

# THE BOUNDLESS TREATY POWER WITHIN A BOUNDED CONSTITUTION

*Saikrishna Bangalore Prakash\**

## INTRODUCTION

The Constitution grants the President the power to make treaties by and with the advice and consent of the Senate. One persistent matter of debate is whether there are subject matter limits to the President's power to make treaties. In particular, in making an international agreement with a foreign nation, are there certain topics that are off limits?<sup>1</sup> For instance may the President make a treaty about the details of family law, a subject often thought beyond the authority of the federal government?<sup>2</sup> Or may the President make a treaty that obliges the United States to respect certain human rights, say a right to be free of corporal punishment? While many nuanced

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1 There are, of course, other enduring questions about the treaty power. Treaties are always, first and foremost, international agreements. Under the Constitution, American treaties can have a second aspect, namely serving as a vehicle for the creation of domestic law. Prior to the Constitution and after its creation, there were extensive and fascinating discussions about whether treaties could make domestic law on the subjects granted to Congress by Article I. For instance, could a commercial treaty do no more than make an international agreement, with Congress actually having to change domestic commerce statutes to satisfy the new international obligation? This Article will not discuss this question.

A second vital issue is whether there are limits to Congress's power to pass statutes meant to enforce treaties. For instance, as a means of implementing a treaty related to chemical weapons, can Congress impose a nationwide ban on the use of chemicals used as weapons? This was one of the questions presented in *Bond v. United States* during the Supreme Court's October 2013 Term. Following the Court's example, I will duck this question.

2 Because Congress is not limited to the enumerated powers in the territories and the District of Columbia, Congress has no subject matter limits in those jurisdictions. When discussing the scope of the treaty power, I will be discussing whether treaties can make international agreements about what the governments and the peoples of the United States must (or must not) do in the fifty states.

answers are possible, in the main, there are two primary answers: “no” and “yes.”<sup>3</sup>

Those who respond “no” to such questions suppose that the federal power to make treaties is not constrained by any subject matter limits. Their answer likely turns (in part) on their inability to detect subject matter constraints either in the Treaty Clause or elsewhere in the Constitution. Hence they conclude that the President, with the Senate’s consent, can make treaties on *any* subject: commerce, tax, military alliances, the rights of aliens, territorial cessions, migratory birds, human rights, children’s rights, and even animal rights. If the Republic of Panama sought a treaty with the United States relating to neighborhood watches, the President could make such a treaty, provided the Senate was unwise enough to consent with the requisite supermajority.

Those who answer “yes”—those who suppose that there are subject matter limits on the treaty power—likely trade upon a sense that there must be implied limits on what the President may cram into a treaty. The federal government is a government of exhaustively enumerated and (therefore) limited powers. After carefully expressing what the Congress may do in Article I, Section 8 and what the President may do in the rest of Article II, how can it be that the Treaty Clause surreptitiously conveys broad power to reach any and all subjects? Such thinking leads some to conclude that the Constitution imposes subject matter limits that are left unsaid.

I count myself in the first camp, among those who suppose that the Constitution contains no subject matter limits on the treaty power. More precisely, I believe that the *original* Constitution granted the President the power to make international agreements, with no particular constraints on the subjects they might touch. I reach this conclusion with a great deal of reluctance not because the case for this proposition is weak but because, as a matter of policy, I favor subject matter limits on the treaty power as a means of ensuring exclusive state authority over certain matters. Nonetheless, I have become convinced that the Constitution does not gratify my preferences. The treaty power is boundless in the sense that treaties of the United States can concern any subject, no matter how fanciful or seemingly absurd the matter might seem.

Yet the treaty power is not completely without bounds. There likely are constraints on federal power that apply regardless of the sort of power (legislative, executive, judicial) being exercised. Such constraints would likewise apply to the treaty power as well.

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3 I have greatly benefitted from the numerous works on this subject. Among the articles I have profited from are: Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) [hereinafter Bradley, *The Treaty Power and American Federalism*]; Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000); 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); Michael D. Ramsey, *Missouri v. Holland and Historical Textualism*, 73 MO. L. REV. 969 (2008).

Part I canvasses possible subject matter limits on the treaty power. Part II discusses the Constitution's text. Part III considers subject matter limits on treaties prior to the Constitution's creation. Part IV examines how the Constitution constrains the treaty power that lacks subject matter bounds.

### I. POSSIBLE SUBJECT MATTER LIMITS

The basic argument that the treaty power is boundless can be stated relatively succinctly, at least for now. In the eighteenth century, a treaty was a significant, durable contract or agreement between sovereigns.<sup>4</sup> The national government enjoys the power to make such contracts, without regard to subject matter, because the Constitution grants the power to make treaties without imposing any such constraints. Many (perhaps most) treaties of the United States have concerned matters that no one disputes are the proper subjects of treaties—alliances, commerce, etc. Some modern treaties of the United States seemingly have encroached upon new ground, embracing matters often not typically found in international agreements.<sup>5</sup> Those contracts with other nations that occupied new subject matter territory are no less treaties because they incorporate novel subjects not usually found in treaties. In a similar way, a contract made with my friend where I promise not to touch my nose and she promises to give me a dollar in consideration for this promise is no less a contract even if no one else has ever made such a fanciful contract. Because the federal government has the power to make treaties with other sovereigns, it has the power to make all sorts of contracts, sound as well as unsound pacts, serious as well as curious bargains.

