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Treaty Solutions from the Land Down Under: Reconciling American Federalism and International Law

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Treaty Solutions from the Land Down Under: Reconciling American Federalism and International Law

Cyril Robert Emery*

Abstract

The United States has ratified various treaties impinging on traditional areas of state concern. Recently, in a nod to federalism, the federal government has adopted practices excusing the states from complying with some of these treaties. These practices have put the United States in violation of treaty obligations and are in tension with principles of international law.

While there is extensive scholarship recommending changes to U.S. law that would potentially balance state interests and treaty obligations, few scholars have looked to solutions found in other federally organized nations. Recent reforms in Australia allow its states to consult with the Commonwealth government before treaties affecting state interests are ratified. This article argues that adopting aspects of the Australian reforms in the United States would alleviate the current U.S. tension with international law by giving states a role in treaty making that does not prevent the federal government from meeting treaty obligations.

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Introduction

Throughout U.S. history, the interests of the states¹ have often conflicted with treaty obligations.² Traditionally, however, U.S. law has been a strict parent and suppressed this conflict by asserting that, as far as treaties are concerned, states should neither be seen nor heard.³ Adopting a more progressive parenting technique, the U.S. federal government, in a nod to the principles of federalism, has recently allowed the states to make their presence felt in the realm of treaty compliance in two ways. First, the executive branch and the Senate have attached statements to treaties indicating that the federal government will

1. In order to avoid confusion, and based on the model provided by Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 404, 404 n.1 (2003) [hereinafter Swaine, *Does Federalism*], this article uses the terms “states,” “territories,” and “sub-units” to refer to subnational governments and “nations,” “countries,” “Commonwealth government” and “federal government” to refer to nation-states or national governments.

2. David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1077 (2000) (outlining the reoccurrence of the debate throughout American history).

3. See, e.g., Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 459-60 (2004) (presenting but not agreeing with the proposition and citing, e.g., *Zchernig v. Miller*, 389 U.S. 429, 441 (1968); *United States v. Belmont*, 301 U.S. 324, 331 (1937); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889)); Swaine, *Does Federalism*, *supra* note 1, at 1 (presenting but not agreeing with the proposition); Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1129 n.1 (2000) [hereinafter Swaine, *Negotiating Federalism*] (citing for the proposition, but not agreeing with, e.g. LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 150 (2d ed. 1996) [hereinafter HENKIN, FOREIGN AFFAIRS]). For a discussion of the numerous ways states have historically exerted and continue to exert some control over compliance with treaties, see Ku, *supra*, at 476-526.

implement its obligations under the treaties only as far as the federal system allows and that additional implementation will be left to the states.⁴ These statements are known as federalism reservations.⁵ Second, the federal government allowed the states to heavily influence the enforcement of certain International Court of Justice (hereinafter ICJ) orders stemming from treaty violations.⁶ Like the best efforts of many well-meaning parents, these more tolerant practices have failed to resolve the underlying conflict and have created fresh problems. They only marginally protect the principles of federalism and turn out to be in serious tension with international law.

The U.S. practice of unilaterally attaching federalism reservations to multilateral treaties has historic roots⁷ but has been used most significantly in three human rights treaties ratified within the last twenty years.⁸ The U.S. executive branch and Senate attached reservations to these treaties because of concerns that treaty obligations might interfere with areas of traditional state concern.⁹ These reservations have two important components. First, they declare the attached treaties to be non-self executing,¹⁰ meaning that they must be implemented before going

4. See *infra* notes 7-13 and accompanying text; see also Ku, *supra* note 3, at 521-26.

5. See, e.g., Golove, *supra* note 2, at 1273 (using the term “federalism reservations”). These reservations are also called federalism understandings, Ku, *supra* note 3, at 522 (using the term “federalism understanding” and distinguishing it from “federal reservation”), and federalism RUDs (an acronym for reservations, understandings, and declarations), Swaine, *Does Federalism*, *supra* note 1, at 442 (using the term “federalism RUDs”). This article uses the term “federalism reservation” to indicate any treaty reservation directly aimed at making accommodations for federal systems of government.

6. See *infra* notes 17-30 and accompanying text; see also Ku, *supra* note 3, at 510-21.

7. Although unilateral reservations to multilateral treaties were not embraced by international law until the 1950s, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 431 (2000) [hereinafter Bradley & Goldsmith, *Conditional Consent*], the United States had a history of negotiating for federalism reservations in bilateral treaties, *id.* at 409-10, and a constitutional amendment requiring the use of federalism reservations came relatively close to being passed in the 1950s. *Id.* at 412-13.

8. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984 (ratified in 1994), 23 I.L.M. 1027, *revised* 24 I.L.M. 535 (1985); International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (ratified in 1988) [hereinafter ICCPR]; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (ratified in 1994). Curtis A. Bradley and Jack L. Goldsmith cite these treaties and ratification dates in the context of demonstrating the U.S. practice of using reservations to treaties generally and for federalism purposes, Bradley & Goldsmith, *Conditional Consent*, *supra* note 7, at 416.

9. See Bradley & Goldsmith, *Conditional Consent*, *supra* note 7, at 416.

10. See U.S. Senate Resolution of Advice and Consent to Ratification of the Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec.

into effect.¹¹ Second, they proclaim that the treaties “shall be implemented by the federal government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments.”¹² These reservations bring states into the treaty process by, on their face, allowing states to choose whether to implement any of the treaty provisions that affect areas of state concern.¹³ State interests, however, are only partially served by this practice because the federal government can, on a whim, decide not to attach any reservations to a treaty.¹⁴ This is not the only drawback to the reservations. By giving the choice of implementing certain treaty obligations to the states, the U.S. federal government seems to have waived responsibility for those obligations. Because of this apparent waiver, the federalism reservations potentially violate international law.¹⁵ Furthermore, they are

S7634 ¶ III (daily ed. June 24, 1994) [hereinafter Race Convention reservations]; U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. S4784 ¶ III(1) (daily ed. Apr. 2, 1992) [hereinafter ICCPR reservations]; U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. S17492 ¶ III(1) (daily ed. Oct. 27, 1990) [hereinafter Torture Convention reservations]; see also Bradley & Goldsmith, *Conditional Consent*, *supra* note 7, at 416 n.87 (citing these reservations generally and providing directions to the University of Minnesota’s excellent web site which provides their text, <http://www1.umn.edu/humanrts/usdocs/usres.html>) (last visited June 20, 2005).

11. Ku, *supra* note 3, at 462. The default rule in the United States is that treaties are self-executing, meaning they come into legal force as soon as they are ratified. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987) (explaining that courts must give direct effect to international law and that treaties are only “non-self executing” under special conditions). Although “self-executing” treaties are legally binding and can be upheld in court, some form of active implementation may still be required in order to meet the specific obligations of the treaty. See Ku, *supra* note 3, at 508 (discussing state implementation of self-executing treaties); see *infra* note 97 and accompanying text.

12. Race Convention reservations, *supra* note 10, at ¶ II; see also ICCPR reservations, *supra* note 10, at ¶ II(5); Torture Convention reservations, *supra* note 10, at ¶ II(5).

13. See Ku, *supra* note 3, at 525 (stating that non-self-execution clauses preclude judicial enforcement and that states are likely left with jurisdiction over the treaty with which the federal government cannot interfere). Whether the federalism reservations succeed in leaving the choice to implement treaties to the states is, as a legal matter, hotly debated. While Professors Bradley and Goldsmith have defended the legal validity of the reservations, *Conditional Consent*, *supra* note 7, at 401-02, others contend that they serve no legal purpose because the U.S. federal government has jurisdiction over all matters arising under a treaty. See, e.g., Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 346 (1995) [hereinafter, Henkin, *Ghost*].

14. See Bradley & Goldsmith, *Conditional Consent*, *supra* note 7, at 415-16 (explaining that the executive branch and the Senate have the choice whether to attach federalism reservations to treaties).

15. For example, according to Professor M. Cherif Bassiouni:

“Good faith” is a basic requirement in the law of treaties, and a “reservation” or

generally disfavored in treaty talks because negotiating nations view them as illegitimate attempts by federal nations to reduce their obligations under the proposed treaties.¹⁶

The conflict between state interests and treaty obligations has been particularly bitter in reference to a series of binding ICJ orders based on U.S. violations of treaty obligations under the Vienna Convention on Consular Relations (hereinafter VCCR).¹⁷ The ICJ orders have required

the like which expressly holds that the treaty at issue does not impose any duty on the United States to enact implementing legislation that may be contrary to the Constitution as interpreted by domestic law and judicial interpretations violates that basic principle. For all practical purposes, this “reservation” leaves the United States free from any legal obligation under the ICCPR whenever, in its sole discretion, it decides not to implement it legislatively. In fact, this “reservation” allows Congress, at any time, to pass a law contrary to an ICCPR provision and have it supersede the treaty. Also, it allows any federal judge to hold that a given statute or court decision supersedes the ICCPR.

This open-ended approach to treaties is incompatible with international law, much as it is incompatible with common sense and good judgment.

M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States*, 42 DEPAUL L. REV. 1169, 1179-80 (1993) (footnotes omitted); see also Henkin, *Ghost*, *supra* note 13, at 344. *Contra* Bradley & Goldsmith, *Conditional Consent*, *supra* note 7, at 423-39 (evaluating Bassiouni’s and Henkin’s arguments and concluding that, despite various concerns, unilateral reservations to treaties do not violate international law).

16. Attachment C—Principles and Procedures for Commonwealth-State Consultation on Treaties ¶ 8.1, Council of Australian Governments’ Communiqué 14 June 1996 [hereinafter Principles and Procedures], http://www.coag.gov.au/meetings/140696/attachment_c.htm; Brian R. Opeskin, *International Law and Federal States*, in INTERNATIONAL LAW AND FEDERALISM 1, 15-17 (1997) (describing general resistance to federalism reservations and specifically to those proposed by the United States and Australia for the ICCPR) [hereinafter Opeskin, *Federal States*]. *But see* Opeskin, *Federal States*, *supra*, at 19 (citing Gillian Triggs, *Australia’s Ratification of the International Covenant on Civil and Political Rights: Endorsement or Repudiation?*, 31 INT’L & COMP. L.Q. 278, 292 (1982), for the proposition that in some cases non-federal states may agree to federalism reservations in order to encourage wider accession to a treaty).

17. *Avena and other Mexican Nationals (Mex. v. U.S.)* (Mar. 31, 2004), 43 I.L.M. 581 (2004) [hereinafter *Avena Final Order*], *available at* <http://www.icj-cij.org>; *Avena and other Mexican Nationals (Mex. v. U.S.)* (Provisional Measures Order of Feb. 5, 2003) [hereinafter *Avena Provisional Measures Order*], <http://www.icj-cij.org>; *LaGrand (F.R.G. v. U.S.)*, 1999 I.C.J. 9 (Provisional Measures Order of Mar. 3) [hereinafter *LaGrand Provisional Measures Order*], *available at* <http://www.icj-cij.org>; *Vienna Convention on Consular Relations (Para. v. U.S.)* (Provisional Measures Order), 1998 I.C.J. 248 (April 9) [hereinafter *VCCR Provisional Measures Order*], *available at* <http://www.icj-cij.org>. ICJ final orders are binding under the terms of the Statute of the International Court of Justice, June 26, 1945, arts. 38(1), 59, 59 Stat. 1055, 1060; 33 U.N.T.S. 993, *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm#CHAPTER_II, to which the United States and all signatories of the UN Charter are parties, see LOUIS HENKIN, FOREIGN AFFAIRS, *supra* note 3, at 266 n.78 (2d ed. 1996). *See also*, e.g., Sanja Djajic, *The Effect of International Court of Justice Decisions on Municipal Courts in the United States: Breard v. Green*, 23 HASTINGS INT’L

the stay of executions¹⁸ and the review of convictions and sentencing of certain foreign nationals in the United States.¹⁹ Regarding the orders staying executions, the U.S. federal government under President Clinton pursued a course of action that was sensitive to federalism concerns. The government argued that it could not interfere with state criminal proceedings²⁰ and limited its enforcement of the orders to functionally non-binding communiqués and letters requesting state compliance.²¹ State response to these requests was mixed,²² and executions in Virginia

& COMP. L. REV. 27, 40 (1999) (stating that ICJ rulings are binding on states). The status of the provisional measures issued in some of the VCCR disputes was uncertain until more recently, *LaGrand* (F.R.G. v. U.S.) (June 27, 2001), 40 I.L.M. 1069, 1096 ¶ 109 (2001) [hereinafter *LaGrand* Final Order] (ICJ ruling that provisional measures are binding), available at <http://www.icj-cij.org>.

18. *Avena* Provisional Measures Order, *supra* note 17, ¶ 59; *LaGrand* Provisional Measures Order, *supra* note 17, at 16 ¶ 29; VCCR Provisional Measures Order, *supra* note 17, at 258 ¶ 41.

19. *Avena* Final Order, *supra* note 17, at 619 ¶¶ 138-41 (ordering review and reconsideration beyond what is available in the clemency process).

20. In the federal government's Amicus Curiae Brief to *Breard v. Greene*, 523 U.S. 371 (1998), a U.S. Supreme Court case arising out of the same facts as the ICJ VCCR case, "[t]he Solicitor General stated . . . to the Supreme Court that the 'federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States. The measures at the United States' disposal under our Constitution may in some cases include only persuasion. . . .'" *Ku*, *supra* note 3, at 513, (quoting Brief for the United States as Amicus Curiae at 51, *Breard v. Greene*, 523 U.S. 371 (1998) (No. 97-8214 (A97-732)) (internal quotations omitted)).

21. In response to the VCCR Provisional Measures Order, *supra* note 17, Secretary of State Madeleine Albright wrote Virginia Governor James Gilmore requesting that he abide by the ICJ order and stay the execution of Angel Francisco Breard, a Paraguayan national. *Ku*, *supra* note 3, at 512 & n.278. In response to the *LaGrand* Provisional Measures Order, *supra* note 17, the ICJ order was merely forwarded to the Governor of Arizona. See *LaGrand* Case, Memorial of the Federal Republic of Germany, at ¶ 4.169 (F.R.G. v. U.S.) (Sept. 16, 1999) (cited by *Ku*, *supra* note 3, at 512 n.278), <http://www.icj-cij.org>. The response to the recent ICJ decision in *Avena and other Mexican Nationals*, *supra* note 17, requiring review and reconsideration of the cases of Mexican nationals who were denied their consular notification rights, has been similar. In anticipation of the pending Oklahoma execution of Mexican national Osbaldo Torres Aguilera, U.S. Department of State Legal Advisor William H. Taft IV wrote Oklahoma Governor Brad Henry and the Oklahoma Pardon and Parole Board requesting that they give "careful consideration" to Torres' clemency request. Sean D. Murphy, *Implementation of the Avena Decision by Oklahoma Court*, 98 AM. J. INT'L L. 581, 582 & nn.7 & 9 (2004) (citing and providing key passages from the letters).

