

Missouri v. Holland and Historical Textualism

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I. INTRODUCTION

A longstanding debate, recently reinvigorated, is whether the U.S. Constitution imposes subject matter limitations on federal treaty-making akin to the limits it places, through Article I, Section 8, on federal legislation. That debate was supposedly settled in the negative by the U.S. Supreme Court in *Missouri v. Holland*,¹ and its practical significance was drained away by the effective abandonment of subject matter limits on Congress in cases such as *Wickard v. Filburn*.² But the Court's more recent revival of at least some Article I, Section 8 limits on federal legislation³ and the willingness in some academic quarters to reconsider *Holland* have put the point again in the spotlight.⁴

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1. 252 U.S. 416 (1920).

2. 317 U.S. 111 (1942).

3. *E.g.*, *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

4. For calls to reconsider, see especially Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1; Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998). The most comprehensive historical defense of *Holland*, to which this essay is much indebted, is David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000). For other important defenses, see Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. “States’ Rights” in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1297-316 (1999); Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 46-49 (1997); Carlos Manuel Vázquez, Breard, Printz, and the Treaty Power, 70 U. COLO. L. REV. 1317, 1337-43 (1999); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 190-93 (2d ed. 1996).

A distinct and important challenge to *Holland* is Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005).

This essay does not undertake to say what the *Holland* rule should be today; instead, it advances a methodology to determine the Constitution's original meaning on the matter. Its approach, for want of a better phrase, I will call "historical textualism." In brief, historical textualism finds constitutional meaning in the specific words of the Constitution's text as they were situated and understood in the context in which they were written. Applying that approach, I find full support for *Holland's* conclusion in the Constitution's original meaning. That conclusion differs from other studies which have relied on "originalist" analysis to find subject matter limits on federal treaty-making. Drawing this contrast underscores the differences between the approach I advocate and other approaches for determining historical meaning.⁵

The essay proceeds as follows. Part II outlines historical textualism as an approach to determining the Constitution's original meaning. Part III undertakes the *Holland* inquiry regarding the scope of the treaty-making power using a historical textualist approach and concludes that the Constitution's original meaning imposes no generalized subject matter limitations on federal treaty-making akin to those Article I, Section 8 places on Congress' lawmaking power. Part IV examines leading studies that reach the opposite conclusion, and shows how these differences are driven principally by differences in interpretive methodology.

II. HISTORICAL TEXTUALISM: A SUMMARY

This part offers a brief overview of the interpretive methodology I will call "historical textualism." The object of this methodology is to find the closest approximation (as limited by factors such as the lapse of time, shifting background assumptions, and imperfect historical records) of how the founding generation in America understood the document produced by the Constitutional Convention in 1787 (and, as relevant, how its Amendments were understood at the time they were adopted).

It is important to emphasize that this approach is not in itself an argument for applying the Constitution's historical meaning to determine modern constitutional rules. The debate over which constitutional rules should hold force today is separate from the question of how we can best understand the

Professor Rosenkranz argues on originalist grounds that Congress cannot implement treaties beyond its specifically enumerated powers; Holmes in *Holland* largely assumed the contrary. See 252 U.S. at 432. This essay does not address this debate; its focus is solely the validity of the treaty, not the validity of the implementing legislation.

5. This essay's textual and historical analysis of *Holland* is based in large part on MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 300-17 (2007). See also *id.* at 1-9 (discussing methodological issues).

historical document's meaning in its own time.⁶ Historical textualism addresses only the latter.

It is also important to emphasize that historical textualism, like any other historical inquiry, does not claim certainty of results. Often we will find it extremely difficult, if not impossible, to identify a constitutional clause's historical meaning. Often there will be multiple possible meanings, with no sure way to choose among them. Other times a clause may have no satisfactory explanation. The goal is merely to find the most plausible meaning in as many cases as possible, while recognizing the limitations of the inquiry and appreciating that the most plausible meaning may be only slightly preferable to the second-most-plausible. Finally, it is worth noting that the inquiry should not be understood as materially distinct from an inquiry into the historical meaning of other historical legal documents, such as the Articles of Confederation, the 1776 Virginia state constitution, or the Constitution of the Confederate States of America.⁷ The fact that some people think modern constitutional rules ought in some sense to arise from the U.S. Constitution's historical meaning should not influence how that historical meaning should be determined. Only accidents of subsequent history make people look to the U.S. Constitution (rather than, say, the Articles or the Confederate Constitution) as a source of modern rules. Those accidents of history surely do not affect what the U.S. Constitution (or any other historical document) meant at the time it was written.⁸

With these caveats, what follows is a sketch of the proposed approach. First, historical textualism is fundamentally focused on finding the most plausible meaning of the actual words and phrases in the document. It is not sufficient, in this formulation, to say merely that one's interpretive approach "starts with the text": the question is wholly conceived as asking what the text (that is, its words and phrases) meant. More important than starting with the text (although that is of course the right starting point) is *ending with the text*. That is, in a historical textualist approach, the conclusion should be rendered as: phrase "X" has meaning "Y." As described below, quite a few things beyond the document's actual words and phrases may contribute to that conclusion, but the conclusion should always be brought back to a particular

6. See Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 53-55 (2006); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997).

7. See Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529 (1998).

8. I would not go so far as to say, as Professor Lawson has in early works, that reading a historical legal document is no different from reading any document. See Lawson, *supra* note 6, at 1833-34. Its nature as a legal document may affect the way it was read in its time, and that should be taken into account. In his more recent work Lawson seems to have moved toward that position. See Lawson & Seidman, *supra* note 6.

clause or set of clauses.⁹ A historical textualist will be skeptical of conclusions supposedly based on an abstract constitutional “structure” or “purpose” but not tied to particular words and phrases.

Focus on particular words and phrases may sometimes be dismissed as “clause-bound” interpretation.¹⁰ That characterization is both true and untrue. As explained below, historical textualism employs a wide range of evidence to determine the meaning of particular words and phrases. Further, if correctly done, historical textualism does not focus on *some* particular words and phrases in the document at the expense of others. How one phrase fits with others elsewhere in the document, or how words used in one place are used in another, is highly probative evidence of meaning. As Akhil Amar explains, “the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.”¹¹ Thus,

the same (or very similar) words in the same document should, at least presumptively, be construed in the same (or a very similar) way. But the flip side of the intratextual coin is that when two (or more) clauses feature different wording, this difference may also be a clue to meaning, and invite different construction of the different words.¹²

Likewise, even in the absence of similar phrasing, historical textualism will consider how the proposed meaning of a particular clause fits with other parts of the document.¹³ Nothing in the idea of textualism is inconsistent with the idea of looking throughout the entire text for clues to meaning of particular clauses; to the contrary, that is a core component.

At the same time, though, historical textualism *is* “clause-bound” in that it embodies a search for the specific meaning of particular clauses. The document is made up of clauses (or phrases, or however one wishes to put it), and the question of the document’s historical meaning is a question of its component clauses’ historical meaning. The historical meaning of the whole is not more than the historical meaning of the sum of its clauses. In that sense, historical textualism should regard the phrase “clause-bound” as no

9. And of course, as qualified above, the conclusion need not necessarily be made at a high level of certainty. One should not mistake focus on text for a quest for certainty; a conclusion that phrase “X” had “Y” meaning at a given time carries no particular implication for how confident one is about that conclusion.

10. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 12, 88-89 n.* (1980).

11. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

12. *Id.* at 761.

13. See, e.g., Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1597-602 (2002) (considering how two possible meanings of Article I, Section 8’s declare-war clause fit with other parts of the document).

pejorative. Binding oneself to the historical meaning of the document's words and phrases is precisely what anchors the inquiry, making it an investigation of what was actually written as opposed to speculation about what should have been written.¹⁴

Being "clause-bound" thus does not mean eschewing "structural" arguments,¹⁵ but it does mean treating them carefully. It is one thing to use what Professor Charles Black's foundational work called "the constitution in all its parts"¹⁶ to illuminate the meaning of a particular part.¹⁷ It is quite another to find meaning in "the general themes of the entire constitutional document" (as John Ely put it)¹⁸ without relating them back to particular words and phrases. Both approaches may be called "structural",¹⁹ but for a textualist there should be a manifest distinction.²⁰ "General themes" not reflected in

14. See JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 27 (2005) ("[F]ocusing on the text employs history at an effective level of generality. It avoids the dangers of allowing pure intellectual history to scatter our analysis. Although we can use historical works about systems of belief widely held by Americans at the time of the Constitution's framing, such views are relevant only to the extent that they appear in the constitutional text. The Constitution distilled the abstract political theories and beliefs of the time into a workable system of government, but it was these concrete texts, and the political institutions and relationships to which they gave rise, that defined the foreign affairs power.").

15. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

16. *Id.* at 7.

17. For example, as Akhil Amar describes,

the phrases 'separation of powers' and 'checks and balances' appear nowhere in the Constitution, but these organizing concepts are part of the document, read holistically. Each of the three great departments – legislative, executive, judicial – is given its own separate article, introduced by a separate vesting clause. To read these three vesting clauses as an ensemble (as their conspicuously parallel language and parallel placement would seem to invite) is to see a plain statement of separated powers.

Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 30 (2000).

18. ELY, *supra* note 10, at 12.

19. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); Amar, *supra* note 17, at 29-30.

20. Here I differ, at least in some terminology, with a leading exponent of textualism, Professor Akhil Amar. See Amar, *supra* note 17, at 29-30 ("[A]lthough some might seek to divorce textual from structural arguments, there are sound reasons to keep them wed."). I would say, rather, that textualism and structuralism overlap, but not completely: some so-called structural arguments are textual and some are not. That description seems to accord with Professor Black's view; Black advanced his version of structural reasoning as distinct from and to some extent in opposition to textualism. See BLACK, *supra* note 15, at 4-12. At least some of Black's leading examples of structuralism do not use structure to illuminate the meaning of particular clauses (as a textualist would) but rather seek constitutional meaning in something beyond particular clauses.

actual text are difficult to objectively identify and apply to particular disputes; one may be skeptical (at least without powerful and specific supporting evidence) that arguments based upon them reflect what the Constitution actually meant, as opposed to what one thinks it ought to have said.²¹

Second, historical textualism underscores that words and phrases do not have inherent meanings, but only those meanings given to them at a particular time. It is possible, of course, to read the Constitution while giving its words their modern meaning²² (though why one would wish to do so is unclear), but this is not a useful way to understand what it meant at the time that it was written. Language evolves, and what a word meant in one era may be quite different from what it means in the next.²³ Further, particular words may commonly be used together as a unified phrase with a well-understood meaning at one time, while at some later time they might not ordinarily be used together at all, or might be used together to very different effect. A text's historical meaning arises from the context in which it was written and from the common meaning of its words in the ordinary language of that particular time. Thus historical textualism emphasizes the document's words and phrases as they were used and understood at the time they were written. If we want to identify the meaning of a particular phrase when it was written, we need to understand the linguistic context of that time (and divest ourselves, as much as possible, of the linguistic context of our own time).

Key evidence for a historical textualist, therefore, is how the society of the time generally used the words and phrases for which we want to find meaning. The best evidence of historical meaning may not be anything tied to the document itself, but rather may arise from the way a relevant phrase was used in other prior or contemporaneous speech or writing. Contrary to the focus of some originalist scholarship, historical textualism would not necessarily regard the Constitution's drafting or ratification debates, or its post-ratification history, to be the most probative evidence. Rather, historical textualism's first contextual inquiry likely would focus on the way people used the same or similar language *before* the Constitutional Convention (for example, in the Articles of Confederation, in the Continental Congress, or in mid-eighteenth-century political writing). To the extent common use of a phrase can be identified, we can set the Convention's phrasing within its linguistic context, without the potential that subsequent positions or interests

21. Thus, to continue the example from *supra* note 17, a textualist can use the structural concept of separation of powers reflected in Section 1 of Articles I, II, and III to illuminate meaning of phrases within those articles (or elsewhere in the document) as Professor Amar suggests, but once "separation of powers" as an abstract value becomes the direct source of particular constitutional rules not tied to particular text, I would no longer call the approach textualism. For an illustration tied to the *Holland* debates, see *infra* Part III.

22. BOBBITT, *supra* note 19, at 26 (describing this mode of argumentation).

23. See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003).

colored the way speakers saw constitutional language.²⁴ To the same effect, linguistic context might plausibly be established by immediate post-ratification use of relevant words and phrases in contexts *not* directly tied to constitutional debates.

Third, historical textualism nonetheless does also emphasize traditional originalist sources: the drafting and ratifying debates and post-ratification constitutional history. Its use of these sources may be more cautious – and at the same time less selective – than some traditional approaches. To begin, the historical textualist focuses upon the meaning of words and phrases, and thus is interested in direct evidence of how those words and phrases were actually used, or indirect evidence of how the historical sources seemed to assume they would be used. In contrast, general statements of goals, values or expectations, especially where not tied to any specific language, seem much less probative. Drafting, ratifying and post-ratification history are not ends in themselves, but only evidence of what a particular phrase may have meant. Further, a historical textualist will appreciate that the very act of placing a phrase in a constitutional text (or a text one hopes will become constitutional) can affect how contemporaries may purport to understand that phrase's meaning. Someone who has financial, institutional or ideological interests in a particular constitutional outcome will naturally incline toward finding and expressing meanings that comport with those interests. This shading of meaning can happen quite quickly, so that even virtually contemporaneous sources may be affected by it. Thus the historical textualist will be skeptical of expressions linked to such interests, and will give more weight to expressions in which the speaker does not appear to have such an interest (or is speaking contrary to it), and expressions in which the meaning of the relevant word or phrase seems to be assumed or uncontested. On the other hand, a historical textualist will not regard the inquiry as limited to speakers who were themselves “framers,” in the sense of being present at the drafting convention or the ratifying conventions. The inquiry is not what any particular person thought or said, but rather what the most common meaning of the relevant phrase was. Thus educated and informed speakers of the time, regardless of their role in the actual conventions, can help establish the linguistic context which a historical textualist is trying to discover.²⁵

24. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 265-78 (2001) (using this approach to establish the meaning of “executive” power in Article II, Section 1).

25. For discussions emphasizing these themes, see, for example, ANTONIN SCALIA, A MATTER OF INTERPRETATION 37-38 (1997); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003); John F. Manning, *Textualism and the Role of the Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1354 (1998).