Theories that imagine that the treaty power faces subject matter constraints require a bit more elucidation, at least to discern the bounds that the theories contemplate. I mention two different subject matter limits to give a sense of the possible, but these by no means exhaust the possibilities. Both are perhaps motivated by the sense, referenced earlier, that when we step back from the Constitution's text and consider its structure, we should conclude that it presupposes enclaves of exclusive state legislative authority. Family law, property law, the law of torts—were not these to be regulated by the respective states without federal interference? The Constitution is studied with too many signals that the federal government cannot regulate everything under the sun, even via the treaty power.

Subject matter limits on the treaty power can be classified as either internal or external. Internal restraints arise from something in the Constitution itself, usually structural inferences about enumeration or federalism. External restraints, though perhaps loosely grounded in the word "treaty," derive

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4 See Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 183–206 (1998) (describing the difference between treaties and other types of international agreements).

5 See, e.g., Convention on Psychotropic Substances pmbl., *opened for signature* Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175 (stating that the treaty is designed to "prevent and combat abuse of [psychotropic] substances").

their force from something outside the Constitution, a sense that the international system limits the scope of treaties generally and hence acts as an implied (but no less real) check on the President's ability to make treaties.

Consider a theory of internal restraint, namely that because Article I, Section 8 enumerates federal legislative power and because the treaty power seems something of a substitute for ordinary federal lawmaking, we ought to regard the treaty power's scope as coterminous with the grants to Congress. This theory of the scope of the treaty power would presumably rest upon the view that having painstakingly listed eighteen grants of legislative power in Article I<sup>6</sup> and a handful of legislative authorities elsewhere,<sup>7</sup> all resting with Congress, no sensible constitution maker would grant the President, acting with the Senate, the power to make international agreements relating to matters beyond these specific grants.<sup>8</sup> No rational constitution maker would do this because it would render the system of enumerated powers something of a farce. Even if Congress could not legislate in some areas like property law or inheritance, the President could, with the Senate's consent, make international contracts related to such subjects. Having enumerated so many (but not all) legislative subjects, the Constitution leaves the unenumerated subjects to the states.

External theories suppose that the treaty power's subject matter limits are to be discerned by reference to what are the proper subjects of treaties in the international arena. In other words, international law or the practices and customs of treaty-making implicitly restrain the treaty power of the United States. Sometimes this goes by the claim that treaties must relate to matters of "international concern."<sup>9</sup> Because constraints on treaties come from the international realm, they have no necessary relationship to the legislative grants to Congress. Federal treaties might cover some areas in which Congress can legislate (e.g., commerce, bankruptcy), and they might extend to some topics that Congress cannot (e.g., alliances and the rights of resident aliens).

To complicate matters, subjects of "international concern" can be a static or dynamic concept. The dynamic version asks what is a matter of international concern today. Whatever is such a matter is a proper subject for treaties made today even if the subject was not a matter of international concern in the eighteenth, nineteenth or twentieth centuries. Even if no

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6 U.S. CONST. art. I, § 8.

7 See, e.g., *id.* art. III, § 3, cl. 2 (granting Congress the power to "declare the punishment of treason"); *id.* art. IV, § 1 (granting Congress the power to "prescribe the manner" in which states must accord full faith and credit to sister state laws).

8 This theory of internal restraint was a common one in the nineteenth and early twentieth centuries. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 190 (2d ed. 1996). However, in *Missouri v. Holland*, 252 U.S. 416 (1920), the Supreme Court rejected this limitation. See *id.* at 433 ("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 . . .").

9 Bradley, *The Treaty Power and American Federalism*, *supra* note 3, at 394 (quoting HENKIN, *supra* note 8, at 197).

human rights treaties were made in the eighteenth century, such treaties can be made today because human rights are now a matter of international concern given the pervasive interest of countries to contract about how nations treat their own nationals.

The static view reads the Treaty Clause as providing that the President may make treaties on subjects that were a matter of international concern in the late eighteenth century. If a subject is a matter of international concern today, but was not an international matter in the late eighteenth century, then the President cannot make a treaty on the subject, no matter its weighty international significance today. Contrariwise, if something is no longer a matter of international concern, but was a matter of international interest in the eighteenth century, the President could make a treaty on that now marginalized and long disregarded topic.

Because I believe there are no subject matter limits particular to the treaty power, I won't further explore theories that read the treaty power as constrained to certain subjects. Instead, in the sections that follow, I lay out the textual, structural, and historical argument that the Constitution neither imposes (nor incorporates) any subject matter limits particular to the scope of the treaty power.

To adumbrate the argument, prior to the Constitution, treaties were generally understood to be nothing more than contracts or agreements between nations. Hence, the law of nations imposed no subject matter limits on what might be a proper subject for a treaty. Indeed, treaties sometimes covered how nations treated their own citizens, thus regulating a matter that might, at first blush, seem to be no more than a matter of (intra)national concern. After declaring independence, America made treaties that went beyond the narrow subjects listed as matters of national concern in the Articles of Confederation, indicating that those subjects did not limit the treaty power. Despite lacking legislative authority over commerce, territorial acquisition, or the rights of aliens, the Continental Congress made treaties on all these subjects. Turning to the Constitution, its text grants the federal government the right to make international contracts, never expressly limiting the subjects in those contracts.<sup>10</sup> As a matter of structure, where the Constitution means to limit forms of lawmaking, it does so expressly. Because there are no express constraints particularly applicable to treaties, there are none.