22. After receiving letters from U.S. Department of State Legal Advisor William H. Taft IV, see *supra* note 21, Oklahoma Governor Brad Henry commuted the sentence of a Mexican national from death to life in prison. Murphy, *supra* note 21, at 582. In response to the VCCR Provisional Measures Order, *supra* note 17, however, the Governor of Virginia denied the Secretary of State's request for a stay, see *supra* note 21, and executed Breard as planned. See Jonathan I. Charney & W. Michael Reisman, *Agora: Breard: The Facts*, 92 AM. J. INT'L L. 666, 674 (reprinting Governor Gilmore's statement outlining why he did not grant Breard clemency). Similarly, in the *LaGrand* case, Arizona went ahead with its execution of German national Walter LaGrand. *LaGrand* (F.R.G. v. U.S.) (June 27, 2001), 40 I.L.M. 1069, 1079 ¶ 34 (2001), available at

and Arizona put the United States in violation of international law.²³

President George W. Bush's response to the ICJ's review orders has been no more satisfying. Although Bush insisted the VCCR did not apply to Texas when he was Governor,²⁴ and has made strong comments in favor of federalism,²⁵ as President he issued a memorandum ordering state courts to review the sentencing of foreign nationals as required by the ICJ.²⁶ This action, however, does not mean that the Bush

<http://www.icj-cij.org>.

23. LaGrand Final Order, *supra* note 17, at 1102 ¶ 5 (ICJ ruling that U.S. failure to take all measures at its disposal to stay Arizona execution of LaGrand was a breach of U.S. obligations). Paraguay withdrew its case against the U.S. once Virginia executed Breard, Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 426 (Discontinuance Order of Nov. 10), *available at* <http://www.icj-cij.org>, but the facts indicate a similar result to that in *LaGrand* had the case gone forward. To be fair, there was some question as to whether ICJ provisional measures were binding under international law when the executions took place, LaGrand Final Order, *supra* note 17, at 1092 ¶ 99.

24. *See, e.g.*, Al Kamen, *Virtually Blushing*, WASH. POST, June 23, 1997 at A17 (quoting general counsel Alberto R. Gonzalez as saying “[s]ince the State of Texas is not a signatory to the Vienna Convention on Consular Relations, . . . we believe it is inappropriate to ask Texas to determine whether a breach of [the treaty] occurred in connection with the arrest and conviction of Mr. Montoya.”) (cited by Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 588 (1997), for the proposition that sub-national governments fail to consider international law in decision-making).

25. *E.g.*, President George W. Bush, Remarks by the President at National Governors' Association Meeting (Feb. 26, 2001) (“I’m going to make respect for federalism a priority in this administration. Respect for federalism begins with an understanding of its philosophy. The framers of the Constitution did not believe in an all-knowing, all-powerful federal government. They believed that our freedom is best preserved when power is dispersed. That is why they limited and enumerated the federal government’s powers, and reserved the remaining functions of government to the states.”), <http://www.whitehouse.gov/news/releases/2001/02/20010226-8.html> (last visited June 20, 2005).

26. The memorandum reads in part:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the [ICJ] in the [*Avena* case], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

U.S. President George W. Bush: Memorandum for the U.S. Attorney-General Regarding Compliance with the Decision of the International Court of Justice in *Avena* (February 28, 2005) (referring to the *Avena* Final Order, *supra* note 17) [hereinafter *Avena* Memorandum], *available at* http://brownwelsh.com/Archive/2005-03-10_Avena_compliance.pdf (last visited June 20, 2005); *see* Brief for the United States as Amicus Curiae at 9, *Medellín v. Dretke*, No. 04-5928 (S. Ct. argued Mar. 28, 2005) (“[I]n the exercise of his constitutionally based foreign affairs power, and his authority under the United Nations Charter, the President has determined that compliance should be achieved by the enforcement of the ICJ decision in state courts in accordance with principles of comity. That presidential determination, like an executive agreement, has independent legal force and effect, and contrary state rules must give way under the Supremacy

administration is more concerned with international law and order than with federalism. At about the same time as plans regarding the review orders were made public, the federal government announced its withdrawal from the provisions of the VCCR that allow disputes arising under it to be heard by the ICJ.²⁷ Considering that, in order to resolve the Iran hostage crisis, the United States was the first country to appeal to the ICJ under its VCCR jurisdiction,²⁸ this is a substantial sacrifice presumably made on behalf of the states in order to insulate them from future ICJ rulings. The courts continue to confront cases arising from the ICJ review orders,²⁹ and the states are likely to challenge Bush's order requiring state court review of sentencing.³⁰ The ongoing conflict is disturbing evidence that the federal government has yet to find a satisfactory method of reconciling state interests and treaty obligations.

To unsettle matters even more, the U.S. Supreme Court has issued a bevy of recent opinions that signal potential constitutional limits on the federal government's ability to impose treaty obligations on the states.³¹

Clause.”), available at http://supreme.lp.findlaw.com/supreme_court/briefs/04-5928/04-5928.mer.ami.usa.html (last visited June 20, 2005); see also Adam Liptak, *U.S. Says It Has Withdrawn From World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, at A16, available at 2005 WLNR 3685583.

27. Liptak, *supra* note 26, at A16; see United States Department of State, Bureau of Consular Affairs, Announcement: All Consular Notification Requirements Remain in Effect, http://travel.state.gov/news/news_2155.html.

28. See *Supreme Court to Hear Case of Mexican National on Death Row in Connection With Alleged US Treaty Violations* (National Public Radio Morning Edition radio broadcast, Mar. 28, 2005) (citing Ambassador Thomas Pickering for the proposition that ICJ helped pave the way for the freeing of the hostages) [hereinafter *Supreme Court to Hear*]; see generally Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) (Provisional Measures Order of Dec. 15, 1979), 1979 I.C.J. 7, available at <http://www.icj-cij.org>.

29. Most recently, the Supreme Court issued a per curiam opinion finding it had improvidently granted certiorari in regards to a petition for relief based on the ICJ's Avena Final Order, *supra* note 17, filed by a Mexican inmate on death row in Texas. *Medellin v. Dretke*, 125 S. Ct. 2088, No. 04-5928 (May 23, 2005) (per curiam). The Court based its decision on the “possibility that the Texas courts will provide *Medellin* with the review he seeks pursuant to the *Avena* judgment and the President's memorandum [*supra* note 26], and the potential for review in this Court once the Texas courts have heard and decided *Medellin*'s pending action.” *Id.* at 6. The Court previously struck down similar pleas, stating that inmates were procedurally barred from bringing claims under the VCCR at any time after trial. *Breard v. Greene*, 523 U.S. 371, 376-77 (1998).

30. *Supreme Court to Hear*, *supra* note 28 (quoting the Texas Attorney General as saying, “[w]e respectfully believe the executive determination exceeds the constitutional bounds for federal authority.”); see Liptak, *supra* note 26, at A16 (citing a spokesman for the Texas Attorney General, and concluding that “Texas prosecutors have not conceded that the president has the power to force state courts to reopen the *Medellin* case.”).

31. *Swaine, Does Federalism*, *supra* note 1, at 415-41 (citing the Supreme Court's recent federalism jurisprudence, embodied in such cases as *United States v. Morrison*, 529 U.S. 598 (2000), *Alden v. Maine*, 527 U.S. 706 (1999), *Printz v. United States*, 521

These limits would likely make it extremely difficult for the United States to comply with international obligations.³² Since there are rarely concrete ramifications for treaty violations,³³ the United States would not suffer too greatly by placing federalism ahead of treaty obligations. The federal government, however, has expressed commitment to its international obligations generally and the VCCR in particular.³⁴ Issues of reciprocity and the maintenance of good bargaining relations are enough to justify this commitment,³⁵ and, in the best of all worlds, the

U.S. 898 (1997), *City of Boerne v. Flores*, 421 U.S. 507 (1997), *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), *United States v. Lopez*, 514 U.S. 549 (1995), and *New York v. United States*, 505 U.S. 144 (1992), as potentially limiting the federal government's treaty power).

32. Swaine, *Does Federalism*, *supra* note 1, at 408 (stating that, “[s]hould any of this come to pass [referring to the application of the Supreme Court’s federalism rulings to the treaty power], the new federalism will have placed the United States in violation of its treaty obligations”).

33. See, e.g., Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 196 (1998) (stating that “[o]f course, international law generally is not . . . subject to supranational enforcement mechanisms, and as a practical matter is . . . subject to violation on a regular basis,” but listing other consequences); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 713 (“Treaty obligations might be thought by some to be ‘precatory’ as a general matter because effective international enforcement mechanisms are lacking.”) [hereinafter Vázquez, *Self-Executing Treaties*].

34. In regards international law generally, consider statements from the George W. Bush administration regarding the treatment of prisoners at Abu Ghraib and Guantanamo. E.g., Alberto Gonzales, White House Counsel, Press Briefing (June 22, 2004) (“President Bush knows his most important job is to protect this nation. At the same time, he’s made it clear, in the war against al Qaeda and its supporters, the United States will follow its treaty obligations and U.S. law, both of which prohibit the use of torture. And this has been firm U.S. policy since the outset of this administration and it remains our policy today.”), <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>; Scott McClellan, White House Press Secretary, Press Gaggle (May 17, 2004) (“But our policy is clear. The United States policy is that we comply with all our laws and with our—and with our treaty obligations. And that is our policy.”), <http://www.whitehouse.gov/news/releases/2004/05/20040517-7.html>; Colin L. Powell, U.S. Secretary of State, Interview on ABC’s This Week with George Stephanopoulos (June 13, 2004) (“He was—the President believed, and he has said this, that he would follow all obligations, because he felt he was bound by those obligations. . . . And his instructions to us consistently were to follow our obligations under international treaties and other constraints that applied to our activities.”), <http://www.state.gov/secretary/rm/33474.htm>. Regarding the VCCR, see Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998) (reprinted in Charney & Reisman, *supra* note 22, at 671-72) (stating that “[t]he execution of Mr. Breard in the present circumstance could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the [VCCR]”) [hereinafter Albright Letter].

35. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 51-54 (2d ed. 1979) [hereinafter HENKIN, *HOW NATIONS*] (discussing the foreign policy reasons nations have for complying with international law); see also Heather M. Heath, *Non-Compliance with the Vienna Convention on Consular Relations and its Effect on Reciprocity for United States Citizens Abroad*, 17 N.Y. INT’L L. REV. 1, 10 (2000) (indicating concern

United States would develop a treaty-making and compliance process that encompasses its federal system of government without sacrificing international law.³⁶

The observation that federal systems of government and compliance with international law do not always go hand-in-hand is not new,³⁷ and it is no surprise that other federal nations have faced problems balancing state interests and international obligations.³⁸ Over the last thirty years, one federally organized nation in particular, Australia, which is composed of six states and two territories,³⁹ has adopted procedural reforms designed to address this issue by developing a role for states in its treaty-making process in a manner that does not undermine compliance with treaty obligations.⁴⁰ In a nutshell, Australia has

about U.S. citizens' consular notification rights abroad because of failure of United States to meet VCCR obligations); Swaine, *Does Federalism*, *supra* note 1, at 408-10 (citing HENKIN, *HOW NATIONS*, *supra*, and discussing the negative bargaining effects for the United States if it appears unable to enforce international law against the states); Albright Letter, *supra* note 34, at 672 (same as Heath, *supra*).

36. For the purposes of this Article, references to treaty making refer to the steps in the treaty process before ratification.

37. See Brian R. Opeskin & Donald R. Rothwell, *The Impact of Treaties on Australian Federalism*, 27 CASE W. RES. J. INT'L L. 1, 1 (1995) (quoting K.C. WHEARE, *FEDERAL GOVERNMENT* 186 (4th ed. 1963) and *New South Wales v. Commonwealth* (1975) 135 C.L.R. 337, 445 (Stephen, J.)) [hereinafter Opeskin & Rothwell, *Impact of Treaties*].

38. For example, local state opposition has hindered India's implementation of the Convention on International Trade in Endangered Species, the Agreement on the International Trade of Tropical Timber, and the World Heritage Convention. Ronald J. Herring & Erach Barusha, *Embedded Capacities: India's Compliance with International Environmental Accords*, in *ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS* 395, 396-97 (Edith Brown Weiss & Harold K. Jacobsen eds., 1998). Similarly, Canada's federal system has prevented total implementation of the North American Agreement on Environmental Cooperation, with only three provinces enforcing the treaty's side agreement. Joseph DiMento, *International Environmental Law: A Global Assessment*, 33 ENVTL. L. REP. 10,387, 10,421 n.321 (2003) (examining the record as of June 2002).

39. For simplicity, this article generally refers to both the states and territories as "states." The six states are New South Wales, Tasmania, Queensland, South Australia, Victoria, and Western Australia. The two internal territories are the Northern Territory and the Australian Capital Territory. Australia also has a number of external territories, but the internal territories have self-governing status like the states, and, despite some constitutional differences, are for most purposes essentially the same as the states. Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 1 n.4.

40. Australia's Commonwealth government has had a commitment to territory involvement in the early stages of the treaty-making process since 1977, see Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 14, and initially adopted formal procedures for accomplishing it in 1983, see Australian Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* ¶ 13.19 (1995) [hereinafter *Trick or Treaty?*], <http://www.austlii.edu.au/au/other/dfat/reports/tortcon.html> (last visited June 20, 2005), with the most recent revision coming in 1996. Principles and Procedures, *supra* note 16; see Hilary Charlesworth et al., *Deep Anxieties: Australia and the International Legal Order*, 25 SYDNEY L. REV.

reconciled its central authority with the autonomy of its states by adopting procedures that give the territories an official but non-binding advisory role in the treaty-making process.⁴¹ This caters to federalism by giving states a platform to voice misgivings about treaties that infringe on their traditional areas of concern. With this platform, states can put political pressure on the federal government to either modify those treaties or not ratify them at all.⁴² This arrangement, however, does not alter the federal government's supremacy in foreign affairs, and it retains power over the states to uphold international law and any treaties that have been adopted.⁴³

The goal of this article is to examine Australian reforms and evaluate whether they represent a viable option in the U.S. legal and political environment for reconciling federalism and the international law of treaties.⁴⁴ While there is a mountain of scholarship examining the appropriate role of federalism in U.S. treaty relations and proposing methods for its incorporation,⁴⁵ few scholars have looked to solutions

423, 439–40 (2003).