In laying out this approach, I do not mean to take a position on the debate within originalist scholarship over the ultimate nature of meaning. It may be that a text cannot have a historical meaning independent of the intent of its authors. See

Finally, historical textualism will look to general historical context and founding-era history and values, but only as secondary or confirming sources. It is surely true, as Akhil Amar puts it, that

[e]pic events gave birth to the Constitution's words The document's words lose some of their meaning – some of their wisdom, some of their richness, some of their nuance, some of their rigor – if read wholly apart from these epic events. Textualism presupposes that the specific constitutional words ultimately enacted were generally chosen with care. Otherwise, why bother reading closely? By pondering the public legislative history of these carefully chosen words, we can often learn more about what they meant to the American People who enacted them as the supreme law of the land. Thus, good historical narrative, in both a broad (epic-events) sense and a narrow (drafting/ratification) sense, should inform good textual analysis; with uncanny economy, the text often distills hard-won historical lessons and drafting insights.²⁶

But, as with structural arguments, care must be taken to bring the inquiry back to the meaning of particular constitutional phrases, and not to deduce specific constitutional results from the broad currents of history (else we will no longer have results anchored in the text). Broad historical context may help us choose between plausible competing meanings indicated by the textual sources described above. Or, even where those sources appear to point to a preferred meaning, it is important to ask whether that meaning is plausible given the intellectual and political history of the time. When focusing on particular words and phrases, modern linguistic biases and the difficulty of identifying meaning across large spans of time and in the face of fragmentary records may cause us to reach a conclusion that simply does not fit with the relevant period's broader historical context. In such a case, the broader historical context should force a re-examination of the text. It is equally important, however, to emphasize the secondary and confirming nature of this inquiry. The broader context should rarely be used to develop meaning of particular words and phrases, because usually it exists at too abstract a level to permit definite affirmative conclusions about specific

Larry Alexander & Saikrishna Prakash, "Is that English You're Speaking?" *Why Intention Free Interpretation Is an Impossibility*, 41 *SAN DIEGO L. REV.* 967 (2004). On the other hand, it may be that a text's meaning can be supplied by reasonable listeners of the time (real or hypothetical), independent of its drafters' intent. See Lawson & Seidman, *supra* note 6, at 54-56; SCALIA, *supra*, at 37-38. Or, there may be other combinations or alternatives. See STEVEN D. SMITH, *LAW'S QUANDARY* (2004) (discussing competing considerations). As a practical matter, except in unusual situations, historical textualism is likely the best evidence of intent and public meaning, whatever one's theoretical touchstone.

26. Amar, *supra* note 17, at 29.

constitutional directions. It can sometimes be used to rule out proposed meanings. But a historical textualist will be exceptionally cautious in using this evidence, for it is all too easy to slide into using it affirmatively rather than negatively, and thus to create rules from unbounded history rather than to find them in the text and its historical context.

III. TEXTUALISM AND LIMITS ON THE TREATY POWER

A. *The Textual Basis of Missouri v. Holland*

The foregoing suggests an outline – necessarily oversimplified and abstract – for approaching a historical textualist inquiry. This part applies the approach to a central question confronted in *Missouri v. Holland*: whether the federal treaty-making power contains subject matter limitations.

Holland, as is well-known, involved migrating birds. The United States and Great Britain entered into a treaty to protect migratory birds, and the U.S. Congress enacted a criminal statute implementing it. Missouri, a state the birds visited, objected that this subject lay beyond federal power. Under then-prevalent interpretations of Article I, Section 8, the subject probably did lie beyond Congress' power absent the treaty, because the birds themselves were not articles of interstate commerce. Nonetheless, in *Holland* Justice Oliver Wendell Holmes denied that the Constitution limited federal treaty-making power by subject matter in any way comparable to its limits on Congress' lawmaking power. "The treaty in question," he wrote, "does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment."²⁷ Not surprisingly, with this set-up Holmes easily found that Missouri had no "reserved" power in "birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away."²⁸

Holland echoes arguments that date to the founding era. For example, several early treaties affected the ability of non-citizens to own land within the states. Regulation of land ownership was at least arguably beyond Congress' Article I, Section 8 commerce power at the time. Robert Livingston, formerly secretary of foreign affairs under the Articles of Confederation, argued in 1795 that as a result land ownership also could not be the subject of a treaty; such a treaty, he wrote,

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

28. *Id.* at 434. *Holland* arguably leaves open arguments that some other greater state interests might be protected under an "invisible radiation from the general terms of the Tenth Amendment." *Id.* at 433-34. But Holmes' phrasing seems uninviting to future challenges (especially textual ones) and modern analyses tend to see the opinion as opening the way to effectively unbounded treaty power.

appears to infringe the constitutional independence of the respective states. – Congress alone have the power to naturalize; but neither congress, nor any member of the federal government, appear to me to have any right to declare the tenure by which lands shall be holden in the territories of the individual states, without naturalization. This is an act of sovereignty which is confined to the state legislatures, and which they have not ceded to congress, about which, therefore, I am led to doubt the right of the president and senate to treat Is this right of the states abridged by the power of the president and senate to make treaties? Are not their powers to treat confined to such objects as the constitution entrusts to the federal government?²⁹

Of course, for historical textualists, the bare fact that Livingston made this argument somewhat near the founding does not go very far toward proving it is part of the Constitution's original meaning. We should begin, not with what any particular person said about constitutional relationships, but with the text itself.

The federal government's treaty-making power arises from Article II, Section 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" On its face, this provision suggests no subject matter limit on treaty-making; it only places treaty-making under certain procedural restrictions – that the President make the treaty, that the Senate give advice and consent, and that two-thirds concur. Further, looking beyond Article II, the contrast with Congress' lawmaking power is striking. The combination of Article I, Section 1 (giving Congress legislative powers "herein granted") and Article I, Section 8 (listing specific subjects over which Congress "shall have Power") explicitly limits the subject matter of Congress' authority. Article II, Section 2, in contrast, gives the "Power . . . to make Treaties" in general terms, without express subject matter restriction. The lack of parallel language suggests a limit in one case and not in the other.

Article II, Section 2 does seem to require that powers claimed under the treaty-making clause must be exercised through something that really is a "treaty," in the eighteenth-century meaning of the word. "Treaty" meant (as

29. Cato [Robert Livingston], *Observations on Mr. Jay's Treaty*, No. XVI, in 3 *THE AMERICAN REMEMBRANCER* 63, 63-64 (Mathew Carey ed., 1795). As discussed below, Thomas Jefferson expressed similar views. THOMAS JEFFERSON, *A MANUAL OF PARLIAMENTARY PRACTICE* § 52 (2d ed. 1812), reprinted in JEFFERSON'S *PARLIAMENTARY WRITINGS* 353, 420-22 (Wilbur Samuel Howell ed., 1988) [hereinafter *JEFFERSON'S MANUAL*]; Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), in 8 *THE WRITINGS OF THOMAS JEFFERSON* 247-48 (Paul Leicester Ford ed., 1897).

it means today) an agreement among nations on matters of mutual interest.³⁰ As a result, exercises of treaty-making power must actually involve an agreement, an international matter, and interest on the part of both nations. The clause thus would reject sham treaties, where the President and the Senate combined to end-run the legislative process for purely domestic reasons, convincing a foreign nation to sign the resulting document to achieve the look of a treaty without any of a treaty's substance.³¹ Beyond this limit (which may not have much practical significance)³² and the express procedural restrictions upon *how* a treaty is made, Article II, Section 2 itself seems to lack further constraints on the treaty-making power.

