and even when they do address the issue, the remedial provisions are typically of secondary importance.

113. See, e.g., Daniel Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331 (2001). On the effectiveness of the remedies not barred by the Eleventh Amendment, see generally Vázquez, *Schizophrenia*, *supra* note 103, at 870-88; Vázquez, *supra* note 29, at 1790-1804.

compliance with federal obligations.

Of greater concern is language in some recent decisions suggesting that the Court is departing from the view that the Eleventh Amendment does not bar the judicial means necessary to assure compliance by the states with their federal obligations. There have been suggestions, for example, that the federal obligations of the states may ultimately depend for their efficacy on the states' good faith.¹¹⁴ This approach may lead the court to cut back on some of the mechanisms now available to enforce the federal obligations of the states. These suggestions are profoundly troubling. They are inconsistent with the Founders' recognition that obligations that rely for their efficacy on the good faith of the obligor are not legal obligations at all. Indeed, one of the principal lessons the Founders learned from the critical period was that reliance on the states' good faith was insufficient—the states could not be trusted to comply with their federal obligations without compulsion.¹¹⁵

Even if the Court were to move in this direction, however, exempting treaty-based claims from the limitations imposed by state sovereign immunity doctrine would be inappropriate. Such a move would be as troubling with respect to statutes as with respect to treaties. An exemption for treaties would be an unsatisfying half-measure which would obscure the true nature of the problem. The fundamental problem would be a conflict between the doctrine of state sovereign immunity and the Supremacy Clause. That clause treats statutes and treaties equivalently. Retaining a symmetry between statutes and treaties with

114. See *Alden*, 119 S. Ct. at 2266. For a discussion of the Court's departures from the supremacy standard, and additional departures that we might expect in the future, see Vázquez, *Schizophrenia*, *supra* note 103. I suggest there, among other things, that the Court may be on the verge of constitutionalizing the doctrine of official immunity. *Id.* at 900-08. Thus, while the statement by Berman, Reese & Young that "[t]here is no doubt that [removal of the official immunity enjoyed by state officials] lies within Congress's power," see Berman, Reese & Young, *supra* note 13, at 1127, may be true as a description of current doctrine, see also Vázquez, *supra* note 29, at 1798-99 (suggesting such a measure), it may not be true for long. But see Meltzer, *supra* note 113, at 1359 n.97 (expressing skepticism of my prediction).

115. See THE FEDERALIST NO. 15, *supra* note 27, at 149:

There was a time when we were told that breaches by the States of the regulations of the federal authority were not to be expected; that a sense of common interest would preside over the conduct of the respective members, and would beget a full compliance with all the constitutional requisitions of the Union. This language, at the present day, would appear as wild as a great part of what we now hear from the same quarter will be thought, when we shall have received further lessons from that best oracle of wisdom, experience. It at all times betrayed an ignorance of the true springs by which human conduct is actuated, and belied the original inducements to the establishment of civil power. Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice without constraint.

respect to state sovereign immunity is more faithful to the constitutional scheme, and would make it more likely that the problem would eventually be resolved with respect to both.

CONCLUSION

I have argued here that state sovereign immunity doctrine is fully applicable to exercises of the Treaty Power. The Court maintains that its recent Eleventh Amendment jurisprudence is compatible with the supremacy of federal law because it leaves available the necessary judicial means for assuring state compliance with their federal obligations. If so, then applying this doctrine to the Treaty Power will not undermine the important national interest in treaty compliance. On the other hand, if the Court departs from the supremacy ideal, then, as Susan Bandes accurately describes my position, “the difference between treaties and statutes becomes the least of our problems.”¹¹⁶ Exempting treaties from the Eleventh Amendment would be an unsatisfying half-measure that might indeed delay a more satisfying solution to the problem.

For similar reasons, I have argued elsewhere that the anti-commandeering doctrine, too, may well apply to exercises of the Treaty Power. Nevertheless, I have defended the holding of *Missouri v. Holland*. My position may thus be summarized as follows: *Missouri v. Holland* stands for the proposition that there are no federalism-based subject-matter limitations on the power of Congress to regulate individuals pursuant to the Treaty Power. Such regulation is valid as long as it implements a valid treaty (meaning a treaty that does not contravene any affirmative prohibition in the Constitution) that has received the consent of two-thirds of the Senate. The Court may have to articulate a “nexus” requirement: that is, the implementing statute would have to bear some specified relationship to the treaty. Perhaps a statute would be regarded as a valid implementation of the treaty only if the treaty required the enactment of the statute. Such a requirement would depart from the analysis in *Missouri v. Holland*, but some such departure may be justified.

When the Congress imposes primary obligations on the states (including state officials), the relevant line of cases is the *New York-Printz-Condon* line of cases. There are many uncertainties about the limits this line of cases imposes of Congress. It is, indeed, because of

116. Bandes, *supra* note 69, at 755.

these uncertainties that the applicability of this line of cases to the Treaty Power remains uncertain.¹¹⁷

It is certain, however, that Congress has the power to impose some primary obligations on states pursuant to numerous Article I powers, including the power to implement treaties. State sovereign immunity issues arise when primary obligations have been validly imposed on states pursuant to treaties, or statutes implementing treaties. My conclusion in this article is that, even when Congress or the treaty-makers possess the power to impose primary obligations on the states, state sovereign immunity limits the remedies to which the states may be subjected. Congress may not subject the states to suit by private parties, foreign states, or Indian tribes, whether for prospective or retrospective relief. Congress may, however, authorize suits against the states by the federal government, and it may subject state officials to suit for prospective relief and for damages payable by them personally.

A treaty that would require a remedy against the states themselves, as distinguished from their officials, could not be complied with. Few treaties address domestic remedies, however, and even fewer are so specific as to require remedies against the state itself as opposed to officials. More common are treaties that simply require the parties to make effective remedies available. Thus, the International Covenant on Civil and Political Rights provides that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation," without specifying whether the compensation is to come from the state or state officials.¹¹⁸ A treaty that would require the provision of judicial remedies against the state itself as opposed to its officials should not be ratified without reservations. The availability of alternative remedies makes it unlikely that such a reservation would be invalid under international law on the ground that it is "incompatible with the object and purpose of the treaty."¹¹⁹

117. See generally Vázquez, *supra* note 4.

118. Dec. 16, 1966, art. 9(5), 999 UNT.S. 171, *entered into force* Mar. 23, 1976.

119. See Vienna Convention on the Law of Treaties, art. 19(c), *opened for signature* May 23, 1969, 1155 UNT.S. 331 (reservation to treaty invalid under international law if incompatible with the object and purpose of the treaty).