41. Principles and Procedures, *supra* note 16, ¶ 5.

42. See *Treaty Making—The People's Process*, Joint Committee on Treaties, Proof Committee Hansard, Brisbane, July 20, 2000, at 7 (statement of Hon. Alexander Downer, Minister of Foreign Affairs) (explaining that under the reforms, the federal government “would obviously try to get a consensus amongst the states and the territories before ratifying a treaty which is of relevance to them.”) [hereinafter *The People's Process*], <http://www.aph.gov.au/hansard/joint/commtee/j1026.pdf> (last visited June 20, 2005).

43. See Donald R. Rothwell, *International Law and Legislative Power*, in INTERNATIONAL LAW AND FEDERALISM 104, 124 (1997) (“through the High Court’s expansive interpretation of Commonwealth powers it has been possible for the Government to initiate and for Parliament to enact legislation designed to give effect to international law. This legislative capacity has been an important element in ensuring that Australia has been able to play an active and responsible role in international affairs.”); see also Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 12 (“The upshot of the High Court’s interpretation of federal legislative power over external affairs is that Parliament does not lack power to implement treaties to which Australia is or intends to become a party, whatever their subject matter.”).

44. It should be noted that the scope of this article is limited to treaties and does not attempt to include an analysis of international agreements made by sole executive agreement or congressional-executive agreement. For a discussion of these types of agreements and federalism issues raised by them, see David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN L. REV. 1963 (2003).

45. See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) [hereinafter Bradley, *Treaty Power Part I*]; Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98, 100–01 (2000) (proposing that *Missouri v. Holland*, 252 U.S. 416 (1920), should be overturned and that Congress’s power to implement treaties should be limited by the federalism considerations that have limited its power in other arenas) [hereinafter Bradley, *Treaty Power Part II*]; Ku, *supra* note 3, at 532–33 (finding that U.S. states already play an important role in implementing international law and that their continued involvement potentially brings greater political legitimacy for, and U.S. involvement in, international law); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for*

found in other federally organized nations.⁴⁶ Even though comparative federalism has been dismissed as an impossible mixing of apples and oranges,⁴⁷ it “may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity.”⁴⁸ The Australian reforms giving states an advisory role are of particular interest for the United States because they echo the Framers’ original intent of requiring state advice and consent in treaty making.⁴⁹ Furthermore, the historically analogous roles for U.S. and Australian states in federal treaty making provide an additional impetus to examine the applicability of the Australian reforms.⁵⁰

Incorporation of Human Rights Law in the United States, 150 U. PA. L. REV. 245, 288-89 (2001) (encouraging inter-governmental cooperation between the states and federal government in implementing international human rights treaties); Swaine, *Does Federalism*, *supra* note 1, at 499-532 (“reviving” compacts between U.S. states and foreign nations as a method of incorporating states into foreign affairs). For exhaustive historical support for the view that states have no formal place in foreign affairs, see Golove, *supra* note 2, at 1079-81.

46. A notable exception is provided by Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1053-57 (2001) [hereinafter Halberstam, *Foreign Affairs*] (weighing the benefits for the United States of EU/German style state participation in foreign affairs).

47. In *Printz v. New York*, Justice Scalia deemed “such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one. . . . The fact is that our federalism is not Europe’s.” *Printz v. New York*, 521 U.S. 898, 921 n.11 (1997) (as quoted by Neil Colman McCabe, “Our Federalism,” *Not Theirs: Judicial Comparative Federalism in the U.S.*, 40 S. TEX. L. REV. 541, 543 (1999)). Professor Swaine makes a different but related point in examining the various approaches federal nations take toward interpreting their constitutions in reference to international law, stating that it is “hazardous to generalize about federal systems at all.” Swaine, *Does Federalism*, *supra* note 1, at 463-66.

48. *Printz*, 521 U.S. at 977 (Breyer, J., dissenting) (comparing EU/German and U.S. approaches to the implementation of federal laws at the constituent government level).

49. The Constitution requires the “Advice and Consent” of the Senate in treaty making, U.S. CONST. art. II, § 2, cl. 2, and, prior to the Seventeenth Amendment in 1913, Senators were appointed by state legislatures and were regarded as representing state interests in the treaty process. Robert Anderson IV, “*Ascertained in a Different Way*”: *The Treaty Power at the Crossroads of Contract, Compact, and Constitution*, 69 GEO. WASH. L. REV. 189, 231-32 (2001). As part of “Advice and Consent,” many Framers imagined the Senate taking an active advisory role in treaty negotiations, although this practice was dismissed almost immediately in favor of consent alone. Bradley & Goldsmith, *Conditional Consent*, *supra* note 7, at 405-06; see *infra* notes 55-56 and accompanying text.

50. Before reform, Australian states were in the same situation as U.S. states after the Seventeenth Amendment, see *supra* note 49 and *infra* Part I, and had no formal role (advisory or otherwise) in the treaty-making decisions of the executive branch. See *Trick or Treaty?*, *supra* note 40, at ¶ 13.19 (describing introduction in 1977 of guidelines for giving states a role in treaty making). This is in contrast to German and EU systems, where constituent governments are formally represented in the treaty process. See The Law Library of Congress, Directorate of Legal Research, National Treaty Powers and

Part I of this article analyzes the historical role of U.S. states in treaty making and the potential legal changes that might alter that role. Part I also briefly considers and critiques some of the current academic proposals for incorporating federalism in U.S. foreign affairs. Part II compares federalism in pre-reform Australian foreign affairs to the historical situation in the United States. Part II continues by describing the recent procedural changes and examining the results of those reforms. Part III analyzes the appropriateness of the Australian reforms for the United States by examining the practical and legal consequences of adopting the reforms. The article concludes that although wholesale U.S. adoption of the Australian reforms would be impractical because of the far greater number of states within the U.S. than in Australia, incorporating some of the reforms would be an attractive method for including federalism in U.S. foreign affairs.

I. State Involvement in the U.S. Treaty-making Process

The Framers addressed the question of the appropriate role of states in the treaty process when they adopted the U.S. Constitution.⁵¹ Because state interference in foreign affairs had nearly driven the country to war under the Articles of Confederation,⁵² the Framers designed the Constitution to give the federal government supremacy in all treaty matters.⁵³ In order to accomplish this, the Constitution generally excises the states from foreign affairs.⁵⁴ The Framers, however, attempted to create balance by giving states an advise-and-consent role in the treaty

Implementation 32, 49 (LL File No. 2004-825); see also Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 213, 235-36 (Kalypso Nicolaidis & Robert Howse eds. 2001) (explaining role of Member States and Länder generally in law making processes) [hereinafter Halberstam, *Comparative Federalism*]. This article does not mean to overstate the similarity between U.S. and Australian systems; important distinctions remain. See *infra* Part II (comparing the two systems in greater depth).

51. See, e.g., Golove, *supra* note 2, at 1102.

52. *Id.* at 1115-16 (discussing tensions created by state refusal to comply with stipulations of the 1782 Treaty of Peace with Great Britain).

53. *Id.* at 1103-04; 1132.

54. U.S. CONST. art. I, § 10, cl. 1. ("No State shall enter into any Treaty, Alliance, or Confederation. . ."); see U.S. CONST. art. VI, § 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); see also U.S. CONST. art. II, § 2, cl. 2. ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . ."). Article X, Section 10, Clause 3 leaves the door open for states to form "compacts" with foreign nations, but only with Congress's consent. For more on state-foreign compacts, see *infra* notes 111-14 and accompanying text.

process. Contrary to their intentions, states as a rule no longer participate in treaty making.

Under Article II, Section 2, Clause 2, the Framers gave the treaty-making power to the President “by and with the Advice and Consent of the Senate . . . provided two thirds of the Senators present concur.” At the founding, Senators were appointed by state legislatures and thus, at least in the Framers’ conception, represented state interests when considering treaties.⁵⁵ The Framers’ intent was that Senators would actively advise the President during treaty negotiations and possess the power to reject a treaty by refusing consent.⁵⁶ The Framers’ intentions, however, were stymied almost immediately when the George Washington administration abandoned the practice of seeking Senate advice during treaty negotiations.⁵⁷

State ability to consent to or reject treaties through representation in the Senate fared better, lasting until the adoption of the Seventeenth Amendment in 1913.⁵⁸ The Seventeenth Amendment requires the popular election of Senators and thus eliminated the Senate’s traditional role as protecting the concerns of state institutions.⁵⁹ Because Senators

55. Anderson, *supra* note 49, at 231-32. (citing James Madison, among others).

56. U.S. CONST. art. II, § 2, cl. 2; Bradley & Goldsmith, *Conditional Consent*, *supra* note 7, at 405 (citing RALSTON HAYDEN, *THE SENATE AND TREATIES 1789-1817* (1920), among others, for the proposition that “[m]any of the Founders believed that the advice function required that the President consult with the Senate prior to negotiating and signing a treaty”). Ralston Hayden reports that active consultation during treaty negotiation was the original intent of the Washington administration and Senate. HAYDEN, *supra* at 103-04.

57. HAYDEN, *supra* note 56, at 104 (“In the end it became [Washington’s] custom merely to inform the Senate of the proposed negotiation upon securing its consent to the nomination of the agent, and to submit the latter’s instructions only with the completed treaty.”); *see also* Bradley & Goldsmith, *Conditional Consent*, *supra* note 7, at 405-06 (citing Hayden). Professor Bradley argues that the Senate adopted conditional consent in order to fulfill its advisory role. Bradley & Goldsmith, *Conditional Consent*, *supra* note 7, at 406. Regardless, state “advice” in the form of conditional consent was, like state “consent,” superseded by the Seventeenth Amendment. *See infra* text accompanying notes 58-61.

58. Anderson, *supra* note 49, at 231-32; Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 224 (2000) [hereinafter Kramer, *Putting Politics*] (stating that the Seventeenth Amendment eliminated “the one feature of the Senate that really might have protected states, the power of state legislators to choose Senators”). Professor Kramer argues that Senate concern with federalism issues probably dried up even before the Seventeenth Amendment because Senators’ long terms insulated them from effective review by state legislatures. Kramer, *Putting Politics*, *supra* at 224 n.33. Professor Golove argues that the Senate continues to represent state interests by obstructing treaties, but Swaine convincingly challenges that argument, explaining that obstructionism has “no necessary connection with any genuine commitment to federalism.” Swaine, *Does Federalism*, *supra* note 1, at 413 n.31 (citing Golove, *supra* note 2, at 1294-99).

59. Anderson, *supra* note 49, at 232.

are elected at the state level, they continue to be somewhat guided by state concerns but have no incentive to protect the states from federal action. As Professor Larry D. Kramer explains:

[I]f we assume that members of Congress elected on the basis of geography respond to state and local interests, doesn't this, in turn, give them an incentive to reduce or minimize the role of state and local government? Federal politicians will want to earn the support and affection of local constituents by providing desired services themselves—through the federal government—rather than to give or share credit with state officials. State officials are rivals, not allies, a fact the Framers understood and the reason they made Senators directly beholden to state legislators in the first place.⁶⁰

Thus, even though the Seventeenth Amendment does not entirely erase state concerns from consideration in the Senate, it in “no way means that federal lawmakers will choose not to preempt state law or not to displace the political authority of state institutions.”⁶¹

The courts have also limited the state voice in foreign affairs. The Supreme Court explicitly stated that states do not exist in relation to foreign affairs in its 1937 *United States v. Belmont* decision.⁶² *Belmont* arose from the following facts: In 1918, the Soviet Union nationalized a number of its corporations.⁶³ One of these corporations had a deposit account with Belmont, a private banker in New York. In 1933, the Soviet Union assigned, via an international compact, its interest in the account (and numerous other assets) to the United States.⁶⁴ Under the agreement, the United States would inform the Soviet Union of all amounts that it realized under the assignment.⁶⁵ The goal of the agreement was to bring about settlement of rival claims between the two countries.⁶⁶ The appellate court held that the assignment violated a New York policy prohibiting enforcement of confiscatory decrees issued by foreign governments.⁶⁷ The Supreme Court rejected this argument, however, and held that “[i]n respect of all international negotiations and compacts, and in respect of foreign affairs generally, state lines disappear. As to such purposes the state of New York does not exist.”⁶⁸

60. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1510-11 (1994).

61. Kramer, *Putting Politics*, *supra* note 58, at 224-25.

62. 301 U.S. 324, 331 (1937); Ku, *supra* note 3, at 459.

63. *Belmont*, 301 U.S. at 326.

64. *Id.*

65. *Id.*

66. *Id.* at 326-27.

67. *United States v. Belmont*, 85 F.2d 542, 543 (1936).

68. *Belmont*, 301 U.S. at 331.

This was not the first time that the Court ruled that states did not have a voice in resisting the unwanted effects of the federal government's foreign affairs decisions, and there is a line of cases dismissing state concerns going back to the first half of the nineteenth century.⁶⁹

One case in particular stands out. The Supreme Court decided *Missouri v. Holland*⁷⁰ in 1920. In *Holland*, Justice Holmes ruled that a treaty regulating the hunting of migratory fowl, and the federal statute implementing it, could not be struck down on the basis of federalism concerns.⁷¹ This ruling came despite lower court decisions citing principles of federalism that had rejected a similar federal statute enacted prior to the treaty.⁷² *Holland* has come to stand for the principle that the federal government's treaty power, unlike other constitutional powers, is not subject to federalism limits.⁷³

While this ruling gives the federal government enormous power in regards to its treaties, Professor David M. Golove makes a lengthy and convincing argument that this is exactly what the Framers intended.⁷⁴ In order to prevent the states' abuse of treaties that occurred under the Articles of Confederation, the Framers had good cause to adopt a system where treaties, once adopted, could not be undermined.⁷⁵ Without state advice and consent in deciding what treaties to adopt, however, the *Holland* decision gives the federal government a broad treaty-making power without regard for state concerns.