## II. THE SCOPE OF THE TREATY POWER PRIOR TO THE CONSTITUTION

In *The Law of Nations*, a treatise on international law written in the mid-eighteenth century, Emerich de Vattel described treaties as nothing more than “[t]he several engagements into which nations may enter”<sup>11</sup> into with each other. He also declared that with respect to things not forbidden by the law of nations, “it rests at the option of nations to make in their treaties

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<sup>10</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>11</sup> EMERICH DE VATTEL, *THE LAW OF NATIONS* 77 (Béla Kapossy & Richard Whatmore eds., 2008) (1758).

whatever agreements they please, or to introduce whatever custom or practice they think proper.”<sup>12</sup> Vattel’s discussion indicates that nations could make “whatever agreements they please” and include in treaties “whatever custom or practice they think proper.”<sup>13</sup>

Thomas Rutherford’s *Institutes of Natural Law* had much the same definition. He wrote that nations are capable of binding themselves in treaties and compacts “to do or to avoid what the law of nature has neither commanded nor forbidden.”<sup>14</sup> Later he noted that nations may enter into any treaties concerning “any rights or obligations, which are consistent with the law of nature.”<sup>15</sup>

In his 1795 treatise on the law of nations in Europe, Robert Plumer Ward wrote of the expansive treaty power. He wrote of the history of treaty-making, noting that treaties could be used to marry individuals, alienate or renounce territory, make alliances, build peace, join confederations, and acquire a “just power of taking part in [another nation’s] affairs.”<sup>16</sup> As with Vattel and Rutherford, Ward believed that the law of nations contained certain prohibitions on treaty-making; everything else was left to the discretion of states. Those prohibitions had to do with the supposedly immutable laws of nations. For instance, a treaty between two states to conquer a peaceful state would be illegal and void, claimed Ward, because it was contrary to the law of nations. So while the law of nations generally provides that we may “determine upon certain things by agreement” and “may leave a vast number of points at the absolute discretion, or even caprice of [Treaty],” it is by no means true that “any thing which the heart of man can devise shall be legal” under the law of nations.<sup>17</sup>

While Ward emphasized the vast potentiality of treaties and sometimes denigrated traditional treaty categories, he, like those who preceded him, realized that these categories were useful. Treaties of alliance were mostly about agreeing to grant assistance in time of war. Treaties of commerce predominantly concerned the terms of trade and the rights of resident foreigners. Treaties of peace were largely about the terms for ending wars. Treaties of confederation created a new entity from sovereigns who were formerly independent of one another. Treaties of unequal alliance gave one nation substantial authority over matters normally under the exclusive control of the other sovereign party.

Each of these treaty categories could cover subjects that might seem, on the surface, to relate to matters of national, rather than international, concern. For instance, by the Treaty of Nonsuch, Queen Elizabeth I of England

12 *Id.* at 71.

13 *Id.*

14 THOMAS RUTHERFORTH, *INSTITUTES OF NATURAL LAW* 484 (2d Am. ed., William & Joseph Neal 1832) (1754).

15 *Id.* at 560.

16 1 ROBERT WARD, *AN ENQUIRY INTO THE FOUNDATION AND HISTORY OF THE LAW OF NATIONS IN EUROPE* 141 (1795).

17 *Id.* at 142.

agreed to assist the Dutch militarily.<sup>18</sup> In return, she acquired two seats on the Dutch Council of State and could negotiate with Spain on behalf of the Dutch.<sup>19</sup> Yet she could make no treaty pertaining to the Dutch without first securing their advice and consent.<sup>20</sup> Despite this limitation, the treaty essentially thrust one powerful sovereign (England) into the government of a weaker nation (the Netherlands). Similarly, Poland struck treaties in which it gave its neighbors authority over matters related to Polish tariffs and customs.<sup>21</sup> Because seemingly internal subjects were also matters of international concern, treaties regulated those internal issues.

Sometimes treaties diminished what many might consider the highest aspects of a nation's sovereignty. Some treaties barred a nation from making war without the consent of another, as when Rome dictated this term to a broken Carthage.<sup>22</sup> Other treaties regulated how a sovereign ruled its people. For instance, Emperor Justinian made peace with the Persian King and agreed to pay tribute.<sup>23</sup> For his part, the Persian King promised to respect the free exercise rights of Christians in his kingdom, something the Emperor was keen to ensure.<sup>24</sup> In another treaty, Justinian allowed Hellenists to return from Persia and practice their religion in peace.<sup>25</sup>

The Treaty of Westphalia, from the mid-seventeenth century, also was something of a peace treaty. Nevertheless it contained many provisions that went beyond the mere cessation of hostilities. In several respects, the Treaty shielded citizens from their sovereigns. Most famously, it gave dissenting religious groups the right to practice their religion free from molestation.<sup>26</sup> It also granted amnesty, restored property, nullified coerced private contracts, and guaranteed freedom of contract and movement.<sup>27</sup>

Treaties safeguarding religious liberty touched North America as well. In 1763, the French and Indian War was concluded with France ceding its territories in Canada to the English.<sup>28</sup> Because France was concerned about the fate of Catholics being handed over to England, the English King guaranteed the "liberty of the Catholick religion to the inhabitants of Canada."<sup>29</sup> While the provision was clearly meant to protect those formerly citizens of France, it was written in general terms, presumably protecting all Catholics, whether of French extraction or not.

18 See EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648, at 240 (Frances Gardiner Davenport ed., 1917).

19 *Id.*

20 *Id.*

21 JERZY LUKOWSKI, THE PARTITIONS OF POLAND 1772, 1793, 1795, at 93 (1999).

22 See R. BOSWORTH SMITH, ROME AND CARTHAGE: THE PUNIC WARS 226 (1885).

23 JAMES ALLAN EVANS, THE EMPEROR JUSTINIAN AND THE BYZANTINE EMPIRE 90 (2005).

24 *Id.*

25 *Id.* at 91.

26 DINAH L. SHELTON, ADVANCED INTRODUCTION TO INTERNATIONAL HUMAN RIGHTS LAW 20–21 (2014).

27 *Id.*

28 Definitive Treaty of Peace, Fr.-Gr. Brit.-Spain, Feb. 10, 1763, 42 Consol. T.S. 320.

29 *Id.* at 324.