Of course, other constitutional provisions may limit the subject matter of treaties. Article VI makes federal statutes the "supreme Law of the Land" only if they are "made in Pursuance" of the Constitution; thus unconstitutional statutes (including those beyond Congress' Article I, Section 8 powers) are not part of supreme law. Article VI also includes as supreme law (in the same sentence) treaties "made, or which shall be made, under the Authority of the United States." This provision seems similarly to mean that unconstitutional treaties are not supreme law. It does not use the "in Pursuance [of the Constitution]" language in order to include treaties previously made in pursuance of the Articles of Confederation or the Continental Congress' unwritten implicit authority prior to the Articles' ratification in 1781; thus the inquiry, if a treaty is challenged, should be whether the United States had "Authority" under its then-existing constitutional arrangement to conclude it. A treaty that lay beyond the United States' constitutional power when made seems manifestly not within the United States' "Authority." And presumably treaties cannot alter the Constitution, as Article VII's much more rigorous amendment process indicates – that is, they cannot create "Authority" where none previously existed.³³

As a result, it seems correct to conclude that treaties cannot alter the constitutional structure described in the text, nor contravene limits set on

30. *E.g.*, EMMERICH DE Vattel, *THE LAW OF NATIONS*, bk. II, § 152 (James Brown Scott ed., Charles G. Fenwick transl., 1964) (1758). As discussed below, Alexander Hamilton conceded this limit in his 1795-96 defense of the treaty power. See Camillus [Alexander Hamilton], *The Defence No. XXXVI*, Jan. 2, 1796, in 20 *THE PAPERS OF ALEXANDER HAMILTON* 3, 6 (Harold C. Syrett ed., 1961-1987).

31. See HENKIN, *supra* note 4, at 185 ("[T]here must be an agreement, a bona fide agreement, between [nations], not a 'mock-marriage'."); Golove, *supra* note 4, at 1090 n.41.

32. See Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 *MICH. L. REV.* 98, 107-10 (2000).

33. This is the way founding-era commentators, including Hamilton, read Article VI. Camillus [Alexander Hamilton], *The Defence No. XXXVI*, Jan. 2, 1796, in 20 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 30, at 6-7 ("a delegated authority cannot rightfully transcend the constituting act"; as a result, "[a] treaty for example cannot transfer the legislative power to the Executive Department" or say "that the Judges and not the President shall command the national forces . . .").

particular branches or on federal power as a whole. So treaties, for example, cannot grant titles of nobility nor eliminate the citizenship requirement for presidential eligibility. They cannot exercise powers given exclusively (by plain language or negative implication) to another branch.³⁴ Nor can they override individual rights, such as the right to a jury trial.³⁵ None of these actions could be taken on “the Authority of the United States” because the Constitution denies the federal government generally, or the treaty-makers specifically, power (“Authority”) to take them.

By this analysis, treaties cannot overturn protections of state sovereignty expressed elsewhere in the Constitution’s text. For example, the Eleventh Amendment declares that judicial power “shall not . . . extend” to suits between a state and citizens of another state, and it seems to follow that this command cannot be changed by treaty.³⁶ Further, my colleague Michael Rappaport has persuasively argued that the Constitution’s use of the word “state” in a number of provisions indicates the constitutional generation’s understanding that the “states” would retain at least a core of sovereignty, since the word “state” in eighteenth-century international law meant an entity with some sovereign attributes.³⁷ That limit should operate against federal treaty-making as well as federal legislation. But none of these textual limits – nor some others that have been advanced more on the basis of structure and implication³⁸ – amounts to a limitation on treaty-making power remotely

34. So, for example, treaties cannot (probably) declare war. Relatedly, Hamilton argued (and modern commentary tends to assume) that appropriations cannot be done by treaty. Camillus [Alexander Hamilton], *The Defence* No. XXXVII, Jan. 6, 1796, in 20 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 30, at 20-21 (“As to the provision, which restricts the issuing of money from the Treasury to cases of appropriation by law, and which from its intrinsic nature may be considered as applicable to the exercise of every power of the Government, it is in no sort touched by the Treaty. In the constant practice of the Government, the cause of an expenditure, or the contract which incurs it, is a distinct thing from the appropriation for satisfying it. . . . So, the Treaty only stipulates what may be a cause of expenditure. An appropriation by law will still be requisite for actual payment.”).

35. *See Reid v. Covert*, 354 U.S. 1, 15-19 (1957).

36. That should also be true of other similar protections of state sovereignty that the Supreme Court has found in the Eleventh Amendment or elsewhere, to the extent they can be textually justified. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Paraguay v. Allen*, 134 F.3d 622, 627-29 (4th Cir. 1998); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 *COLUM. L. REV.* 403 (2003).

37. Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 *NW. U. L. REV.* 819, 821-22 (1999). On this ground, Livingston was probably correct to argue that a treaty could not require New York’s governor to be a British citizen. *See Cato* [Robert Livingston], *Observations on Mr. Jay’s Treaty* No. XVI, in 3 *THE AMERICAN REMEMBRANCER*, *supra* note 29, at 64.

38. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997).

approaching the subject matter limitations on Congress's lawmaking, and none of them casts doubt upon the result in *Holland*.

As Holmes indicated in *Holland*, some analyses (including Livingston's) see the Tenth Amendment as the basis for a broad subject matter limitation on treaties. By the reasoning above, it seems correct to say that to the extent the Tenth Amendment limits federal power, it limits treaty-making power, for a treaty made beyond the authority of the Tenth Amendment is not a treaty "made . . . under the Authority of the United States." But it is hard to make a textual case that the Amendment limits treaty-making power in the manner Livingston supposed.

The Tenth Amendment reads in full: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." At least on its face, all it appears to say is that the United States does not have extraconstitutional powers (that is, if the federal government claims a power, it must look for it within the Constitution and not claim it by virtue of, for example, inherent national sovereignty).³⁹ That command is not a trivial one, for subsequent history has shown that, even despite the Tenth Amendment, courts and commentators have been all too willing to reach outside the Constitution to find sources of national power – most infamously, sixteen years after *Holland* in *United States v. Curtiss-Wright Export Corp.*⁴⁰ Taken seriously, the Tenth Amendment is an important limit on the source of federal power and a vital underpinning of the Constitution's core architecture. But it adds nothing to the *Holland* debate. Justice Holmes in *Holland* did not look outside the Constitution to find federal power. Rather, his textual proposition was that Article II, Section 2 granted treaty-making power, and the Tenth Amendment did not limit a power that was constitutionally granted.⁴¹ The core counterargument must remain that Holmes erred in thinking Article II, Section 2 granted unrestricted treaty-making power. The Tenth Amendment has nothing to say on that matter.

39. See RAMSEY, *supra* note 5, at 13-28; Michael D. Ramsey, *The Myth of Extra-constitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000). See *infra* note 68 and accompanying text (finding confirmation of this reading in the Amendment's historical context).