As indicated in the Introduction, the President and the Senate attempted to strengthen the state role in the treaty process during the last two decades by introducing federalism reservations to treaties and not seeking enforcement of ICJ rulings.⁷⁶ While these methods have put the United States in tension with international law, that tension is the product

69. See, e.g., *Ku*, *supra* note 3, at 459 nn.2-3 (citing *Zchernig v. Miller*, 389 U.S. 429, 441 (1968); *United States v. Belmont*, 301 U.S. 324, 331 (1937); *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575 (1840)).

70. 252 U.S. 416 (1920).

71. *Id.* at 433-34 (specifically holding that the treaty did not violate some "invisible radiation from the general terms of the Tenth Amendment") (cited for the same proposition in Swaine, *Does Federalism*, *supra* note 1, at 415).

72. Swaine, *Does Federalism*, *supra* note 1, at 415 (citing *United States v. McCullagh*, 221 F. 288, 292-96 (D. Kan. 1915); *United States v. Shauver*, 214 F. 154, 160 (E.D. Ark. 1914)).

73. See Swaine, *Does Federalism*, *supra* note 1, at 423 (citing *Holland* as the basis for arguments that the federal government's foreign affairs powers are not subject to any constitutional limitations).

74. Golove, *supra* note 2, at 1102-49.

75. *Id.* at 1132. Golove particularly applauds the Court's opinion in *Holland*, stating that it "ought rightly to be celebrated as among the greatest of the Court's decisions." *Id.* at 1266.

76. See *supra* text accompanying notes 7-23.

of political decisionmaking and not the result of the fundamental structure of U.S. law. First, if the federal government were concerned about the legality of the federalism reservations, it could simply withdraw them. Second, while the Clinton administration insisted that it could not force the states to comply with ICJ rulings,⁷⁷ the federal government has successfully sued states to force compliance in the past.⁷⁸ Thus, the federal government appears to maintain the final word as to whether or not the United States meets its treaty obligations and has merely made a political choice at times to favor state interests over international obligations.⁷⁹

The nature of U.S. incapacity to meet obligations could change, however, if the Supreme Court applies certain substantive, procedural, and remedial limits on the federal treaty power that appear to follow from the Court's federalism jurisprudence in other areas. These limits would formalize state power in the treaty process, while making compliance with international obligations substantially more difficult.⁸⁰ In analyzing these limits, this article relies on a recent and comprehensive article by Professor Edward T. Swaine.⁸¹

The first of these limits involves a potential reassessment by the Court of the broad holding in *Missouri v. Holland*.⁸² Swaine cites a series of recent cases for the proposition that the Supreme Court might take a

77. See *supra* note 20 and accompanying text.

78. Malvina Halberstam, *The Constitutional Authority of the Federal Government in State Criminal Proceedings that Involve U.S. Treaty Obligations or Affect U.S. Foreign Relations*, 10 *IND. INT'L & COMP. L. REV.* 1, 14 [hereinafter Halberstam, *Constitutional Authority*] (citing *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405 (1925); *United States v. Arlington*, 669 F.2d 925 (4th Cir. 1982)). Ku argues that such suits have only been brought to enforce treaties that were self-executing and thus don't apply to the ICJ orders, which he argues are non-self executing. Ku, *supra* note 3, at 517-18. Ku states that the only other times the federal government has sued to enforce treaty obligations have been in cases involving American Indian treaties where the federal government was considered a "guardian" of Indian interests. *Id.* at 491 n.174, 517 n.301 (citing *United States v. Minnesota*, 270 U.S. 181 (1926); *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975)). The Bush administration apparently believes it has the authority to force state compliance, having ordered state courts to review the cases of foreign nationals denied consular notification rights. See *supra* note 26 and accompanying text. Texas has questioned the constitutionality of the administration's decision, *Supreme Court to Hear*, *supra* note 28, and the issue will most likely be brought before a court before long.

79. See Halberstam, *Constitutional Authority*, *supra* note 78, at 5 ("Although the practice in the United States is apparently for the Secretary of State to forward requests regarding non-imposition of the death penalty to the state in which the accused is to be tried, that is a matter of policy, not constitutional requirement."); cf. Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 *AM. J. INT'L L.* 675, 679 (1998) (arguing that whether or not federalism trumps international affairs is a decision for the political branches to make).

80. Swaine, *Does Federalism*, *supra* note 1, at 408.

81. *Id.*

82. See *supra* notes 70-73 and accompanying text.

step back from *Holland* and apply some type of federalism limit to the federal government's power to make and implement treaties.⁸³ Professor Curtis A. Bradley believes that this limit should in part take the form of that found in *United States v. Lopez*, *City of Boerne v. Flores*, and *United States v. Morrison*.⁸⁴ In those cases, the Court struck down federal legislation as exceeding the powers granted under the Commerce Clause and Section Five of the Fourteenth Amendment,⁸⁵ reasoning that without some limits the federal government would have an unchecked police power⁸⁶ and interfere in areas of traditional state concern.⁸⁷ The ruling in *Holland* explicitly rejects the application of federalism principles used to

83. Swaine, *Does Federalism*, *supra* note 1, at 415-16 (citing *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995)).

84. Bradley summarizes his argument in Bradley, *Treaty Power Part II*, *supra* note 45, at 100-01 (arguing that the best rule for applying federalism limits to the treaty power "would allow the treatymakers the ability to conclude treaties on any subject but would limit their ability to create supreme federal law to the scope of Congress's power to do so"); see Bradley, *Treaty Power Part I*, *supra* note 45, at 456 (explaining "the option I favor, would be to subject the treaty power to the same federalism restrictions that apply to Congress's legislative powers. Under this approach, the treaty power would not confer any additional regulatory powers on the federal government, just the power to bind the United States on the international plane. Thus, for example, it could not be used to resurrect legislation determined by the Supreme Court to be beyond Congress's legislative powers, such as the legislation at issue in the recent New York, Lopez, Boerne, and Printz decisions"). Bradley incorporated *Morrison* into his argument in Bradley, *Treaty Power Part II*, *supra*, at 115-17. For a brief description of Bradley's position, see Swaine, *Does Federalism*, *supra* note 1, at 418-19.

85. *Morrison*, 529 U.S. 598 (holding that the civil remedy provisions of the Violence Against Women Act exceeded Congress's authority under the Fourteenth Amendment and Commerce Clause); *Boerne*, 521 U.S. 507 (holding that Congress did not have power under the Fourteenth Amendment to enact the Religious Freedom Restoration Act); *Lopez*, 514 U.S. 549 (holding that the Gun-Free School Zones Act exceeded Congress's authority under the Commerce Clause).

86. *Lopez*, 514 U.S. at 567 ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."); see also *Morrison*, 529 U.S. 598, 613 (2000) ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." (quoting *Lopez*, 514 U.S. at 564)).

87. *Morrison*, 529 U.S. at 611 ("Were the federal government to take over the regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur. . . ." (quoting *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring))); *Boerne*, 521 U.S. at 534 (characterizing RFRA as "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens"). My characterization in this and the preceding footnote of the reasoning in *Lopez* and *Morrison* is based on my analysis of those cases in Cyril Robert Emery, Note, *Setting Boundaries for Extraterritorial Applications of the Property Clause: An Assessment of an Alternative Source of Authority for Environmental Regulations*, 79 IND. L. J. 515 (2004).

limit Congress's authority in other areas to the treaty power,⁸⁸ and Bradley states that the case would, therefore, have to be overturned.⁸⁹ Although Swaine suggests more subtle strategies the Court might use to limit *Holland*,⁹⁰ he agrees its reversal is a possibility.⁹¹ The reversal of *Holland* would protect states by preventing U.S. enforcement of treaties that circumvent traditional limits on federal power. For example, in reference to *Holland*, the federal government could no longer rely on its treaty power to enforce a migratory bird statute that Congress could not implement with its commerce power.⁹² While *Holland*'s reversal might protect state interests, it would seriously interfere with U.S. ability to meet treaty obligations. If federal legislation implementing older treaties were struck down as violating federalism principles, the United States would find itself without a means of enforcing those treaties and would, therefore, be in violation of its obligations.

A potential procedural limit on the treaty power arises from the Court's recent application of the anticommandeering principle. In *New York v. United States*⁹³ and *Printz v. United States*,⁹⁴ the Supreme Court ruled that when legislating under the commerce power the federal government may not direct state legislatures to adopt regulatory programs or force state officials to actively enforce federal laws. If this rule were applied to the treaty power, it could prevent implementation of treaties such as the VCCR. The United States ratified the VCCR in 1969. The treaty is self-executing⁹⁵ and, thus, went into force as national law immediately without the need for legislative implementation.⁹⁶ The

88. *Missouri v. Holland*, 252 U.S. 416, 432-33 (1920).

89. Bradley, *Treaty Power Part II*, *supra* note 45, at 100-01.

90. First, he submits that the Court might presume when examining treaties that the federal government did not intend to exceed its general legislative history. Swaine, *Does Federalism*, *supra* note 1, at 422. Second, he proposes that the Court might more closely scrutinize whether certain provisions of implementing legislation are necessary to fulfill a treaty's obligations. *Id.*

91. As Swaine recognizes, an essential part of the *Holland* decision is that the decision's author, Justice Holmes, assumes that Congress has the power under the Necessary and Proper Clause to create implementing legislation for any treaty the federal government has ratified. *Id.* at 419 n.66. Swaine argues that the Supreme Court has been much less indulgent of late in reading the Necessary and Proper Clause, opening the door for that part of *Holland* to be overturned. *Id.* at 420-21.

92. Migratory bird legislation enacted before ratification of the Migratory Bird Treaty had been found to exceed Congress's commerce power. *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915) (cited in Swaine, *Does Federalism*, *supra* note 1, at 415).

93. 505 U.S. 144 (1992).

94. 521 U.S. 898 (1997).

95. *E.g.*, *Standt v. City of New York*, 153 F.Supp.2d 417, 423 n.3 (S.D.N.Y. 2001).

96. Vázquez, *Self-Executing Treaties*, *supra* note 33, at 695 (stating that "[a]t a general level, a self-executing treaty may be defined as a treaty that may be enforced in the courts without prior legislation by Congress").

VCCR, however, entails a certain measure of active implementation because one of its provisions requires that officials notify arrested foreign nationals of their right to communicate with their consulate.⁹⁷ In the Committee on Foreign Relations' report on the VCCR, members of the Senate recognized that the states would need to fulfill some of the treaty's obligations because state officers control many arrests.⁹⁸ While state enforcement of the VCCR has not been particularly effective,⁹⁹ it appears to be the only practical method of adopting the treaty.¹⁰⁰ If the anticommandeering principle were applied to the VCCR, however, the federal government could not ask state officers to fulfill the treaty's obligations.¹⁰¹ The federal government would be left with the

97. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1)(b), 21 U.S.T. 77, 596 U.N.T.S. 261.

98. Senators James William Fulbright and Philip Clifford Case implicitly recognized the need for state implementation when they asked Deputy Legal Advisor J. Edward Lyerly, "[h]ow does the State Department notify State and local jurisdictions of the provisions of consular treaties so that they know which consuls (if any) to notify when they arrest a foreign national?," S. Exec Rep. No. 91-9, app., at 24 (1969) (statement of Deputy Legal Adviser J. Edward Lyerly) (cited by William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 268 (1998), for a similar proposition).

99. For example, in 2004, the ICJ found that U.S. officials had failed to notify fifty-one Mexicans of their consular rights upon arrest. *Avena* Final Order, *supra* note 17, at 611 ¶ 106(1). While this may seem like a small number, the ICJ was only concerned with inmates on death row. There are presumably many more non-death row inmates who were not notified of consular rights.

100. Chad Thornberry, *Federalism v. Foreign Affairs: How the United States Can Administer Article 36 of the Vienna Convention on Consular Relations Within the States*, 31 MCGEORGE L. REV. 107, 125 (1999); see Swaine, *Does Federalism*, *supra* note 1, at 432 n.115 (stating that, in regards to the VCCR, the United States "could have more actively supervised state and local officials, or hired a third party to do so, but the size and complexity of such an undertaking would be staggering").

101. Carlos Manuel Vázquez, Breard, Printz, and the Treaty Power, 70 U. COLO. L. REV. 1317, 1323 (1999) [hereinafter Vázquez, *The Treaty Power*]. Although the anticommandeering principle would have a negative impact on U.S. ability to meet treaty obligations, its benefits for state interests are perhaps limited. While the principle would prevent the federal government from burdening states with certain treaty obligations, it could also prevent the federal government from seeking federalism reservations designed to protect states. Federalism reservations protect states not only by potentially allowing them to choose whether to implement treaties at all, see *supra* note 13 and accompanying text, but also by giving them flexibility to implement treaties in a manner they see fit. See *supra* note 12 and accompanying text. According to Professor Carlos Manuel Vázquez, if applied in the treaty context, the anticommandeering principle would render federalism reservations unconstitutional because they leave legislative implementation of treaties to states thus commandeering state legislatures. Vázquez, *The Treaty Power*, *supra*, at 1354-56. If this came to pass and the federal government still wished to implement a treaty to which reservations were attached, it could enforce the treaty directly using federal officials instead of state legislatures. This would harm states by taking away their control over implementation of these treaties, leaving them at the mercy of the federal government's enforcement techniques.

impractical option of performing the notifications¹⁰² or the unattractive choice of breaching the treaty and accepting the consequences.¹⁰³

Of the federalism limits on the treaty power that the Court could potentially adopt, the application of the state sovereign immunity doctrine as a remedial limit seems the most probable and imminent. In two cases arising from the ICJ disputes mentioned above, the Supreme Court stated in dicta that under the Eleventh Amendment foreign governments probably cannot sue states for violations of a treaty.¹⁰⁴ If these dicta are followed, it will mean that foreign nations and nationals cannot sue states to meet treaty obligations that have been assigned to those states through federalism reservations or simply by default, as in the case of the VCCR.¹⁰⁵ By not providing remedies to certain treaty violations, the United States would potentially be in further breach of these treaties and even more at odds with international law.¹⁰⁶

If any of these judicial limits on the federal treaty power come to pass, they would legally cement a preference for states' rights over international obligations and make the federal government's compliance with treaties very difficult. One would hope, however, that the Court, as much as the federal government, would prefer a method of incorporating federalism in the treaty process that neither undermines international obligations nor too severely challenges the legal structure that has been built to protect the states.