Why would nations agree to limit how they might exercise their sovereign authorities or how they might regulate their own citizens? And why would other sovereigns demand such limits? The former provisions were necessary to conciliate more powerful nations who desired such constraints. Having a check on another nation's power to wage war or raise funds might prove useful as a means of keeping that nation subordinate. The proto-human rights provisions were perhaps essential as a means of ending a war and of ensuring that it would not recommence. If France thought that Great Britain, at war's end, would suppress all Catholics in Canada, that fear might spur France to prolong its war with Great Britain. Moreover, religious protections in particular stifled the impulse for religious wars, where co-religionists in one nation would use the suppression of their brethren in another as a reason to wage war.

The underlying principle of treaties was the underlying principle of contracts. Treaties were struck for the mutual benefit of the parties. As one German put it in the mid-eighteenth century, "free nations can contract about things relating either to the utility of either or of both."<sup>30</sup>

When the United States took its place on the world stage in 1776, it acquired this power to make mutually beneficial international contracts. As the Declaration put it, the "United Colonies" had "full Power to . . . conclude Peace, contract Alliances . . . and to do all other Acts and Things which Independent States may of right do."<sup>31</sup> Because it had full power to do all things which "Independent States" may do, the "United Colonies" had authority to make all manner of international commitments, extending to such topics as property law, family law, etc.

Indeed, the text of the Articles of Confederation suggested a broad treaty power—one that extended beyond the obviously limited reach of the Continental Congress's legislative power and touched matters ordinarily within the purview of the states. Under the Articles of Confederation, the Congress enjoyed but little legislative power. Its most prominent legislative authorities extended to creating and running post offices, regulating weights and measures, and requisitioning funds and soldiers from the states.<sup>32</sup> It also enjoyed executive authority over war, peace, and treaties.<sup>33</sup> Among the vital authorities that Congress lacked was legislative authority over commerce, territorial acquisitions or cessions, and the peacetime rights of foreign nationals.

In this context, the treaty power—granted expressly and exclusively to the Continental Congress by the Articles—supplied some of the deficiency in national authority. Congress enjoyed a power of "entering into treaties and alliances," subject to two express constraints.<sup>34</sup> It could make no commercial

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30 2 JOHAN GOTTLIEB HEINECCIUS, *A METHODOICAL SYSTEM OF UNIVERSAL LAW* 200 (1741).

31 THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

32 See ARTICLES OF CONFEDERATION of 1781, art. IX, paras. 4–5.

33 See *id.* art. VI.

34 *Id.* art. IX, para. 1.



treaty that sought to restrain state legislatures from imposing nondiscriminatory duties and imposts on foreigners. Nor could it make a commercial treaty that barred the exportation or importation of any goods.

Because Congress evidently had no legislative power over foreign commerce, the curbs on commercial treaties found in the Articles assumed that Congress could make treaties on subjects not otherwise within the competence of Congress. In other words, the Articles presupposed that the Continental Congress's treaty power extended to commercial treaties notwithstanding the lack of legislative power over commerce.

The more general point is that in making treaties, Congress could make international contracts on matters other than the mail, weights and measures, peace, alliances, and war. In a sense, the Articles of Confederation had incorporated the far-reaching international sense of the scope of treaties. It had integrated that broad law of nations by granting authority to make treaties and alliances without introducing significant subject matter constraints, save for the limits on commercial treaties.

Actual treaties struck by the United States advance the claim that the Articles incorporated the "full [law of nations] Power" to make treaties.<sup>35</sup> The Continental Congress made agreements that would assist in its war with Great Britain,<sup>36</sup> cement its status as an independent sovereign,<sup>37</sup> and assist in the economic development and expansion of the United States.<sup>38</sup>

Consider Indian treaties. These often expanded the boundaries of the United States, a legislative power never expressly granted to the Continental Congress. Americans understood that because treaties could encompass "whatever agreements [nations] please,"<sup>39</sup> they could be used to acquire territory for the United States from Indian tribes. Another way of putting the point is that even though the Continental Congress lacked legislative authority to purchase territory, treaties could be struck to gain territory.

Indian treaties also regulated the rights of Americans, as when they declared that Americans settling on Indian land would lose the protection of the United States and ominously declared that these settlers could be dealt with as the Indians saw fit.<sup>40</sup> These treaties *limited* the rights of Americans. Still we might conceive of them as human rights provisions of a sort, namely provisions that diminished the rights of Americans in a bid to appease Indian allies.

35 THE DECLARATION OF INDEPENDENCE, para. 32 (U.S. 1776).

36 See Treaty of Alliance, U.S.-Fr., Feb. 6, 1778, 8 Stat. 6.

37 See Paris Peace Treaty, U.S.-Gr. Brit., Jan. 20, 1783, 8 Stat. 58.

38 See, e.g., Treaty with the Wyandot and Other Nations, U.S.-Wyandot, art. VI, Jan. 21, 1785, 7 Stat. 16 [hereinafter Treaty with the Wyandots] ("The Indians . . . do acknowledge the lands east, south and west of the lines described . . . to belong to the United States.").

39 VATTEL, *supra* note 11, at 71.

40 See Treaty with the Wyandots, *supra* note 38, art. V ("If any citizen of the United States . . . shall attempt to settle on [Indian lands] . . . such person shall forfeit the protection of the United States, and the Indians may punish him as they please.").