40. 299 U.S. 304 (1936); see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002) (tracing history of claims of inherent federal powers). The Court in *Curtiss-Wright* expressly denied that the Tenth Amendment applied to foreign affairs powers. See 299 U.S. at 316. For a historical refutation of this view, see RAMSEY, *supra* note 5, at 17-48.

41. *Missouri v. Holland*, 252 U.S. 416, 432 (1920) ("To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article 2, Section 2, the power to make treaties is delegated expressly . . .").

And in fact, despite allusions to the Tenth Amendment, Livingston fundamentally rested on an interpretation of Article II, Section 2. In his view, Article II, Section 2 did *not* give unlimited treaty-making power, but only treaty-making power over “such objects as the constitution entrusts to the federal government.”⁴² Apparently, then, he thought Article II, Section 2 was not a substantive grant of power at all; it meant only that, to the extent other parts of the Constitution gave federal power over a subject, the federal government could exercise that power by (among other means) making a treaty. And if that were so, he would be correct to argue that other subjects not conveyed to the federal government elsewhere in the Constitution were beyond its power as a result of the Tenth Amendment. As later commentary has described it, Livingston reflected an “implementational” view of the treaty-making clause: the clause allowed the federal government to implement through treaties the powers it was granted elsewhere in the Constitution.⁴³

Looking at the full document, Livingston’s view seems an odd way to read Article II, Section 2. Nowhere in its text does the Constitution convey powers to the federal government as a whole. To the contrary, it creates separate branches of government (principally through the operation of Articles I, II, and III) and conveys particular powers to each branch (or to combinations of branches). Powers given to one branch are *not* powers given to the federal government as a whole, to be exercised by each branch through its particular procedures and methods of implementation. Rather, at least as we commonly read them, powers given to one branch are by strong negative implication *not* given to other branches (unless other branches have some independent textual claim upon them). Giving Congress the power “[t]o declare War” in Article I, Section 8, for example, is conventionally understood to *deny* the President power to declare war, not to make war-declarations, as a general matter, part of generic federal power.⁴⁴ Similarly, the fact that Congress has power to regulate interstate commerce is no reason to think an entirely different entity – the President-plus-Senate, for example – has power to regulate commerce. Conversely, when a particular branch is given general power to act through particular procedures, we would not confine the matters on which that power may operate to subjects over which other branches have authority. For example, federal courts can use their judicial power (Article III, Section 1) to hear cases between citizens of different states (Article III, Section 2); there is no reason to think that this jurisdiction would be limited to subject matters over which other branches are given authority (and it has never been read that way). Similarly, the President (at least on one common reading of the Constitution’s eighteenth-century meaning) has diplomatic authority arising from

42. Cato [Robert Livingston], *Observations on Mr. Jay’s Treaty No. XVI*, in 3 *THE AMERICAN REMEMBRANCER*, *supra* note 29, at 63-64.

43. Lawson & Seidman, *supra* note 4, at 4. As Lawson and Seidman explain, this would include not only subjects listed in Article I, Section 8 as powers of Congress, but also presidential powers arising elsewhere in Article II.

44. *See* Ramsey, *supra* note 13, at 1597-602.

Article II, Section 1's grant of "executive Power";⁴⁵ there is no reason to think that what the President can discuss when exercising the diplomatic power can only encompass subject matters granted to other branches in other provisions. Rather, the text's design heavily indicates that the federal government consists of separate branches whose power rests on independent constitutional sources.

Perhaps Livingston's defenders could argue that we should rethink our entire understanding of how the text operates to conclude that all federal powers are limited to the subject matter to which some federal powers are limited (Livingston himself did not make this argument, as he focused only on the treaty-making power). But if that principle had been the Constitution's object, the text is written in a strange way. It would have been much more forthright, in that case, to first declare that the federal government as a whole has power over a set of subjects, and then describe how each of the branches can act to affect those subject matters. The fact that the text is not organized this way strongly indicates that there is no such general principle; and if there is no such general principle, it seems especially odd to read only the treaty-making power in this way.

In sum, the purely textual case for *Holland* is that Article II, Section 2 grants treaty-making power in general terms, subject to procedural but not subject matter limitations, and that while Article VI limits that grant by the restrictions on federal power expressed elsewhere in the document, no other provision of the document restricts treaty-making power in the way Missouri contended. The textual counterargument appears to be that Article II, Section 2's grant, despite its seemingly general terms, extends only to subject matter granted to other branches of the federal government elsewhere in the Constitution, and that the Tenth Amendment confirms that the treaty-makers cannot look beyond those subject matter grants. On the basis of text alone, the former seems a more comfortable fit than the latter.

B. Pre-Convention Evidence

Although historical textualism begins with the text, it emphasizes also the importance of historical evidence of meaning, which can sometimes point in a different direction than what seems to be indicated by the text alone. I now turn to this category of analysis.

The first step should be to consider evidence of understandings prior to the Constitutional Convention. For historical textualism, the most salient point in the *Holland* debate should be that Americans of the late 1780s had seen the relevant language of Article II, Section 2 before – in their then-operative constitutional document, the Articles of Confederation. Under the Articles, the federal government consisted of a single entity, the Continental

45. See Prakash & Ramsey, *supra* note 24, at 252-65; see also RAMSEY, *supra* note 5, at 51-73.

Congress.⁴⁶ Article 9 of the Articles granted treaty-making power to the Congress in terms similar to those of the Constitution: “The United States, in Congress assembled, shall have . . . power of . . . entering into treaties and alliances . . .” It also made that power exclusive – a provision replicated by the Constitution’s Article I, Section 10 – and required nine states’ consent to approve treaties, a provision approximated by the Constitution’s supermajority requirement in Article II, Section 2.

Article 9 also had an explicit, but narrow, subject matter limitation on treaties (not repeated in the Constitution): “no treaty of commerce shall be made, whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever . . .”⁴⁷ And Article 2 paralleled the Tenth Amendment, in somewhat stronger terms: “Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”

Crucially, it is hard to find anyone at the time who thought this grant of treaty-making power definitively confined treaties’ subject matter only to subjects granted to the Congress elsewhere in the Articles, and practice and commentary indicates an overwhelming consensus to the contrary. For example, the Congress made several commercial treaties, and pursued others.⁴⁸ The Articles’ text assumed that the Congress had power to make commercial treaties by placing limits upon that power in Article 9. Few (if any) people seemed to think that commercial treaties, as a category, exceeded the Congress’ treaty-making power; there was, for example, no recorded objection in Congress on this ground. But the Congress had no express legislative power

46. For background, see MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-1781* (1940) (drafting of the Articles); JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* (1979) (government under the Articles). Quotations from the Articles are taken from the final draft of November 15, 1777, approved by the Continental Congress and reprinted in 9 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789*, at 907-25 (Worthington Ford et al. eds., 1906-1937).

47. Article 6 qualified this by prohibiting states from applying “any imposts or duties which may interfere with any stipulations in treaties entered into by the United States, in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.”