Academic responses to the current tension in the U.S. between federalism and treaty obligations tend toward absolutism. For example, if Professor Bradley's suggestion that *Holland* should be reversed were accepted, states would exercise a vast new power in reviewing treaties that would severely hamper the federal government's ability to meet obligations and surely solidify the United States' reputation as an international scofflaw. To avoid this, the U.S. federal government could simply adopt a practice of not ratifying any treaties that implicate state interests. This practice would prevent U.S. conflicts with international law but would not meet the federal government's needs. For example,

102. See *supra* note 100.

103. Swaine, *Does Federalism*, *supra* note 1, at 432. Those consequences would not include being dragged into the ICJ now that the Bush administration has withdrawn the United States from the optional protocol giving the ICJ jurisdiction over conflicts arising under the VCCR. Liptak, *supra* note 26, at A16. International relations consequences would, of course, remain.

104. *Fed. Republic of Germany v. United States*, 526 U.S. 111, 112 (1999); *Breard v. Greene*, 523 U.S. 371, 377 (1998); see also Swaine, *Does Federalism*, *supra* note 1, at 435 (citing these cases for the same principle).

105. Swaine *Does Federalism*, *supra* note 1, at 438.

106. *Id.* at 438-41 (explaining that application of state sovereign immunity could threaten certain treaties that have provisions requiring remedies, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights).

the federal government has shown an interest in adopting human rights treaties¹⁰⁷ and, despite the federalism concerns raised by these treaties,¹⁰⁸ continues to consider signing and ratifying them.¹⁰⁹

On the opposite end of the spectrum from Bradley's suggestion are assertions that the states have no place in foreign affairs.¹¹⁰ These assertions, however, neither account for the Framers' intent nor the commitment by the federal government to include states in the treaty process. Outside of these absolutist arguments, scholars have suggested giving states the ability to form their own international agreements as a method of reconciling federalism and international obligations.

For example, Professor Swaine and others advance the revival of state-foreign compacts.¹¹¹ Under the Constitution, the states may, with the approval of Congress, form compacts with foreign nations.¹¹² Compacts have rarely been used, but Swaine argues that if federal authority to implement treaties or to require states to implement them is lacking, the federal government could have states fill the gap by forming international agreements covering the same subject matter.¹¹³ For

107. See Bradley, *Treaty Power Part I*, *supra* note 45, at 402-03 (identifying various human rights treaties that have been adopted or considered by the federal government); Bradley & Goldsmith, *Conditional Consent*, *supra* note 7, at 414 (stating that "[a]s for the desirability of ratifying human rights treaties, presidents and the Senate have agreed that a failure by the United States to ratify the major human rights treaties would result in . . . foreign policy costs").

108. Human rights treaties tend to implicate traditional areas of state concern, such as criminal and family law. Spiro, *supra* note 24, at 568; see also Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1674-75 (1997) (stating that human rights treaties "have numerous potential conflicts with state law").

109. For example, the current Bush administration initially supported ratification of the Convention on the Elimination of All Forms of Discrimination Against Women, although the administration has now withdrawn that support. Natasha Fain, *Human Rights Within the United States: The Erosion of Confidence*, 21 BERKELEY J. INT'L L. 607, 614-15 (making the point that the Bush administration has generally taken no positive action on human rights treaties under consideration). For other evidence of federal interest in human rights treaties, see Ku, *supra* note 3, at 463 (citing the examples from Bradley, *Treaty Power Part I*, *supra* note 45, at 402-03, mentioned *supra* in note 103).

110. See Swaine, *Negotiating Federalism*, *supra* note 3, at 1129 n.1 (citing, but not agreeing with, e.g. HENKIN, *FOREIGN AFFAIRS*, *supra* note 3, at 150; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §4-6, at 230 (2d ed. 1988)).

111. Swaine, *Does Federalism*, *supra* note 1, at 494; see Anderson, *supra* note 49, at 245-47.

112. U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power. . ."). Historically, Congress has been granted broad leeway in determining the method of its consent. See Swaine, *Does Federalism*, *supra* note 1, at 501-02 (citing evidence for Congress's ability to consent in the manner of its own choosing).

113. Swaine, *Does Federalism*, *supra* note 1, at 510. The requirement of congressional approval would prevent states from entering agreements that would undermine the federal government's foreign affairs goals. See *id.* at 503-05 (explaining

example, if the Court finds that the anticommandeering principle invalidates the VCCR, Swaine suggests that the states could, with Congress's permission, intervene and negotiate with foreign nations to form compacts granting consular notification rights.¹¹⁴

While theoretically sound, state agreements with foreign nations present grave practical difficulties. These difficulties arise due to the nature of the agreements that states would most likely be called upon to make. Considering the federal government's federalism worries regarding human rights agreements,¹¹⁵ such agreements would seem especially suitable for state-foreign compacts. Human rights compacts, though, would likely prove impractical because they purport to guarantee individual rights.¹¹⁶ Consider Swaine's example of the VCCR. Just as human rights treaties guarantee individual rights, the VCCR entitles individuals to be notified of their right to communicate with their consulate.¹¹⁷ If the VCCR were struck down and states entered into compacts, they could certainly provide foreign arrestees with consular notification. The foreign nations that agreed to the compact, however, would have no way of providing reciprocity for this or any other compact guaranteeing individual rights because it is extremely difficult to satisfactorily identify the state citizenship of U.S. citizens.¹¹⁸ Passports

the various ways Congress can control state-foreign compacts).

114. *Id.* at 522-23.

115. See, e.g., Curtis A. Bradley, *World War II Compensation and Foreign Relations Federalism*, 20 BERKELEY J. INT'L L. 282, 287 (2002) (stating that "when ratifying human rights treaties, the President and Senate routinely attach federalism understandings providing that the treaties will be implemented in a manner consistent with our federal system of government").

116. For context, consider the following:

Until recently, international law has exclusively focused on states. Individuals did not have rights under international law. In the last fifty years, a large number of states have ratified treaties that deal with individual human rights, such as the Genocide Convention, the Covenant on Civil and Political Rights, the Convention on Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women. All of these protect individual human rights.

Malvina Halberstam, *The Application of the Foreign Sovereign Immunities Act to an Action Against the French Railroad for Transporting Thousands of Jews and Others to Their Deaths: Abrams v. SNCF*, 15 N.Y. INT'L L. REV. 1, 6-7 (2002) (footnotes omitted).

117. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1)(b), 21 U.S.T. 77, 596 U.N.T.S. 261; see also LaGrand Final Order, *supra* note 17, at 1102 ¶ 128(4) (holding that by not notifying Karl and Walter LaGrand of their rights under the VCCR, the United States violated its obligation to the brothers).

118. The Fourteenth Amendment states, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, §1. This would imply that individuals are citizens of the states wherein they reside. The Supreme Court, however, resisted this definition of state citizenship in the area where the issue comes up most: determining state citizenship for the purpose of establishing diversity jurisdiction. 13B

are not state-specific and the most common legal test concerning state citizenship rests on the intent of the person in question.¹¹⁹ Without some type of reform, therefore, foreign nations would be unable to identify whether a U.S. citizen came from the state party to the compact or a state that did not grant consular notification rights. At best, the foreign nation could only provide uncertain implementation of the agreement that would occasionally deny benefits to deserving arrestees.

This is not an insurmountable problem, but it does present a significant practical barrier because the entire structure of U.S. state citizenship would have to be revised in order for states to create effective agreements with foreign nations. The United States could adopt state-specific passports and more rigid legal definitions of state citizenship. In the face of such extreme measures, however, the question arises whether there is a more practical method of reconciling state interests and international obligations.

II. State Involvement in the Australian Treaty-Making Process

Like the United States, Australia has adopted recent reforms to give states a greater role in the treaty process. While the two nations have similar constitutional frameworks, the Australian reforms have focused on state advice as opposed to federalism reservations or declarations of federal incapacity. In this section, this article provides a comparison of the two systems, relying on an article by Brian R. Opeskin and Donald R. Rothwell.¹²⁰ This article then examines the recent Australian reforms and evaluates their efficacy.

CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3611 (3rd ed. 1998 & Supp. 2004) (citing *Robertson v. Cease*, 97 U.S. 646 (1878)). Under 28 U.S.C. § 1332 (2000), the federal district courts have jurisdiction over actions between citizens of different states dealing with claims over a certain minimum amount. Rather than strictly define state citizenship, courts have decided that for “diversity purposes, state citizenship is essentially synonymous with domicile.” Peter B. Oh, *A Jurisdictional Approach to Collapsing Corporate Distinctions*, 55 RUTGERS L. REV. 389, 455 (2003). Courts generically hold that “domicile of a person is the place where he has his true, fixed home and principal establishment, and to which, whenever he is absent, he has the intention of returning.” Wright, *supra*, at § 3612. Predictably, considering the requirement of looking at intent, this test has been criticized as being too difficult to apply. David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 10 (1968) (stating that “[d]omicile is an unsatisfactory test for American state citizenship . . . because it is difficult to determine”); *see also* Wright, *supra*, at § 3612 (cataloging some of the difficulties courts face determining intent). Considering the mountain of judicial decisions addressing the issue, *see* Wright, *supra*, at § 3612, it would seem that courts struggle to apply the domicile rule, and foreign officials could hardly be expected to do any better.

119. *See supra* note 118 (explaining the role of intent in determining state citizenship).

120. Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37.

Just as in the United States, the drafters of the Australian Constitution provided for federal authority in foreign affairs. Whereas the Framers of the U.S. Constitution were explicit in giving predominance to the federal government in treaty matters,¹²¹ the Australian Framers had cause to be more circumspect. When the Australian Constitution became effective in 1901, Australia's foreign relations were still controlled by the Imperial government, and the Constitution's drafters were wary about including provisions explicitly relating to the power to make treaties.¹²² Nonetheless, Sections 51 and 61 of the Constitution have come to stand for the proposition that the federal government has the final word in treaty matters.

Section 61 of the Constitution states, "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."¹²³ As Opeskin and Rothwell explain, this archaic clause gives the current Australian executive branch, as embodied by the Prime Minister and his or her cabinet, the foreign affairs powers that were previously held by the Queen, including the authority to make and terminate treaties.¹²⁴ This provision, although vastly more opaque, mirrors Article II, Section 2, Clause 2, of the U.S. Constitution.¹²⁵ Thus, just like the U.S. President, the Australian Prime Minister makes treaties. The Constitutions differ, however, in that the Australian Prime Minister can ratify treaties without the legislative branch's consent.¹²⁶

The Australian Federal Legislature, like the U.S. Congress, is an organ of enumerated powers and is delegated power over "external affairs" under Section 51 of the Constitution.¹²⁷ The Australian High Court has interpreted this power to include the ability to implement basically any treaty signed and ratified by the Prime Minister.¹²⁸ This

121. See *supra* notes 53-54 and accompanying text.

122. Charlesworth, *supra* note 40, at 429-30.

123. AUSTL. CONST. ch. 2, § 61.

124. Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 4-5.

125. Giving the President the power to enter into treaties with advice and consent of the Senate.

126. Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 5.

127. "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: . . . External Affairs. . . ." AUSTL. CONST. ch. 1, pt. 5, § 51, cl. 29.

128. "The upshot of the High Court's interpretation of federal legislative power over external affairs is that Parliament does not lack power to implement treaties to which Australia is or intends to become a party, whatever their subject matter." Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 12. Opeskin & Rothwell come to this conclusion based on High Court decisions in *Queensland v. Commonwealth* (1989) 167 C.L.R. 232; *Richardson v. Forestry Comm'n* (1988) 164 C.L.R. 261; *Commonwealth v.*

essentially gives the Australian Federal Legislature the same broad power to implement treaties granted to the U.S. Congress in *Missouri v. Holland*. Unlike the default rule of self-execution in the United States, treaties are non-self-executing in Australia and, therefore, require legislative implementation to become binding domestically.¹²⁹ To avoid the international embarrassment of ratifying a treaty that the Federal Legislature won't implement, the Prime Minister generally assures that legislation will be passed prior to ratification.¹³⁰

The states can also implement treaties and in some cases are better situated to do so.¹³¹ For this reason, the Australian Federal Legislature sometimes leaves the responsibility to them, just as the U.S. federal government leaves treaty implementation to the U.S. states on occasion.¹³² Nevertheless, under the Australian Constitution, if a state fails to implement a treaty, the Federal Legislature can always choose to enact pre-empting legislation.¹³³ Neither U.S. nor Australian states can independently form treaties with foreign nations.¹³⁴

Thus, just like the U.S. federal government since adoption of the Seventeenth Amendment, the Australian federal government historically possessed sole authority to negotiate and ratify treaties and the power to implement them. While this model provided the federal government with the tools to meet its treaty obligations, it did little to protect states' interests. In 1975, two treaties that impinged on traditional areas of state concern regarding the environment and human rights entered into force in Australia: the Convention for the Protection of the World Cultural and Natural Heritage (hereinafter the World Heritage Convention)¹³⁵ and the

Tasmania (1983) 158 C.L.R. 1; *Koonwarta v. Bjelke-Petersen* (1982) 153 C.L.R. 168. Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 11.

129. Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 6-8.

130. *Id.* at 6.

131. *Id.* at 15-17.

132. *Ku*, *supra* note 3, at 477-526 (cataloging a variety of areas in which states have implemented treaties through legislation or otherwise); *see also supra* note 100 and accompanying text (explaining that it makes practical sense that the states implement some of the VCCR obligations).

133. Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 16 n.69 (citing AUSTL. CONST. ch. 5, § 109).

134. As for Australia, consider Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 13 (citing *New South Wales v. Commonwealth (the Seas and Submerged Lands Case)* (1975) 135 C.L.R. 337; *Commonwealth v. New South Wales* (1923) 32 C.L.R. 200; for principle that Australian states have no legal personality and cannot enter into treaties). In the United States, U.S. CONST. art. I, § 10, cl. 1 prohibits states from entering into treaties.

135. *Convention for the Protection of the World Cultural and Natural Heritage*, entered into force Nov. 17, 1975, 27 U.S.T. 37, 1975 Austl. T.S. No. 47. Like Opeskin & Rothwell, this article uses the Australian Treaty Series citations for Australian treaties. These citations indicate the year when the treaty entered force in Australia.