Admittedly, the Articles of Confederation had granted Congress authority to regulate “trade and managing all affairs with the Indians.”<sup>41</sup> Hence, perhaps the tribal treaties can be regarded as resulting from the exercise of this legislative power rather than from the grant of treaty authority. This reading would suggest that the legislative power to manage “affairs” with tribes included power to acquire land and an ability to pare back the rights of Americans, particularly their right to expect the protection of their governments.

But this attempt to ground Indian treaties in the legislative power of the Continental Congress does little to advance a narrow reading of the treaty power. If the power of managing affairs with Indians is read as authorizing territorial acquisitions and the diminution of the rights of American citizens, that same “management” power also may authorize the grant of human rights to Americans, at least where a tribe insisted on the grant of such rights in return for some concession. In other words, if read as a measure of the authority to make Indian treaties, the power to manage relations with Indians suggests a sweeping treaty power because the management of those relationships might require any sort of treaties that tribes might wish to make.

Furthermore, even though the Articles did not employ the same phrasing with respect to foreign nations, the Continental Congress rather clearly had authority to manage affairs with those nations.<sup>42</sup> If the power to manage affairs with Indian tribes included a power to strike any and all treaties with them because such agreements helped the Congress manage America’s relationships with those tribes, the Congress’s undoubted power to manage affairs with foreign nations likewise included authority to make any and all treaties with those nations. In other words, the “managing all affairs” language of the Articles, if read to authorize the treaties actually struck with Indian tribes, imposes no subject matter constraints on treaties and suggests a broad power to make any treaties that might conduce sound relations.

No less suggestive of a broad treaty power were the more complex agreements struck with foreign nations. Though the Articles never granted it foreign commerce authority, Congress made commercial treaties, recognizing that its enumerated treaty power covered all manner of treaties, save for the two sorts forbidden by the text.<sup>43</sup> These commercial treaties, struck with

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41 ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

42 The Articles of Confederation granted Congress the power to “enter[ ] into treaties and alliances” with foreign nations, subject to two limitations. *Id.* art. IX, para. 1; *see supra* text accompanying note 35.

43 In 1782, James Madison had claimed that the power to make commercial treaties might be limited by the reserved rights of the states. But Congress decisively rejected the treaty negotiation instructions that Madison (and others) had drafted to reflect this concern. Moreover, with the ratification of subsequent commercial treaties, it became crystal clear that the rest of Congress rejected Madison’s narrow reading of the treaty power. In any event, that Madison admitted that Congress could make some commercial treaties without a grant of legislative power over foreign commerce demonstrates that he understood that the treaty power was not limited to the matters over which Congress had legislative authority.

France, Netherlands, Sweden, and Prussia prior to 1787, typically gave each party most-favored nation status.

Because these treaties were styled treaties “of amity and commerce,” they also evidenced a friendship. One means of demonstrating goodwill to another nation was to cede rights to their aliens within the United States. And the United States did this quite often. In particular, Congress agreed to grant aliens free exercise rights and the rights to bequeath, inherit, transport, and dispose of, property.<sup>44</sup> There was, of course, no enumerated legislative power to regulate the privileges of aliens. Nor was there express authority to make treaties of amity (as opposed to treaties of alliance).

Moreover, these treaties of amity and commerce also covered, in limited ways, what Americans could do on native soil. These treaties stipulated that Americans could not accept a commission as a privateer in the service of a foreign state at war with America’s treaty partner.<sup>45</sup> The remedy for illegally taking a commission was punishment as a pirate.<sup>46</sup> Needless to say, there was no enumerated legislative power to bar fighting on behalf of a foreign nation.

Congressional debate and treaty instructions also suggested a broad treaty power. In one instance, Congress sought to negotiate a treaty with Spain that would, in return for commercial privileges, temporarily cede navigation rights on the Mississippi. On the merits, Southerners opposed ceding these navigation rights on the grounds that it was unjust and contrary to the ends of the Confederation.<sup>47</sup> They also argued that the treaty instructions to John Jay were “unconstitutional” because only seven states had relayed the instructions when nine were necessary to actually make treaties. Yet Southerners never went so far as arguing that actually ceding navigational rights was per se unconstitutional, i.e., contrary to the Articles of Confederation or its treaty power. Moreover the negotiations (and the instructions given to John Jay) supposed that Congress, by treaty, could cede territorial claims to other countries.

There was no enumerated power to cede territory (or navigational rights) to other countries, suggesting that, again, treaties were not limited to the subjects matters granted to the Continental Congress. None of this should be surprising. Having made treaties to acquire land from Indian tribes, the United States had adopted the view that treaties could be used to acquire, cede, and renounce territory. It would have been extremely odd to read the Confederation treaty power as encompassing a right to acquire territory but not a right to cede it. Reading the treaty power as including power

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44 See Treaty of Amity of Commerce, U.S.-Prussia, art. X, Sept. 10, 1785, 8 Stat. 84.

45 See *id.* art. XX (“No citizen . . . shall take from any power with which the other may be at war any commission or letter of marque for arming any vessel to act as a privateer against the other . . .”).

46 *Id.*

47 See Resolutions Reaffirming American Rights to Navigate the Mississippi (Nov. 29, 1786) (editorial note), in 9 THE PAPERS OF JAMES MADISON 181 (Robert A. Rutland ed., 1975).

over territorial acquisitions and cessions made eminent sense for treaties had long been a means by which nations gained and lost territory.

Given the grant of treaty power to Congress and the presence of only two constraints (both related to commerce), seasoned observers concluded that Congress enjoyed sweeping authority under the treaty power. When Great Britain expressed doubts in 1785 about Congress's power to make commercial treaties, John Adams noted to John Jay that while there were two specific limitations on treaty-making, they only applied to commerce treaties "all others Congress have full power to make."<sup>48</sup> Speaking of the same dispute, Richard Henry Lee of Virginia, said that besides the two restrictions listed in the Articles, "Congress have a clear & unquestioned right to make any treaty they choose."<sup>49</sup> Adams and Lee were eminently qualified to comment; Adams was the American representative in the Court of St. James and Lee was the President of the Continental Congress.