48. SAMUEL FLAGG BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* 15-84 (4th ed. 1955); 2 *TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA* 59, 123, 162 (Hunter Miller ed., 1931) (commercial treaties with the Netherlands, Sweden and Prussia). The Congress aggressively sought other commercial treaties without success, but also without material objection as to its authority. See 26 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789*, *supra* note 46, at 357-63.

over commercial regulation, and Article 2 insisted that the Congress' power had to be given expressly. The Congress' (assumed) power to make commercial treaties could only have come from the treaty-making clause itself, which granted that power only in the general terms of "entering into treaties." In short, the "implementational" view of treaty-making power, argued later by Livingston and Thomas Jefferson, had no basis in the Articles.

Some objections did arise at the time to particular provisions in the Congress' treaties. The 1783 peace treaty with Britain, for example, affected state contract law (by permitting recovery of pre-war debts) and state property law (by requiring restoration of loyalist property). The subsequent commercial treaties guaranteed that foreign nations' citizens could inherit and own property in the United States, contrary to some state laws, and granted various rights to foreign citizens residing in the states. Some of these provisions were said to encroach too heavily upon state sovereignty. James Madison, then a Virginia delegate to the Congress, raised early doubts about the commercial treaties. Various state legislators, particularly in New York and Virginia, maintained that the peace treaty overreached on the matter of debts and loyalist property as one of their arguments for not complying with it.⁴⁹

It was not entirely clear what provision of the Articles these treaties supposedly infringed, or even if the objection was legal as opposed to political in nature. The key, though, is that despite these specific concerns there was no *general* suggestion that the commercial treaties exceeded the Congress' power. Often states did not comply with treaties, but this was justified more on the ground that implementation of treaties was a discretionary matter for the states than on the ground that the treaties exceeded the Congress' power. To the contrary, the Congress (whose delegates were appointed by the state legislatures) approved the commercial treaties by the required supermajority, and strongly urged state compliance.⁵⁰ Indeed, the principal contemporaneous treaty-based complaint against the Articles' Congress was not that it exceeded its power in forming treaties, but that it inappropriately lacked power to enforce the treaties it did make.⁵¹

Thus, there should be little doubt that the Continental Congress saw its Article 9 treaty-making power as an independent and general grant of authority, as did a substantial proportion of Americans who considered the matter. Even Jefferson (who later embraced Livingston's arguments) wrote in 1785:

49. Golove, *supra* note 4, at 1115-32 (British treaty); *id.* at 1111-15 (commercial treaties); *id.* at 1106-07 (French treaty).

50. The Congress rejected Madison's objection, in the form of a report to limit the negotiating instructions of U.S. ministers. 22 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, *supra* note 46, at 393-96. In New York, Hamilton defended a broad view of the Congress' treaty power. Alexander Hamilton, A Letter from Phocion to the Considerate Citizens of New York (Jan. 1784), in 3 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 29, at 483, 490-91. On the debate broadly, see Golove, *supra* note 4, at 1123-32.

51. See RAMSEY, *supra* note 5, at 29-48.

Congress, by the Confederation have no original and inherent power over the commerce of the states. But by the 9th. article they are authorised to enter into treaties of commerce. . . . Congress may by treaty establish any system of commerce they please. But, as I before observed, it is by treaty alone they can do it. Tho' they may exercise their other powers by resolution or ordinance, those over commerce can only be exercised by forming a treaty⁵²

It is worth repeating, in light of this quote, that Article 9 did not specifically authorize the Congress to enter into treaties of commerce – only treaties in general.

This understanding of Article 9 of the Articles of Confederation in turn is crucial evidence of the Constitution's meaning, because Article II, Section 2 used similar language to convey treaty-making power. As Madison told Virginia's ratifying convention in 1788, under the Articles "Congress are authorised indefinitely to make treaties" and "the power is precisely in the new Constitution, as it is in the Confederation."⁵³ Any contrary view would have to explain why the same provision that carried no subject matter limitations in the Articles would implicitly carry them when repeated in the (more nationalist) Constitution.

C. *Drafting and Ratifying Evidence*

Delegates to the 1787 constitutional convention in Philadelphia surely knew how the Articles granted treaty-making power to the Congress and how that power had been understood throughout the 1780s. There is no reason to suppose that they would have used parallel language in the Constitution had they intended a wholly different effect, and every reason to suppose that they saw their language as parallel. Madison, for example, wrote in *The Federalist*, defending the Constitution's treaty-making power, that the Constitution's "power[] to make treaties" was "comprised in the Articles of Confederation, with this difference only, that [it] is disembarassed by the plan of the convention, of an exception under which treaties might be substantially frustrated by regulations of the States."⁵⁴ Of course, if the drafting debates indicated a contrary understanding on the part of some delegates, we would have to rethink this point. But they do not. In fact, so far as our records reflect, the delegates had few discussions of subject matter limitations on treaty-making

52. Letter from Thomas Jefferson to James Monroe (June 17, 1785), in 8 THE PAPERS OF THOMAS JEFFERSON 227, 230-31 (Julian P. Boyd ed., 1953).

53. 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1395 (Merrill Jensen et al. eds., 1976-present) [hereinafter DOCUMENTARY HISTORY].

54. THE FEDERALIST NO. 42, at 273 (James Madison) (Isaac Kramnick ed., 1987).

power,⁵⁵ and they did not even carry over the Articles' express limits. To the contrary, the limits on treaty-making that appeared to occupy the delegates were procedural: which branch or branches should have treaty-making power, and what vote should be required for approval.⁵⁶ In any event, nothing in the drafting history reflects any delegate's view that the treaty-making power extended only to Article I, Section 8 subjects or contained some similar subject-matter limitation.

The Constitution's treaty-making power became a focus of anti-federalist opposition during the ratification debates, precisely because of its apparent scope. "Brutus," one of the most sophisticated anti-federalist essayists, complained: "I do not find any limitation, or restriction, to the exercise of [treaty] power."⁵⁷ Anti-federalist criticism at the Virginia ratifying convention was especially sharp. "Will any Gentleman say," asked George Mason, "that [the President and Senate] may not make a treaty, whereby the subjects of France, England, and other powers may buy what lands they please in this country? . . . The President and Senate can make any treaty whatsoever."⁵⁸ Patrick Henry objected that "[t]he President, and a few Senators, possess [treaty power] in the most unlimited manner" and thus "if any thing should be left us, it would be because the President and Senators were pleased to admit it."⁵⁹

If a reasonable interpretation of Article II, Section 2 had been that its treaty-making power was limited to subjects conveyed to the federal government elsewhere in the text, that would have been a powerful retort to Henry and Mason. Notably, the Constitution's defenders for the most part did not suggest it. Rather, the argument centered on two distinct questions. First, anti-federalists objected to including treaties in Article VI, for (as they rightly saw) that took away the states' power to resist encroaching treaties. Federalists generally defended the provision by pointing to treaty debacles of the Articles of Confederation. Second, anti-federalists thought treaties were too easy to make. According to federalists, the supermajority-of-the-Senate rule, coupled with the states' representation in the Senate, would protect the states against encroaching treaties.⁶⁰ Not so, anti-federalists responded, because the "two-thirds of the Senators present" language allowed the President and only a handful of Senators (two-thirds of a quorum) to approve.⁶¹ The core anti-federalist demand was to increase this protection, either by requiring

55. Bradley, *supra* note 4, at 410-12; Golove, *supra* note 4, at 1132-37 (noting "surprisingly minimal discussions of the scope of the treaty power").