International Convention on the Elimination of All Forms of Racial Discrimination.¹³⁶ The states challenged federal implementation of these treaties as exceeding federal authority under Section 51 of the Constitution, but the High Court repeatedly ruled against them.¹³⁷ It held that, as long as the obligation was *bona fide* and not an overt attempt to enhance the power of the Federal Parliament, the implementing legislation was valid.¹³⁸ While the *bona fide* requirement hints at a potential limitation on the Federal Parliament's power to implement treaties, the Australian High Court has yet to strike down treaty legislation as exceeding federal authority.

Although the High Court has not offered the states legal protection from the implementation of treaties affecting their traditional areas of concern, procedural changes in treaty making have made up for it, at least in part. These changes began in 1976 with the election of a conservative government that was dedicated to a policy of "cooperative federalism."¹³⁹ This policy manifested itself in various attempts to include states in the treaty process. For example, in 1977, proposals were made to give states an advisory role in the negotiation and ratification of treaties.¹⁴⁰ During that same year, the Australian federal government published *Guidelines on Treaty Consultation* stating that the government would pursue federalism reservations where appropriate.¹⁴¹ While the use of federalism reservations was quickly abandoned,¹⁴² state

136. International Convention on the Elimination of All Forms of Racial Discrimination, *entered into force* Jan. 4, 1969, 660 U.N.T.S. 195, 1975 Austl. T.S. No. 40. Opeskin & Rothwell cite this treaty and others as covering "subject areas that were traditionally regarded as falling within state competence, namely human rights and the environment." Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 10-11.

137. Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 11-12 (citing *Queensland v. Commonwealth* 167 C.L.R. 232 (Austl.1989); *Richardson v. Forestry Comm'n* 164 C.L.R. 261 (Austl. 1988); *Commonwealth v. Tasmania* 158 C.L.R. 1 (Austl. 1983); *Koonwarta v. Bjelke-Petersen* 153 C.L.R. 168 (Austl. 1982)).

138. For example, in *Richardson v. Forestry Commission* 164 C.L.R. 261 (Austl. 1988), Justice Gaudron summarizes the High Court's position as follows:

The fact that Australia is a party to a treaty (leaving to one side a treaty which is not entered into *bona fide*) will itself suffice to engage the power to legislate with respect to external affairs, and will authorize the passing of a law so long as that law is reasonably capable of being viewed as conducive to the purpose of the treaty if it is also reasonably capable of being viewed as appropriate, or adapted to, the circumstance which engages the power.

Id. at 343 (Gaudron, J.); see Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 12.

139. Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 18-19.

140. *Trick or Treaty?*, *supra* note 40, at ¶ 13.19; Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 14.

141. Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 18-19 (citing Henry Burmester, *Federal Clauses: An Australian Perspective*, 34 INT'L & COMP. L.Q. 522, 534 (1985)).

142. In 1983, the newly elected labour government rejected the use of federalism

advice in treaty making is the hallmark of Australia's current "Principles and Procedures for Commonwealth-State Consultation on Treaties" (hereinafter "Principles and Procedures") agreed to by the state Premiers¹⁴³ and the federal government as part of broad Australian treaty reforms in 1996.¹⁴⁴

The basic mechanism for state advice under the "Principles and Procedures" is the Commonwealth-State Standing Committee on Treaties (hereinafter State Standing Committee).¹⁴⁵ The State Standing Committee is a body of federal officials and senior officers from the various states that meets at least twice a year.¹⁴⁶ Every six months, the federal government is required to provide the states with a list of current and upcoming treaty negotiations.¹⁴⁷ The State Standing Committee examines this list and identifies treaties of importance to the states and proposes mechanisms for involving the states in the negotiation of those treaties.¹⁴⁸ It also coordinates state representation on relevant treaty delegations.¹⁴⁹ Finally, it reports on the implementation of treaties that have implications for the states.¹⁵⁰

The "Principles and Procedures" incorporate other significant

reservations in the "Principles and Procedures for Commonwealth-State Consultation on Treaties" (hereinafter "Principles and Procedures") agreed to by the state Premiers and the Commonwealth government. *Trick or Treaty?*, *supra* note 40, at ¶ 13.8. According to the "Principles and Procedures," the international community viewed the reservations with contempt and as simply a method of evading international obligations. *Id.* This has been the official Australian position ever since. Principles and Procedures, *supra* note 16, at ¶ 8.1 (stating Australian position regarding federalism reservations in the current version of the "Principles and Procedures"); *see also* Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 18-19 (making same claim in 1995 and citing 1992 "Principles and Procedures" as evidence).

143. Premiers are the Australian equivalent of U.S. state Governors.

144. Principles and Procedures, *supra* note 16. There have been several incarnations of the "Principles and Procedures," this is only the most recent. *Trick or Treaty?*, *supra* note 40, at ¶¶ 13.8, 13.19. For a basic review of the 1996 treaty reforms, *see* Charlesworth, *supra* note 40, at 439-44.

145. Principles and Procedures, *supra* note 16, at ¶¶ 5.4-5.5; *Trick or Treaty?*, *supra* note 40, at ¶ 13.22.

146. Principles and Procedures, *supra* note 16, at ¶ 5.4; *Trick or Treaty?*, *supra* note 40, ¶ 13.22. The State Standing Committee "consists of representatives from the Premier's or Chief Minister's Departments in every State and Territory. [The State Standing Committee] is chaired by a senior official of the Prime Minister's Department and also has representatives from the Department of Foreign Affairs and Trade and the Attorney General's Department." Australian Government, Department of Foreign Affairs and Trade Web site, <http://www.dfat.gov.au/treaties/making/making2.html> (last visited June 20, 2005).

147. Principles and Procedures, *supra* note 16, at ¶ 4.2(b); *Trick or Treaty?*, *supra* note 40, at ¶ 13.23.

148. Principles and Procedures, *supra* note 16, at ¶ 5.4; *Trick or Treaty?*, *supra* note 40, at ¶ 13.22.

149. *Id.*

150. *Id.*

mechanisms for state advice as well. In 1996 the Australian Senate adopted a resolution requiring the preparation of a National Interest Analysis (hereinafter NIA) for every treaty tabled in Parliament.¹⁵¹ NIAs are the procedural equivalent of Environmental Impact Statements in the United States.¹⁵² Essentially, they are publicly available documents created by the federal government detailing the benefits and drawbacks of adopting a treaty under consideration.¹⁵³ The “Principles and Procedures” require the federal government to consult with the states during the preparation of NIAs for treaties that implicate state interests.¹⁵⁴

As part of the 1996 reforms, the Australian federal government also established a Joint Standing Committee on Treaties (hereinafter JSCOT).¹⁵⁵ JSCOT releases reports on matters arising from treaties and NIAs.¹⁵⁶ Although JSCOT is made up of members of the Federal Parliament who, like U.S. Senators, do not represent state interests, it has made a habit of reviewing and commenting on the federal government’s consultations with states during the treaty process.¹⁵⁷ JSCOT’s close scrutiny of the consultations gives the states an additional layer of procedural protection, and its publicly available reports, in combination

151. Charlesworth, *supra* note 40, at 439-40 (citing Minister for Foreign Affairs and the Attorney-General, *Government Announces Reform of Treaty-Making*, Department of Foreign Affairs and Trade, Media Release FA 29 (May 2, 1996) [hereinafter *Reform of Treaty-Making*], available at <http://www.dfat.gov.au/media/releases/foreign/1996/fa29.html>). Under the reforms every treaty signed by Australia must be tabled in Parliament at least fifteen days before it can be ratified. *Id.*

152. For more on EISs, see *infra* note 190 and accompanying text.

153. Charlesworth, *supra* note 40, at 439-40; Parliament of Australia, Joint Standing Committee on Treaties Web Site [hereinafter JSCOT Web Site], <http://www.aph.gov.au/house/committee/jsct/ppgrole.htm> (last visited June 20, 2005).

154. Principles and Procedures, *supra* note 16, at ¶ 4.2(c).

155. JSCOT Web Site, *supra* note 153; see Charlesworth, *supra* note 40, at 439-40 (citing *Reform of Treaty-Making*, *supra* note 151).

156. JSCOT Web Site, *supra* note 153; see Charlesworth, *supra* note 40, at 441.

157. For the most in-depth review, see Joint Standing Committee on Treaties, Parliament of the Commonwealth of Australia, *Report 61: The Australia-United States Free Trade Agreement* at ¶¶ 3.43-3.63 (June 2004) [hereinafter *Report 61*] (reviewing consultations between states and Commonwealth during negotiations leading up to the Australia-United States Free Trade Agreement), <http://www.aph.gov.au/house/committee/jsct/usafta/report.htm>. See also Joint Standing Committee on Treaties, Parliament of the Commonwealth of Australia, *Report 60: Treaties Tabled on 2 March 2004* at ¶¶ 3.21-3.23 (May 2004) (briefly reviewing state consultations on the World Tourism Organization), available at <http://www.aph.gov.au/house/committee/jsct/usafta/report.htm>; Joint Standing Committee on Treaties, Parliament of the Commonwealth of Australia, *Report 62: Treaties Tabled on 30 March 2004* at ¶¶ 2.50-2.53 (Aug. 2004) (briefly reviewing state consultations on the Agreement between the Government of Australia and the Government of New Zealand for the Establishment of a Joint Scheme for the regulation of Therapeutic Products), available at <http://www.aph.gov.au/house/committee/jsct/usafta/report.htm>.

with the NIAs, make information about treaty making more readily available to the general population.¹⁵⁸

Finally, the “Principles and Procedures” establish a Treaties Council.¹⁵⁹ The Treaties Council is made up of the Australian Prime Minister and the Premiers of each state and provides an opportunity for the states to suggest federal adoption of treaties and discuss treaties referred to it by the State Standing Committee.¹⁶⁰ The Treaties Council is required to meet every year but, in fact, has met just once since its establishment.¹⁶¹ This lapse may appear to tarnish the reforms, but a recent article suggests that it possibly reflects the success of the State Standing Committee, which has simply not felt the need to refer treaties to the Treaties Council.¹⁶²

Despite criticism that the Treaties Council has not met frequently enough,¹⁶³ state involvement through the NIAs and the State Standing Committee has received positive reviews from the states. For example, in JSCOT’s 1999 report on the treaty process, New South Wales Legislative Council member Hon. Ronald Dyer stated that the State Standing Committee “mechanism at a bureaucratic level appears to be working well. The officials are meeting regularly, and that is excellent.”¹⁶⁴ The representative from Tasmania, a state that has particularly suffered from the effects of treaties,¹⁶⁵ was not as positive,

158. Charlesworth, *supra* note 40, at 440-41.

159. Principles and Procedures, *supra* note 16, at ¶¶ 5.1-5.3.

160. *Id.* at ¶¶ 5.1-5.4. In the context of the United States, imagine the President formally meeting with the Governors of every state and discussing treaties.

161. *Report 61*, *supra* note 157, at ¶ 3.61.

162. Charlesworth, *supra* note 40, at 440-41.

163. *See Report 61*, *supra* note 157, at ¶ 3.61 (presenting Western Australian and Australian Capital Territory submissions suggesting that the Treaties Council should meet more often); Joint Standing Committee on Treaties, Parliament of the Commonwealth of Australia, *Report 24: A Seminar on the Role of Parliaments in Treaty Making*, Appendix C—Seminar Transcript 47 (Aug. 1999) [hereinafter *Report 24*] (statement of Hon. Ronald Dyer, member of New South Wales Legislative Council and Chair of the Standing Committee on Law and Justice) (also suggesting the Treaties Council should meet more often), available at <http://www.aph.gov.au/house/committee/jsct/reports/report24/report24.pdf> (last visited June 20, 2005).

164. *Report 24*, *supra* note 163, Appendix C—Seminar Transcript 47 (statement of Hon. Ronald Dyer, member of New South Wales Legislative Council and Chair of the Standing Committee on Law and Justice). As mentioned in the previous note, Mr. Dyer also suggested that the Treaties Council should meet more often. *Id.*

165. Tasmania has had laws and projects struck down because of interpretation of treaties. First, in 1983, the High Court determined that Australia’s membership in the World Heritage Convention prohibited Tasmania from building a potentially lucrative dam. *Commonwealth v. Tasmania* 158 C.L.R. 1 (Austl. 1983); *Report 24*, *supra* note 163, Appendix C—Seminar Transcript 47-48 (statement of Hon. Ray Bailey, President of the Tasmanian Legislative Council). More recently, the federal government passed a law preempting Tasmania’s anti-sodomy laws in order to come into compliance with the ICCPR. *See Report 24*, *supra*, Appendix C—Seminar Transcript 48 (statement of Hon.

but nevertheless did “congratulate the federal government for having introduced the measures.”¹⁶⁶

More recently, JSCOT released a report on the Australia-United States Free Trade Agreement that reviewed state participation during the negotiations.¹⁶⁷ The Agreement is of general significance to the states, but especially relevant are government procurement provisions that require the states to adhere to certain procedures when considering bids for government contracts.¹⁶⁸ While the states were disappointed by the level of consultation at the end of and after the negotiation process,¹⁶⁹ the NIA indicated that the states were active in framing negotiation objectives¹⁷⁰ and were included as observers during the actual negotiations.¹⁷¹ Furthermore, JSCOT found that most states were generally pleased with the amount of consultation and had praised the federal government’s efforts “to be more inclusive than during previous negotiations.”¹⁷² The process of state advice in Australia seems, therefore, to be a work in progress but on the way to fulfilling state concerns regarding treaties.

The Australian model of state advice is not a panacea in terms of balancing states’ interests and international obligations. First, the Australian reforms are merely procedural, and the federal government can always ignore state advice¹⁷³ or, in an emergency, ratify a treaty without it.¹⁷⁴ As Australian Minister of Foreign Affairs Hon. Alexander

Ray Bailey, President of the Tasmanian Legislative Council); Charlesworth, *supra* note 40, at 436.

166. *Report 24, supra* note 163, Appendix C—Seminar Transcript 47-48 (statement of Hon. Ray Bailey, President of the Tasmanian Legislative Council).

167. *Report 61, supra* note 157, at ¶ 3.41-3.63.

168. Australia-United States Free Trade Agreement, May 18, 2004, U.S.-Austl., ch. 15, available at http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/index.html [hereinafter AUSFTA]; *Report 61, supra* note 157, at ¶ 3.44.