Thomas Jefferson seems to have had a more constrained sense of the treaty power. When, in 1785, he advised making treaties that would grant many of the rights of citizens to friendly aliens, he sheepishly noted that his proposal went "beyond the powers of Congress."<sup>50</sup> Yet by this point in time, American treaties with France, the Netherlands, Sweden and Prussia already had given foreigners some of the rights of American citizens. Why agreeing to give foreigners more of such rights would be "beyond" Congress's power is a mystery. It seems certain that Jefferson was simply mistaken, for if he was right, almost every treaty with foreign nations during the Confederation was *ultra vires*. No one, not even Jefferson, ever claimed as much.

In sum, in the international arena, the treaty power was understood as the power of nations to make contracts that advanced the utility of both or to make "whatever agreements they please."<sup>51</sup> Americans seemed to have the same view, because the Continental Congress made international agreements covering matters not within the legislative competence of the Congress. Among other things, treaties encompassed commerce, territorial acquisitions, the rights of aliens, and even encompassed the rights of Americans. With but two exceptions, the Constitutional Congress could make virtually "any treaty they choose."<sup>52</sup>

### III. CONTINUITY IN THE CONSTITUTION

The Constitution grants Congress almost two-dozen express lawmaking authorities, most of which are in Article I, Section 8. The implication is that those lawmaking authorities not enumerated and not within the grants listed

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48 Letter from John Adams to John Jay (May 8, 1785), in 8 *THE WORKS OF JOHN ADAMS* 242, 243 (Charles Francis Adams ed., 1853).

49 Letter from Richard Henry Lee to John Adams (Aug. 1, 1785), in 2 *THE LETTERS OF RICHARD HENRY LEE* 378, 380 (James Curtis Ballagh ed., 1914).

50 Letter from Thomas Jefferson to John Adams (Jul. 28, 1785), in 1 *THE WORKS OF THOMAS JEFFERSON* 365, 367 (H.A. Washington ed., 1884).

51 See VATTEL, *supra* note 11, at 71.

52 See Letter from Richard Henry Lee, *supra* note 49, at 380.

are not vested with Congress. Article I, Section 1 strongly suggests as much, stating that Congress has those legislative powers “herein granted.” While there are debates about the scope of those legislative powers granted to Congress, few doubt that lawmaking powers not enumerated (and not implied in the enumeration) are not conveyed to Congress. Almost everyone admits that a detailed enumeration of certain, specific legislative powers presupposes something not enumerated and therefore not granted.<sup>53</sup>

The enumerated power principle applies no less to the executive. Article II lists several specific powers. Some, myself included, believe it also grants powers via the Vesting Clause of Article II.<sup>54</sup> But few believe that the Constitution grants powers to the President outside of the grants in Article II. Again, the enumeration of executive authorities, including the vesting of executive power, presupposes some powers not enumerated, like legislative and judicial powers.

The enumeration principle even applies to the judiciary, albeit in a different way. The federal judiciary has the judicial power. The enumeration of nine types of jurisdiction presumes other types of jurisdiction not so cataloged and not exercisable by the federal bench.

The treaty power is expressed rather differently. The President has the power to make treaties.<sup>55</sup> Although there is a prescribed procedure for making treaties, there is no indication that the treaty power is limited to one, five, or eighteen subject matters. Put another way, the Constitution enumerates a power without appending any express subject matter limits, leaving the strong implication that there are none. Had the Constitution granted Congress the power to “make laws” (or the “legislative power”) without qualification as to subjects, few would doubt that the Constitution imposed no subject matter limits on those laws. The Constitution’s text suggests the same conclusion with respect to treaties. This reading is all the more persuasive when we juxtapose the Articles with the Constitution. Recall that under the Articles there were two express subject matter restrictions on the treaty power whereas under the Constitution none are to be found. If there were but two subject matter restrictions under the Articles, the elimination of those restrictions should be understood as an incorporation of a treaty power with no subject matter constraints.

Generally when the Constitution wishes to limit the federal government’s lawmaking powers, it does so explicitly. That is to say, it grants lawmaking authority over some subject matter and then limits it. For instance, Article I, Section 9 limits the ability of Congress to abolish the foreign slave trade prior to 1808. Article V declares how amendments are to be made. But it also provides that no constitutional amendment can ever deny a state equal suffrage in the Senate without that state’s consent. It further declares that

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53 For a skeptic, see Richard Primus, *The Limits of Enumeration*, 124 *YALE L.J.* 576 (2014).

54 See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *YALE L.J.* 231, 265–72 (2001).

55 U.S. CONST. art. II, § 2, cl. 2.

certain constitutional provisions (related to the slave trade and direct taxes) could not be altered by amendment prior to 1808.

In contrast, there are no such constraints placed on treaties. The Constitution does not declare that no treaty may cede American territory or that no treaty can supersede a state's law of descent. Indeed, it does not even forbid the President from entering into treaties that abolish the slave trade prior to 1808, meaning that even if Congress could not abolish the trade prior to 1808, the President, acting in concert with another nation (or nations), and with the advice and consent of the Senate, could have made an international agreement to abolish the slave trade prior to 1808.