56. See Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, 1 PERSP. AM. HIST. 233 (1984).

57. Brutus II, in 13 DOCUMENTARY HISTORY, *supra* note 53, at 524, 529.

58. 10 DOCUMENTARY HISTORY, *supra* note 53, at 1391 (Mason to Virginia convention).

59. *Id.* at 1211, 1381-82 (Henry to Virginia convention).

60. That was the theme, for example, of Hamilton's *Federalist* 69 and 75.

61. *E.g.*, 10 DOCUMENTARY HISTORY, *supra* note 53, at 1380 (Mason to Virginia convention).

three-fourths of Senators present, or two-thirds of all Senators.⁶² As Mason said, “We wish not to refuse, but to guard this power”⁶³

Federalists in turn responded principally not by pointing to treaties’ limited subject matter, but by reaffirming the procedural protections.⁶⁴ The only material mention of subject matter limitations on treaties came from federalist George Nicholas at the Virginia ratifying convention, and even this came at the end of a long discussion emphasizing procedural protections and was itself somewhat ambiguous.⁶⁵ Hamilton’s later description of the ratification debates seems generally correct: anti-federalists pointed out – and federalists generally did not deny – that treaties had largely unlimited scope; the debate concerned whether the method of approving them afforded enough protection. As Hamilton put it, the proposed Constitution

was understood *by all* . . . to give to [treatymaking] power the most ample latitude to render it competent to all the stipulations, which the exigencies of National Affairs might require

Its great extent & importance . . . were mutually taken for granted – and, upon this basis, it was insisted by way of objection – that there were not adequate guards for the safe exercise of so vast a power The reply to these objections, acknowledging the delicacy and magnitude of the power, was directed to shew that its organisation was a proper one and that it was sufficiently guarded.⁶⁶

62. *E.g., id.* at 1554 (proposals of Virginia ratifying convention “[t]hat no commercial treaty shall be ratified without the concurrence of two-thirds of the whole number of the Members of the Senate” nor treaties relating to territory or navigation without three-quarters of Senators).

63. *Id.* at 1391 (Mason to Virginia convention).

64. *E.g., id.* at 1249-52 (Nicholas to Virginia convention); *id.* at 1253-54 (Randolph to Virginia convention); *id.* at 1256 (Corbin to Virginia convention); *id.* at 1380-81 (Nicholas to Virginia convention).

65. *Id.* at 1389 (Nicholas to Virginia convention) (Federal government can “make no treaty which shall be repugnant to the spirit of the Constitution, or inconsistent with the delegated powers. The treaties they make must be under the authority of the United States, to be within their province.”). Golove, *supra* note 4, at 1148, argues that this statement should not be read to endorse the sort of restrictions claimed in *Holland*. Even if it is read to do so, though, it is only one statement, and it is not clear that anyone other than Nicholas accepted it, or what it was based on. See Bradley, *supra* note 4, at 413 (relying on other statements from the Virginia convention which seem inconclusive).

66. Camillus [Alexander Hamilton], The Defence No. XXXVII, in 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 30, at 22, 24. Bradley, *supra* note 4, at 410, acknowledges that “the references to treaties in [the drafting and ratifying] materials primarily concern the process by which the federal government would conclude treaties and the proper governmental actors to be involved in this process.”

The federalists' apparent failure to rest arguments on subject matter limitations in the ratifying debates is important evidence, because it was surely in their interest to do so. True, it is somewhat hazardous to rely heavily on silence, for our records are incomplete and the speakers may have been operating under assumptions that we have difficulty appreciating. Nonetheless, at a minimum the ratifying debates seem to confirm (or at least not contradict) the interpretation that follows most naturally from the Constitution's text itself and from its precursors in the Articles: that the treaty-making clause grants general power to make treaties on any subject of international concern.

D. After Ratification

1. The Tenth Amendment

We should now turn briefly to the history of the Tenth Amendment, ratified in 1791, to confirm our prior conclusion that it adds nothing to the question of Article II, Section 2's scope. As discussed above, the Amendment's text appears to say only that the federal government cannot look outside the Constitution for sources of power. Its history and background provide ample support for that reading.⁶⁷

It is familiar history that the federalists in the ratification debates relied heavily on the Constitution's structure of delegated powers to provide limits on the proposed new national government. As explained by its drafters, the Constitution itself established the national government as a government of enumerated powers in which, as drafter James Wilson argued, "everything which is not given, is reserved."⁶⁸ Madison argued that "[t]he powers delegated . . . to the federal government are few and defined,"⁶⁹ and as he said at Virginia's ratifying convention, echoing Wilson, the principle of the Constitution was that "every thing not granted, is reserved Can the General

67. The following discussion draws heavily from RAMSEY, *supra* note 5, at 17-19. On the Amendment's history, see Charles A. Lofgren, *The Origins of the Tenth Amendment: History, Sovereignty, and the Problem of Constitutional Intention*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 331 (Ronald K. L. Collins ed., 1980); D. A. Jeremy Telman, *A Truism That Isn't True? The Tenth Amendment and Executive War Power*, 51 CATH. U. L. REV. 135, 140-42 (2001); RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 78-81 (1987).

68. James Wilson's Speech in the State House Yard (Oct. 6, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 53, at 167-68; see also *id.* at 454-55 (Wilson to Pennsylvania convention) (arguing that the federal government consists of enumerated powers and failure to enumerate a power leaves it outside the federal government's authority).

69. THE FEDERALIST NO. 45, at 296 (James Madison) (Isaac Kramnick ed., 1987).

Government exercise any power not delegated? . . . The reverse of the proposition holds. The delegation alone warrants the exercise of any power.”⁷⁰

These arguments did little to reassure the anti-federalists.⁷¹ As it became doubtful whether the Constitution would be approved by the requisite nine states, supporters of the Constitution and mild skeptics accepted a strategy of approving the Constitution while calling for amendments to address specific concerns. Although many of these concerns centered on the Constitution’s lack of protection for individual rights (thus leading to the Bill of Rights), some were also structural – in particular, concerns about delegated powers. The pivotal Massachusetts convention, for example, proposed to add language “that all Powers not expressly delegated by the aforesaid Constitution are reserved to the several States”⁷² – a point echoed in New York and Virginia as well. Samuel Adams explained that the proposal was needed to confirm that “if any law made by the federal government shall be extended beyond the power granted by the proposed Constitution . . . it will be an error, and adjudged by the courts of law to be void.”⁷³

Anti-federalists had, moreover, some reason for their fears. Like the Constitution, the Articles had been based on a delegated powers structure (a point of comparison federalists liked to emphasize). But unlike the Constitution, the Articles had a provision – Article 2 – expressly restricting its Congress from exercising any powers not delegated. Yet even under the Articles, some people – including most notably James Wilson – claimed that the Congress could exercise powers that were inherently part of national sovereignty. In 1781, for example, the Congress chartered a national bank, although nothing in the Articles gave it such a power. Wilson defended the charter as an inherent power: because power over a national bank was unavoidably a

70. 10 DOCUMENTARY HISTORY, *supra* note 53, at 1502 (Madison to Virginia convention); *see also* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 259 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT, DEBATES] (Pinckney to South Carolina convention) (“[N]o powers could be executed, or assumed, but such as were expressly delegated . . .”).