169. *Report 61, supra* note 157, at ¶¶ 3.53, 3.55-3.60.

170. National Interest Analysis, Australia-United States Free Trade Agreement, [2004] ATNIA 5, annex 1 [hereinafter ATNIA], <http://www.austlii.edu.au/au/other/dfat/nia/2004/5/annex1.html>; see *Report 61, supra* note 157, at ¶ 3.48.

171. ATNIA, *supra* note 170, annex 1; *Report 61, supra* note 157, at ¶ 3.54. *But see Report 61, supra*, at ¶ 3.55 (citing some state complaints about involvement in negotiations).

172. *Report 61, supra* note 157, ¶ 3.53.

173. *The People’s Process, supra* note 42, at 7 (statement of Hon. Alexander Downer, Minister of Foreign Affairs); see also Department of Foreign Affairs and Trade, Australia and International Treaty Making Information Kit, Review of the Treaty-Making Process ¶ 6.6 (explaining why Australian states don’t have a formal role in treaty making) [hereinafter Treaty Making Information Kit], <http://www.austlii.edu.au/au/other/dfat/infokit.html>.

174. Consider Australian Minister of Foreign Affairs Alexander Downer’s statement in *The People’s Process, supra* note 42, at 5, explaining that in an emergency the federal government could sign and ratify a treaty without it being tabled in Parliament for the requisite fifteen days. In such a situation, there would be no time for states to be

Downer said in 2000, however, “we would obviously try to get a consensus amongst the states and territories before ratifying a treaty which is of relevance to them.”¹⁷⁵ Second, the states can also undermine the goals of the system by delaying or enacting faulty legislation when asked to implement a treaty.¹⁷⁶ Despite these concerns, however, the Australian model is functioning and has created a balance between state interests and international obligations that sacrifices neither.

III. A Proposal for U.S. Adoption of Australian Treaty Reforms

Although successful in Australia, would state advice be an appropriate remedy for the dilemma facing the United States over the proper place of federalism in treaty making? U.S. adoption of state advice certainly has historic charm, as the Framers’ intended the President to consult with the states before signing treaties.¹⁷⁷ Washington’s quick dismissal of the practice and the Seventeenth Amendment’s final exclusion of states from any role in the treaty process, however, tend to undermine the strength of an originalist argument for adopting the Australian reforms. But that should not prove fatal to an argument in favor of adoption. Australia adopted the reforms without reference to historic precedent. More significantly, in 1994, the U.S. federal government enacted the Uruguay Round Agreements Act (hereinafter URAA), which implements the international agreement of the same name.¹⁷⁸ The Uruguay Round Agreements establish many of the provisions that together form the World Trade Organization. The URAA requires the U.S. Trade Representative to consider state advice when formulating U.S. positions that affect state concerns on trade issues arising from the Uruguay Round Agreements.¹⁷⁹ The federal government’s adoption of an act entailing state consultation in certain circumstances shows that it is neither unwilling nor unable to pursue state advice on matters of importance to the states. Furthermore, adoption of a JSCOT-like joint standing committee to review and report on treaties would be in line with congressional practice establishing numerous committees and sub-committees to oversee everything from agriculture to veterans’ affairs.¹⁸⁰

consulted.

175. *Id.* at 7.

176. Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 20.

177. *See supra* notes 55-56 and accompanying text.

178. Uruguay Round Agreements Act of 1994, 19 U.S.C. §§ 3501-3624 (2000).

179. 19 U.S.C. § 3512 (b)(1)(B) (the URAA is also cited by Swaine, *Does Federalism*, *supra* note 1, at 421 n.71, for this principle).

180. Consider the U.S. Senate Web site, http://www.senate.gov/pagelayout/committees/d_three_sections_with_tasers/committees_home.htm (last visited June 20, 2005).

A. *Benefits and Drawbacks of the Australian Reforms for the U.S. States*

Regardless of precedent, U.S. adoption of the Australian reforms would have significant concrete benefits for the states and the federal government. As far as the states are concerned, the greatest benefit would be the opportunity to access and consult on any treaty of importance to the states.¹⁸¹

This opportunity would, in some ways, provide the states broader protection than the implementation of Swaine's state-foreign compacts;¹⁸² the federal government's continued use of federalism reservations; or the reversal of *Holland*, Professor Bradley's extreme proposal for reform.¹⁸³ These schemes are all deficient because they only provide states with protection in limited circumstances. State-foreign compacts must be authorized by Congress, and thus can only be adopted on the federal government's whim.¹⁸⁴ Similarly, federalism reservations are applied only when the federal government identifies a treaty as potentially interfering with state sovereignty.¹⁸⁵ Finally, while the reversal of *Holland* could prevent the adoption of treaties for which there is no other federal authority,¹⁸⁶ it would not affect the adoption of numerous other treaties that have serious implications for the states. Consider, for example, treaties regulating trade. There is little question

181. See *supra* notes 140-54 and accompanying text for a description of how state advice works in Australia.

182. See *supra* notes 111-14 and accompanying text.

183. See *supra* notes 84-89 and accompanying text.

184. Consider Swaine's explanation of the broad power Congress exercises over compacts:

Under existing case law and contemporary practice, the "treaties" proscribed to the states by the Compact Clause effectively comprise those pacts to which Congress has not consented, and "compacts" are anything to which [Congress] has consented.

Congress's power of consent, indeed, permits it far more authority than a veto, and includes the power to condition consent. Congress has employed that power to insist on federal participation in compact negotiations, to delegate to the executive branch the authority so that it may approve the compact and terminate it, to require federal participation in the administration of the compact, and to require the return to Congress to approve additional parties. Indeed, it would appear that Congress is permitted to stipulate in advance all the compact's significant terms, a principle vindicated by the lower courts in a case involving Landis and Frankfurter's favorite subject.

Swaine, *Does Federalism*, *supra* note 1, at 503-05 (emphasis in original) (footnotes omitted).

185. See Bradley & Goldsmith, *Conditional Consent*, *supra* note 7, at 415-16 (discussing how the executive branch and the Senate design and attach federalism reservations to treaties).

186. See Swaine, *Does Federalism*, *supra* note 1, at 419 (explaining that such cases would be rare under current the subject-matter federalism limitations on Congress).

that the federal government can adopt treaties relating to commercial and trade matters under its Commerce Clause power and would continue to be able to do so if *Holland* were overturned.¹⁸⁷ Professor Bradley's suggestion, therefore, offers no protection in regards to these treaties even though they frequently have effects on traditional areas of state concern.¹⁸⁸ Under the Australian reforms, on the other hand, states could identify and consult on any treaty that they determine to affect their interests, including trade agreements.

This is not to say that adopting the Australian reforms would unequivocally favor the states. From a states' rights perspective, the fundamental disadvantage to U.S. adoption of the Australian state advice system is that it would offer states no concrete legal protections. Using the Australian model, state advice and NIAs would be purely non-binding procedures, and the federal government could ignore them at will and continue to adopt treaties that interfere with traditional areas of state concern.¹⁸⁹ A fear of unimpeded federal action, however, underestimates the effectiveness of procedural protections in U.S. law.

Consider, for example, the National Environmental Policy Act (hereinafter NEPA), which requires federal agencies to produce non-binding Environmental Impact Statements (hereinafter EISs) before taking action that might affect the environment.¹⁹⁰ The Act is widely emulated and praised for its effectiveness in alerting agency managers of environmental concerns that might otherwise have been ignored.¹⁹¹ At best, it "opens governmental decisions to an unprecedented level of

187. *Id.* at 419 n.63.

188. *See, e.g.,* John Kincaid, *Fifty Years of German Basic Law: The New Departure for Germany: The Domestication of German Foreign Policy in the European Union*, 53 SMU L. REV. 555, 560 (2000) (explaining that free-trade agreements pose a particular threat to the constitutional powers of constituent governments in federal systems because these governments exercise most of the powers that create non-tariff trade barriers that the agreements seek to ban). The U.S. federal government has taken non-judicial measures to protect states in regards to free-trade agreements. Consider, for example, the federal-state consultation measures mandated under the URAA. 19 U.S.C. § 3512(b)(1)(B).

189. *See supra* notes 173-74 and accompanying text.

190. Bradley C. Karkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 904 (2002) (citing National Environmental Policy Act of 1969 § 102(2)(c), 42 U.S.C. § 4332(2)(C) (1994)). NEPA requires, among other things, that EISs include statements on the impact of a proposed action, adverse environmental effects that cannot be avoided if the action is undertaken, alternatives to the action, and irreversible uses of resources predicated by the action. 42 U.S.C. § 4332(2)(C)(i-v).

191. Karkainen, *supra* note 190, at 904-06 (presenting, but not agreeing with, praise of NEPA). NEPA has been criticized as too costly and burdensome, but the appeal of its procedural nature has convinced even critics to propose alternative procedural measures to replace it. *See id.* at 905-06 (rejecting NEPA but proposing an alternative "as thoroughly procedural in character").

public scrutiny,”¹⁹² and thus “creates powerful pressures on agency decisionmakers to avoid the most environmentally damaging courses of action.”¹⁹³

Similarly, if state concerns regarding a specific treaty were presented to the President or Senate through consultation or a NIA, there would be considerable pressure on the federal government not to ignore those concerns without significant countervailing federal interests. There is evidence that this is the case in Australia, where the Minister of Foreign Affairs has said that the federal government has a strong preference for getting state approval before ratifying a treaty.¹⁹⁴

B. Benefits and Drawbacks of the Australian Reforms for the U.S. Federal Government

Adoption of the Australian model would not only benefit state interests but would also, through the publicly available NIAs and JSCOT reports, serve the public interest by bringing a degree of transparency to a process that in the United States is renowned for being secretive and autocratic.¹⁹⁵ Furthermore, a paper trail could also serve the federal government’s interest in meeting treaty obligations.

Consider a 1997 assertion by then Governor George W. Bush’s general counsel Alberto R. Gonzalez that Texas was not responsible for assuring compliance with the VCCR, because it had not signed the treaty.¹⁹⁶ The Clinton administration appeared sensitive to this sort of

192. *Id.* at 904-05 (attributing this characterization to NEPA’s supporters and citing, e.g., Jonathon Poisner, *A Civic Republican Perspective on the National Environmental Policy Act’s Process for Citizen Participation*, 26 ENVTL. L. 53, 54-55 (1996)).

193. *Id.* at 905 (attributing this characterization to NEPA’s supporters).

194. See *supra* note 175 and accompanying text.

195. According to Professor Lori Fisler Damrosch, “[t]he president-centered model has been dominant since the days of President Washington, but in the more complex, globalized world of the twenty-first century, the treaty process should not be a closed, secretive preserve, as if the president were an eighteenth-century monarch with the Senate his coterie of courtiers.” Lori Fisler Damrosch, *Treaties and International Regulation*, 98 AM. SOC’Y INT’L L. PROC. 349, 350 (2004). Damrosch notes that some progress has been made, especially in regards to trade agreements. *Id.*

196. Al Kamen, *Virtually Blushing*, WASH. POST, June 23, 1997 at A17 (quoting general counsel Alberto R. Gonzalez) (cited by Spiro, *supra* note 24, at 588, for the proposition that sub-national governments fail to consider international law in decisionmaking). This statement foreshadowed an announcement by a spokesman for current Texas Governor Rick Perry that the ICJ had no jurisdiction over Texas, and Texas would not abide by its rulings in VCCR cases staying executions. *The Nation Texas to Ignore Court Order to Stay Executions*, L.A. TIMES, Feb. 7, 2003, at A33 (quoting Gene Acuna, spokesman for Governor Rick Perry) (cited by Ku, *supra* note 3, at 512 n.280, for similar proposition). This announcement came after the ICJ’s February 5, 2003, Avena Provisional Measures Order but before the March 31, 2004 final orders in that case. Avena Final Order, *supra* note 17. A spokesman for the Texas attorney general, however, made it clear immediately following the final order, that “[w]e have held

rhetoric when it decided not to force state compliance with the ICJ orders staying executions.¹⁹⁷ If, however, under an Australian advice model, Texas and other states had expressed satisfaction with the signing of the VCCR in 1969,¹⁹⁸ the record would have undermined Bush's pronouncement, and the federal government could more comfortably dismiss the political pressure against taking steps to enforce the ICJ rulings. On the other hand, if the states had vigorously objected to the treaty, President Nixon would have had strong incentive not to sign it.

There would remain, of course, situations in which the federal government would want to adopt a treaty over state opposition. The Australian reforms would not completely remedy the unpopularity of such a move but might give it a degree of political legitimacy because, at the very least, the states would have received procedural protection. The Australian reforms also make allowances for keeping sensitive treaty talks confidential,¹⁹⁹ and would, therefore, not undermine the federal government's ability to negotiate such treaties. Consequently, U.S. adoption of the reforms would not significantly impede the federal government's ability to conduct foreign affairs and would provide it necessary political legitimacy to enforce its international obligations. This combination would ease the current tension between state concerns

steadfast prior to the ruling that it has no bearing on Texas. . . . We have contacted the State Department to get their guidance. . . . But we still hold to our previous position." Chris Kraul, *U.S. Told to Review Death-penalty Cases Mexico Hails U.N. Court Decision that 51 Inmates Were Denied Diplomatic Help*, SEATTLE TIMES, Apr. 1, 2004, at A6, available at 2004 WLNR 1778240. Texas maintained its resolve in the face of President Bush's decision to order state courts to comply with the ICJ's review order. Adam Liptak, *supra* note 26, at A16 (citing a statement by a spokesperson for the Texas Attorney General that "[t]he State of Texas believes no international court supercedes the laws of Texas or the laws of the United States").

197. See *supra* notes 20-21 and accompanying text.

198. Although the states have resisted the VCCR recently, it offers substantial benefits to their citizens abroad, which might have induced them to support its ratification. Consider, for example, Virginia Governor Jim Gilmore's recognition of the importance of protecting citizens abroad in his statement explaining why he couldn't stay the execution of Angel Francisco Breard. Charney & Reisman, *supra* note 22, at 674 (quoting Gilmore as saying that the Secretary of State's concerns for citizens abroad "are due great respect and I have given them serious consideration").