During the Constitution's drafting at the Philadelphia Convention, some suggested limits on the treaty power. One proposal provided that treaties could not surrender territory without also acquiring "equivalent" territory.<sup>56</sup> Others bemoaned the potential scope of treaties, as when some lamented that treaties could alienate territory without the need for any legislative (statutory) sanction.<sup>57</sup> A delegate noted that a treaty might require a state's produce to be sent to one particular port, presumably on the way to export.<sup>58</sup> Another said to be wary of peace treaties, as they could be used to sacrifice the nation's "dearest interests" like fishing rights and territory.<sup>59</sup> He was particularly worried about peace treaties being used to convey the "extremities of the Continent" by which he presumably meant territory far from population centers.<sup>60</sup>

Those who proposed constraints on the power to make treaties likely supposed that absent such limits, treaties might be made on any subject. In the end, none of these restraints (or any others) were added to the Constitution. The consideration of subject matter constraints, the failure to enact them, and the fact that people assumed that the text incorporated no such limits, are all factors in favor of the notion that the Constitution imposes no subject matter constraints on treaties.

In the states, Antifederalists were quick to pounce on the lack of treaty limits. "By this Constitution, the President with two thirds of the members present in the Senate, can make any treaty," said William Grayson of Virginia.<sup>61</sup> He was not alone. Patrick Henry said the President had "power to make any treaty" and therefore might torture citizens who violated a treaty's protections of ambassadors.<sup>62</sup> Henry also said that the President might cede

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56 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 143 (Max Farrand ed., rev. ed., 1966).

57 *Id.* at 297–98.

58 *See id.* at 393 (fearing that the treaty power could be used to "requir[e] all the Rice of S. Carolina to be sent to some one particular port").

59 *Id.* at 541.

60 *Id.*

61 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 292 (Jonathan Elliot ed., 1876) [hereinafter THE DEBATES IN THE SEVERAL STATE CONVENTIONS].

62 *Id.* at 512.

any territory and was “omnipotent” when it came to treaties.<sup>63</sup> In Virginia, George Mason proposed that “[n]o treaty to dismember the empire ought to be made without the consent of three fourths of the legislature in all its branches.”<sup>64</sup> The proposal assumed that a treaty might otherwise cede territory, particularly the nation’s rights to the Mississippi River. Brutus of New York said that he could “not find any limitation, or restriction, to the exercise of this [treaty] power.”<sup>65</sup> The Federal Farmer observed that there are no “constitutional bounds set to those who shall make [treaties]. The President and two-thirds of the Senate will be empowered to make treaties indefinitely.”<sup>66</sup>

Responses from supporters of the Constitution were threefold. Some said that the treaty power was equally unlimited under the Articles. James Madison said that “[a]s to [the treaty power’s] extent . . . the power is, precisely, in the new Constitution as it is in the Confederation. In the existing confederacy, Congress are [sic] authorized indefinitely to make treaties.”<sup>67</sup> Such arguments sought to deflect criticism, claiming that even if the treaty power was broad under the Constitution, it was no less broad than under the Articles. They in no way refuted the claim that the treaty power lacked subject matter limits; rather they accepted the point.

Others responded that, while treaties might concern any subject, only Congress could create domestic law when it came to matters listed in Article I, Section 8. So while a treaty might concern commerce and thus create an international obligation with respect to it, only Congress could *regulate* commerce. Like the previous response, this one did not deny that treaties might cover any and all subjects. Instead it focused on the consequences of treaties and denied that they could make domestic law (as opposed to an international agreement) on all subjects.

Some could be read as arguing that treaties could not touch certain subjects. James Madison, speaking to the Virginia Ratifying Convention, said that the treaty power would not encompass the power to “dismember the empire, or to alienate any great, essential right. . . . The exercise of the [treaty] power must be consistent with the object of the delegation.”<sup>68</sup> In a different vein, Edmund Randolph argued that treaties had limited effects: “I conceive that neither the life nor property of any citizen, nor the particular right of any state, can be affected by a treaty. The lives and properties of European subjects are not affected by treaties, which are binding on the aggregate community in its political, social capacity.”<sup>69</sup> Finally, George Nicholas said that under the Constitution the federal government could

63 *Id.* at 513.

64 *Id.* at 509.

65 Brutus, *Essays of Brutus II* (Nov. 1, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 372, 377 (Herbert J. Storing ed., 1981).

66 SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 53 (2d ed. 1916).

67 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 61, at 514.

68 *Id.*

69 *Id.* at 504.

“make no treaty which shall be repugnant to the spirit of the Constitution, or inconsistent with the delegated powers.”<sup>70</sup>

Each of these claims has its difficulties. Having said that the power to make treaties would be as it was under the Articles, with the nation having power to make treaties “indefinitely,” it is something of a mystery why James Madison also said that treaties could not be used to alienate territories. A private letter, written on the question of whether the federal government might alienate the rights to navigate the Mississippi, betrays no constitutional doubts about the ability of treaties to cede territory. Though he argued that the new government was less likely to pose a threat to navigational rights, he never claimed that doing so would be unconstitutional. Moreover, he also confirmed that the “present Congress possess the same powers as to treaties, as will be possessed by the New Government.”<sup>71</sup> While the letter was designed to make the Constitution less threatening, it also made clear that the new treaty authority lacked subject matter limits, for the Continental Congress generally lacked such limits.

Edmund Randolph’s point was ambiguous. But it sounds as if Randolph was making a claim about the domestic legal status and effect of treaties. He claimed that treaties were external agreements made in a “political, social capacity,” not instruments that could change domestic law.<sup>72</sup> He never argued that treaties could not relate to the lives or property of citizens or the rights of states. More precisely, he did not deny that treaties might create international law commitments that concern the lives of U.S. citizens or that relate to their property rights. Nor did he claim that treaties could not create international agreements about the powers ordinarily thought to reside with the states.<sup>73</sup> In any event, Randolph was wrong at the time he made the comment because existing U.S. treaties had altered the rights of citizens. Recall that treaties had modified the rights of those who accepted a commission from a foreign country or who settled on Indian land. They were on notice that they had lost the protection of the United States.