199. First, even though the Australian federal government must keep the states abreast of treaty negotiations of relevance to them, it can require that information concerning the negotiations be kept confidential. Principles and Procedures, *supra* note 16, at ¶ 4.2(d). Furthermore, the reforms do not require the publication of NIAs until treaties have been signed, *id.* at ¶ 4.2(c) (explaining that NIAs are published when a treaty is tabled in Parliament, which occurs after the treaty is signed, *Reform of Treaty-Making*, *supra* note 151), thus keeping the interest analysis private until that point. Texts of bilateral treaties are also kept confidential until signed. Treaty Making Information Kit, *supra* note 173, at Stages in the Development of Treaties. Finally, of course, in matters of extreme urgency, the federal government can forego the tabling process, JSCOT Web site, *supra* note 153, and consultation, see *supra* note 174 and accompanying text, altogether.

and international obligations and perhaps usher in an era of “cooperative federalism” in the United States.

C. Effect of Australian Reforms on Potential Federalism Limits to the Treaty Power

Even if the federal government and state governments were to cooperate and adopt the Australian reforms, there would still be the judicial branch to consider. The U.S. legal environment is substantially different from that in Australia. While the Australian High Court has consistently favored the federal government’s ability to make and implement treaties,²⁰⁰ the Supreme Court has applied limits to the U.S. federal government’s power in a variety of areas,²⁰¹ and the treaty power could be next. U.S. adoption of the Australian reforms, however, could give the Court cause to hesitate in at least two instances.

Consider the Court’s potential application of the anticommandeering principle to treaty implementation. In *New York*, the Court reasoned that the federal government should not be able to commandeer state officials to carry out its directives because it confuses citizens as to which political entity is responsible for them.²⁰² If this sort of reasoning were applied in the treaty context, it would prohibit the federal government from signing treaties where implementation is left to the states because those treaties are federal acts that must be enforced by state officials.²⁰³ With the Australian reforms in place, however, citizens would have less cause for confusion as to who is politically accountable for treaties because the publicly available NIAs and JSCOT reports would indicate whether a treaty was favored by a state government or was adopted despite state opposition.²⁰⁴ This transparency, therefore,

200. See Opeskin & Rothwell, *Impact of Treaties*, *supra* note 37, at 42 (stating that the High Court’s “current position is that . . . the mere acceptance of the treaty by Australia is sufficient basis for the Commonwealth to rely on the terms of the treaty to enact implementing legislation”); *supra* notes 137-38 and accompanying text.

201. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (limiting Congress’s authority to legislate under the Commerce Clause and section five of the Fourteenth Amendment); *Printz v. United States*, 521 U.S. 898 (1997) (holding that federal legislation enacted under the Commerce Clause cannot require local officials to execute federal laws).

202. 505 U.S. 144, 182-83 (1997).

203. See Swaine, *Does Federalism*, *supra* note 1, at 432 (explaining how application of the anticommandeering principle to the VCCR would, under *Printz* and *New York*, prevent the federal government from requiring either (1) state officials to carry out notifications or (2) states to adopt implementing legislation).

204. Treaty Making Information Kit, *supra* note 173, Introduction, Joint Standing Committee on Treaties, The process of parliamentary review (“An NIA includes information about . . . the consultation that has occurred with [s]tate and [t]erritory Governments, industry and community groups and other interested parties.”); see

could give the Supreme Court a reason not to apply the anti-commandeering principle to treaties.

Similarly, consider Bradley's suggestion that the Court should overturn *Holland*.²⁰⁵ The Court's reasoning in *Lopez* and *Morrison* would support this move. Just as the Court feared with the commerce power, an unlimited treaty power could lead to an unchecked federal police power²⁰⁶ and federal interference in areas of traditional state concern.²⁰⁷ Adopting the Australian reforms could not decisively prevent the federal government from ignoring state concerns and using its treaty power abusively. If the reforms were adopted, however, the Court might feel less compelled to provide the states legal protection because the reforms already provide significant procedural and political protection when a treaty implicates traditional areas of state concern.²⁰⁸

The presence of these protections could also limit the consequences of the Court's likely adoption of the state sovereign immunity doctrine in the treaty context. While foreign nations would still be prevented from suing states for treaty breaches, the federal government might feel justified in suing to mend the breach because the offending state would already have had an opportunity to consult on the treaty and would be aware of its requirements. Furthermore, as previously discussed, if the state had approved of the treaty during consultation, the federal government would have a strong political justification for enforcing compliance.

D. *Practicality of Applying Australian Reforms in the United States*

Although adopting Australian-style procedural reforms would

Principles and Procedures, *supra* note 16, at ¶ 4.2(c) (including states in the NIA process); *see also* ATNIA, *supra* note 170, annex 1 (providing an example of the inclusion of information on state consultations in an NIA); *supra* note 157 (providing various examples of the inclusion of state information on state consultations in JSCOT reports).

205. *See supra* notes 84-89 and accompanying text.

206. *United States v. Lopez*, 514 U.S. 549, 567 (1995) ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."); *see also* *United States v. Morrison*, 529 U.S. 598, 613 (2000) ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." (quoting *Lopez*, 514 U.S. at 564)).

207. *Morrison*, 529 U.S. at 611 ("Were the federal government to take over the regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur. . . ." (quoting *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring))).

208. As indicated in the Principles and Procedures, the reforms are designed to "relate to treaties of sensitivity and importance to the States and Territories." Principles and Procedures, *supra* note 16, at ¶ 2.1.

benefit both states and the federal government and would potentially undermine the Supreme Court's reasons for applying additional federalism limits, the reforms come with a degree of risk. First, they have only been in place in Australia for a short time, and their long-term success in that country is uncertain. Furthermore, it is impossible to know what measures the Supreme Court might introduce to limit the treaty power in the future. If the Court decides, even in the face of the reforms, to prevent the federal government from enforcing treaties that encroach on traditional areas of state concern, the Australian reforms would do little to enable U.S. compliance with international law. In that case, the reforms would only serve as an additional costly instrument favoring state interests.

Even if the Court does not choose to limit the treaty power, these types of procedural reforms can be prohibitively costly. For example, although NEPA is frequently praised, the EISs have been criticized as too expensive.²⁰⁹ This could be a major concern because the Australian reforms not only require EIS-like NIAs²¹⁰ but also the distribution of treaties under consideration²¹¹ and the administration of the Treaties Council, JSCOT, and the State Standing Committee.²¹² That Australia finds these reforms affordable²¹³ alleviates this concern to some extent in the United States, but it is hard to predict whether U.S. budget-makers will agree that the benefits are worth the costs.

Financial considerations, however, are only one aspect of a more fundamental difficulty surrounding the adoption of the Australian reforms in the United States: scale. Australia has only six states and two territories; the U.S. has fifty states.²¹⁴ This difference would increase costs and bureaucracy. For example, in negotiating the Australia-United States Free Trade Agreement, "[t]he [Australian Federal] Government held meetings or teleconferences with representatives from all the [s]tate and [t]erritory governments both before and after each of the six negotiating rounds."²¹⁵ In the United States, similar consultations would not only be significantly more expensive, but could potentially take much longer. Of course, the U.S. federal government could easily control undue delays by establishing a principle similar to the one built

209. Karkainen, *supra* note 190, at 903 (generally criticizing the cost of EISs).

210. *See supra* notes 151-54 and accompanying text.

211. *See supra* note 147 and accompanying text.

212. *See supra* notes 145-50, 155-60 and accompanying text.

213. Australia's federal government splits some of the costs with the states, which bear the burden of funding state representatives in treaty delegations. Principles and Procedures, *supra* note 16, at ¶ 6.3.

214. A stimulating conversation with Professor Gillian Triggs, University of Melbourne, alerted me to a variety of concerns potentially caused by this difference.

215. ATNIA, *supra* note 170, annex 1.

into the Australian reforms that prevents treaties from being stymied by excessive state consultation.²¹⁶

While the time problems of state consultation could be managed, the scale of the United States would probably prohibit successful integration of a Treaties Council. In Australia, the Prime Minister and the Premiers from each state can comfortably fit around a table. In the United States, a meeting between the President and fifty Governors could not take the form of an intimate consultation. In fact, John Quincy Adams wrote in his diary that it was the difficulties of consulting with a similarly large group that caused President Washington to abandon the practice of seeking Senate advice.²¹⁷ After consulting in the Senate for two days on the 1789 Treaty with the Creek Indians, Washington supposedly said that “he would be damned if he ever went there again.”²¹⁸ It is hard to imagine a U.S. President agreeing to any such consultation with the state Governors.

Conclusion

The practical problems of U.S. adoption of the Australian reforms wholesale are significant. The United States could limit the severity of those problems, however, by adopting only the most significant reforms: namely, the NIAs, JSCOT reports, and the State Standing Committee. The Treaties Council has not played a major role in Australia²¹⁹ and, because of the difficulties of consultation between the President and Governors, is not really appropriate for the United States. Jettisoning the Treaty Council would lessen some of the time and cost burdens of the reforms and make them more palatable to the President.

The reforms would still be costly but no more so than other proposals attempting to reconcile the tensions between international obligations and federalism. Consider the remedy of allowing states to form international agreements.²²⁰ As was mentioned previously, such a system would require radical and costly restructuring of U.S. methods of assigning state citizenship and passports,²²¹ while providing states less

216. The Australian “Principles and Procedures” were “adopted subject to their operation not being allowed to result in unreasonable delays in the negotiating, joining or implementing of treaties by Australia.” Principles and Procedures, *supra* note 16, Part A.

217. HAYDEN, *supra* note 56, at 23 n.4. (citing John Quincy Adams). Hayden explains that Washington did submit later treaties to the Senate prior to negotiation but never again made the submission orally. *Id.*

218. *Id.* Although this anecdote appears as a second hand account in John Quincy Adams’s journal, Hayden finds it credible because of corroboration in the diary of Senator William Maclay. *Id.* at 23.

219. See *supra* note 161 and accompanying text.

220. See *supra* notes 111-114 and accompanying text.

221. See *supra* note 115-19 and accompanying text.

protection from the federal government's treaty power than the Australian reforms.²²²

The potential benefits of creating a State Standing Committee, establishing a JSCOT, and implementing NIAs are considerable. Not only would the U.S. federal government have greater political legitimacy to enforce state compliance with its international obligations, the states would have the opportunity of consulting on any treaty touching state concern, something not possible even under Bradley's vision of a court-limited treaty power. The reforms would also contribute a degree of transparency to U.S. treaty making, a process that has been derided as lacking democratic legitimacy.²²³

This is not to say that adoption of these reforms would definitively remedy the tensions between state concerns and international obligations. The Supreme Court could still limit the treaty power to render federal government enforcement of some international obligations impossible. It is the reformation of the treaty process, however, that could give the Court the incentive not to introduce those limits, which is what makes the need for reform so pressing.

There is no question that a move to introduce a State Standing Committee, a JSCOT, and NIAs to the U.S. treaty process would face serious hurdles. The states would likely be pleased with such reform, as at worst it would supplement potential legal protections. The President and the Senate, however, would be certain to resist. Although Presidents and Senators have frequently expounded on the virtues of states' rights,²²⁴ it has been the trend for the political branches to attempt to

222. See *supra* notes 182-84 and accompanying text.

223. See *e.g.*, Damrosch, *supra* note 195 ("The president-centered model has been dominant since the days of President Washington, but in the more complex, globalized world of the twenty-first century, the treaty process should not be a closed, secretive preserve, as if the president were an eighteenth-century monarch with the Senate his coterie of courtiers."); Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. "War on Terrorism,"* 5 THEORETICAL INQUIRIES L. 47, 51 (2004) ("While particular democratic deficits characterize lawmaking processes in the United States generally, the problem is aggravated in the making and implementation of international law. There is a lack of transparency in the international processes in which treaties are negotiated as well as in the domestic processes in which treaties are ratified with input only from the Senate and not from the House, unlike purely domestic legislation.") (footnote omitted).

224. In 1999, President Clinton issued an executive order on federalism "to ensure that the principles of federalism established by the Framers guide the executive departments and agencies in the formulation and implementation of policies." Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999). President George W. Bush has also announced his commitment to the principles of federalism. See, *e.g.*, President George W. Bush, Remarks by the President at National Governors' Association Meeting (Feb. 26, 2001) ("I'm going to make respect for federalism a priority in this administration. Respect for federalism begins with an understanding of its philosophy. The framers of the Constitution did not believe in an all-knowing, all-powerful federal

expand their power, not give it up.²²⁵ Despite this rather significant hurdle, however, adoption of treaty reform may be the only method for the executive and legislative branches to protect their treaty power from limitation by the Supreme Court.

Although state advice in the U.S. treaty process through a State Standing Committee and NIAs would not precisely resemble the Framers' vision of Senate consultation during treaty making, it would successfully integrate states into the treaty-making process for the first time since 1913. Furthermore, it would allow the federal government to continue to support federalism without sacrificing treaty obligations. For these reasons, lawmakers should consider the Australian reforms of the State Standing Committee, JSCOT reports, and NIAs as they determine how best to reconcile competing state and federal interests in the treaty-making process.

government. They believed that our freedom is best preserved when power is dispersed. That is why they limited and enumerated the federal government's powers, and reserved the remaining functions of government to the states."), available at <http://www.whitehouse.gov/news/releases/2001/02/20010226-8.html> (last visited June 20, 2005). Among Senators, Lamar Alexander has been particularly vocal, condemning his fellow republicans and saying "[t]he principle of federalism has gotten lost in the weeds by a Republican Congress that was elected to uphold it in 1994." James Dao, *The Nation: Rebellion of the States; Red, Blue and Angry All Over*, N.Y. TIMES, Jan. 16, 2005, at 41, available at 2005 WLNR 594669 (quoting Sen. Lamar Alexander).

225. Consider, for example, Professor Michael J. Gerhardt's historical contextualization of President George W. Bush's expansion of executive branch power under the USA Patriot Act and in the environmental realm: "With every effort he takes as President to consolidate executive power, he merely reinforces the growth of the executive branch and particularly executive power that is a legacy of the New Deal." Michael J. Gerhardt, *On Revolution and Wetland Regulations*, 90 GEO. L.J. 2143, 2171 (2002). Or consider, "the growing use by Congress of its legislative powers under the Commerce Clause to expand its criminal authority," Andrew St. Laurent, *Reconstituting United States v. Lopez: Another Look at Federal Criminal Law*, 31 COLUM. J.L. & SOC. PROBS. 61, 108-09 (1997), even at a time when the crime rate was declining. Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 806-07 (1996).