Finally, Nicholas’s claims, when read in context, support a broad reading of the treaty power, at least when it comes to subject matters. Just before speaking of the Constitution’s spirit and its delegated powers, Nicholas described the English King’s power to make treaties, describing it as having “no constitutional limits.”<sup>74</sup> He then went on to say that the President and the Senate “have the same power of making treaties.”<sup>75</sup> This very much sounds like an admission that the treaty power was quite broad.

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70 *Id.* at 507.

71 Letter from James Madison to George Nicholas (May 17, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 804, 806 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

72 See *supra* text accompanying note 69.

73 See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 61, at 504–05.

74 DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 360 (David Robertson ed., 2d ed. 1805).

75 *Id.*



His subsequent reference to the Constitution's spirit likely was an argument there were implied constraints on federal power that would apply no less to treaties. For example, the Constitution's spirit might require compensation for takings accomplished by statute or treaty.

Nicholas's claim that treaties could not be "inconsistent with the delegated powers" is a little more puzzling.<sup>76</sup> Modern readers might assume that Nicholas meant that treaties could only relate to the legislative powers found in Article I, Section 8. Yet the phrase "delegated powers" does not obviously reference Article I alone. It could refer to *all* the powers delegated to the federal government by "We the People," including the treaty power. If we take his phrase to include the treaty power, his claim is true even if the treaty power is not limited to certain subject matters. Given the Constitution's broad grant of treaty authority, treaties relating to the rights of aliens or the rights of Americans in the United States are clearly not "inconsistent with the delegated powers" of the federal government. Perhaps what Nicholas meant is that the Constitution fixes the separation of powers, in the sense that treaties may not override its allocations. In other words, treaties may not transfer the copyright powers to the courts, the judicial power to the President, or the appointment power to Congress. Such treaties would be "inconsistent with [how the Constitution] delegated powers."

In any event, besides Nicholas, no one seems to have said anything that could be read to suggest that treaties could only relate to the Article I, Section 8 authorities of Congress. The absence of such claims makes sense because they would fly in the face of the international understanding of the treaty power. Such assertions also would run counter to prevailing Confederation practice, where ratified treaties went beyond the specific delegated powers of the Continental Congress.

#### IV. CONSTRAINTS ON THE TREATY POWER

Thus far I have argued that the original Constitution never imposed subject matter limits on treaties. But I do not wish to suggest that treaties were truly boundless. The Constitution, insofar as it limits the federal government in all its manifestations, limits the treaty power as well. That there are no subject matter limits to the treaty power does not mean that there are no limits on the treaty power.

There likely are four sorts of limits on the treaty power. First there are the expressed individual-rights limits that are best read as applying to all actions of the federal government. For instance, the Fourth Amendment seems to establish a right against unreasonable searches and seizures, whatever the source of the authority for such searches and seizures. In other words, the Amendment apparently applies no less to searches made pursuant to the terms of a treaty.

Similarly, the Suspension Clause provides "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or

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76 See *supra* text accompanying note 70.

Invasion the public Safety may require it.”<sup>77</sup> This limit is well read to bar suspensions, by anyone, except in cases of rebellion or invasion. Hence a treaty could not suspend outside of these contexts. Nor could a treaty authorize someone to suspend outside these circumstances.

Second, there are express constraints on the federal government not related to rights, such as those found in Article I, Section 9. Consider the ban on titles of nobility.<sup>78</sup> The bar seems to apply to the entire government, not just the Congress. If that is so, no treaty of the United States could grant a title of nobility. Nor could a treaty authorize an officer of the United States to grant a title of nobility.

Third, there may be implied constraints related to states’ rights, limits that apply to all aspects of federal authority. So, for example, perhaps the federal government may not move a state capital from one part of a state to another.<sup>79</sup> Or maybe the federal government may not dictate the precise features of “republican” government, so long as the states are fundamentally republican.<sup>80</sup> If states have a “right” to be free of federal intrusion into their internal governance, no species of lower federal law, be it statutes or treaties, may attempt to intrude.

Fourth, if one supposes that the Constitution protects certain unenumerated individual rights from federal violation, via the Ninth Amendment or otherwise, those rights might constrain the terms of treaties. I will not hazard a guess as to what those rights might be, for I fear that I am far from safe terrain here. But the point is that if one supposes that individuals have unenumerated, but constitutionally protected rights, the treaty power likely could not serve as a means of evading those unenumerated limits on federal authority.

The basic point is that even though the treaty power is boundless as to subject matter, it is still bounded by the Constitution’s constraints that apply to the entire government. The difficulty lies in determining which of the Constitution’s constraints are meant to bind the entire federal superstructure and which are meant to limit only a particular federal entity.

#### CONCLUSION

The argument that the Constitution limits the treaty power to certain subject matters is one that has resonated for two centuries. And yet there is surprisingly little to support it. The treaty power, as it existed in the international arena, had no such limits. The treaty power, as it existed under the Confederation, had no such limits. And the treaty power, as it is found in the original Constitution, has no such limits.

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77 U.S. CONST. art. I, § 9, cl. 2.

78 *Id.* art. I, § 9, cl. 8.

79 *Cf.* *Coyle v. Smith*, 221 U.S. 559 (1911).

80 While the Constitution guarantees each state a republican form of government, it does not grant Congress authority to alter state governmental structures that are already republican. *See* U.S. CONST. art. IV, § 4.