71. *E.g.*, 2 ELLIOT, DEBATES, *supra* note 70, at 398-99 (Tredwell to New York convention); Letters from the Federal Farmer to the Republican (Oct. 12, 1787), in 12 DOCUMENTARY HISTORY, *supra* note 53, at 44-45; *see* Herbert J. Storing, *What the Anti-Federalists Were For*, in 1 THE COMPLETE ANTI-FEDERALIST 1 (Herbert J. Storing ed., 1981). For a state-by-state account of ratification, *see* RATIFYING THE CONSTITUTION (Michael Allen Gillespie & Michael Lienesch eds., 1989).

72. 6 DOCUMENTARY HISTORY, *supra* note 53, at 1469.

73. *Id.* at 1395 (Adams to Massachusetts convention). On the Massachusetts compromise, *see* Michael Allen Gillespie, *Massachusetts: Creating Consensus*, in RATIFYING THE CONSTITUTION, *supra* note 71, at 138, 147-58. Six states recommended such amendments, as did key anti-federalist writers. *See* An Additional Number of Letters from the Federal Farmer to the Republican (May 20, 1788), in 17 DOCUMENTARY HISTORY, *supra* note 53, at 342-43 (describing federal government as “possessing only enumerated power” but proposing an early form of the Tenth Amendment to quiet anti-federalist fears).

national power unexercisable by any individual state, he argued, it could not be delegated but was, rather, a power existing inherently in the Union.⁷⁴ And Wilson, among others (including future Chief Justice John Marshall), sometimes qualified later discussions of the Constitution's delegated powers in ways that seemed to leave open the idea of inherent powers. The federal government, Wilson said at one point, is one whose "powers are particularly enumerated" and "nothing more is intended to be given, than what is so enumerated, unless it results from the nature of the government itself."⁷⁵ Thus the idea that the new national government might claim powers beyond those granted in the document was not far-fetched.

The Constitution got its nine-state approval in 1788 without amendments being made, but when the new government convened in 1789 there remained a sense that some modifications were needed. Madison (now in Congress) took the lead in drafting proposed amendments; he prepared what became the Tenth Amendment to incorporate proposals on the delegation question. As he explained to the new Congress:

I find, from looking into the amendments proposed by the State conventions, that several are particularly anxious that it should be declared in the constitution, that the powers not therein delegated [to the federal government] should be reserved to the several States. . . . [T]here can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it.⁷⁶

74. Considerations on the Bank of North America (1785), in 2 THE WORKS OF JAMES WILSON 824, 828-30 (Robert Green McCloskey ed., 1967) ("To many purposes, the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, and powers, and properties, by the law of nations incident to such. Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States"); see also Letter from George Mason to Thomas Jefferson (Sept. 27, 1781), in 2 THE PAPERS OF GEORGE MASON 1725-1792, at 697-99 (Robert A. Rutland ed., 1970) (describing and opposing arguments "that the late Revolution has transferred the Sovereignty formerly possessed by Great Britain, to the United States, that is to the American Congress"). On inherent and delegated powers during the drafting of the Articles, see especially JENSEN, *supra* note 46, at 160-76.

75. 2 DOCUMENTARY HISTORY, *supra* note 53, at 470 (Wilson to Pennsylvania convention); 10 DOCUMENTARY HISTORY, *supra* note 53, at 1307 (Marshall to Virginia convention). Using similar arguments, later decisions of the Supreme Court directly embraced inherent national powers in areas such as immigration and Indian law, despite the Tenth Amendment. See Cleveland, *supra* note 40.

76. 1 ANNALS OF CONG. 458-59 (Joseph Gales ed., 1834). See AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 315-32 (2005); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 60-61 (1993).

Nothing in this account suggests that the Tenth Amendment was understood as creating *additional* limitations on the national government to protect state sovereignty. Rather, the Amendment's "legislative history" is entirely consistent with its text: the goal was to make clear the Constitution's enumerated-powers structure. The Amendment did not say anything about, and was not understood to mean anything for, the scope of powers that were enumerated.

2. The Jay Treaty Debates

Most founding-era support for subject matter limitations on treaties arises from the Jay Treaty debates of 1795-96 and from subsequent writings by Thomas Jefferson, one of the treaty's principal opponents. These discussions are important because they are essentially the only instances in the early post-ratification period in which leading interpretations of federal treaty-making power read it as *Holland's* opponents do. If they were sufficient to show a consensus – or even a substantial minority position – in favor of treaty-making limits, that would force serious reconsideration of our prior conclusions. To be sure, for historical textualism, post-ratification interpretations cannot alter the Constitution's historical (1788-89) meaning; but near contemporaneous interpretations – surely including those only six or seven years later – are important evidence of how people of the time read the language. And this should be true even if the principal sources – Livingston and Jefferson – were not themselves framers, for they were educated and politically engaged members of the founding generation.

Close examination, however, shows that the Jay Treaty debates offer little to undermine *Holland* or establish subject matter limitations on treaty-making. The 1794 agreement between the United States and Britain⁷⁷ (called the Jay Treaty after principal American negotiator John Jay) highlighted the political fault lines between the emerging pro-French "Republican" party and the pro-English Federalists. It favored Britain in key respects, and many in America viewed it as tantamount to alliance with Britain in its on-going war against revolutionary France. Republicans, led by Jefferson and Madison among others, sharply opposed it on this ground.⁷⁸

The treaty faced two hurdles, and thus two rounds of debate. First, it required approval in the Senate, where it prevailed by a bare two-thirds vote in 1795. 1796 then saw renewed debate in the House, where action was needed

77. Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 9 Stat. 116, *reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, *supra* note 48, at 245.

78. On the treaty and its context, see SAMUEL FLAGG BEMIS, JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY (rev. ed. 1962); ELKINS & MCKITRICK, *supra* note 76, at 406-49.

to appropriate funds to implement parts of the treaty.⁷⁹ The House ultimately went along as well, confirming the nation's reorientation toward Britain and setting the course for the "quasi-war" with France in the late 1790s.⁸⁰

During the first round of debate, Republicans objected on constitutional grounds to numerous provisions. In particular, they invoked federalism concerns in objecting to the treaty's Article 9, which allowed British citizens to own land in the United States. This provision drew Robert Livingston's attack quoted at the outset of this essay; other prominent Republicans similarly targeted it as unconstitutionally infringing on state sovereignty.⁸¹

The question is whether these arguments should be persuasive readings of the Constitution's text. There are at least four reasons why they should not. First, they are only half of an intensely partisan debate; the treaty's supporters, including Hamilton, strongly defended its constitutionality.⁸² Second, they are only weakly linked to any plausible reading of the text. Livingston claimed authority from the Tenth Amendment, but, as discussed above, the Amendment on its face does not require anything like he proposed. It says only that "powers" not delegated to the federal government are reserved to the states (i.e., no inherent federal powers); treaty-making "power" is delegated. Livingston wanted to find limits on the *delegated* treaty-making power, and the text (Article II, Section 2) seemed unpromising. As Hamilton argued in response:

It was impossible for words more comprehensive to be used than those which grant the power to make treaties. They are such as would naturally be employed to confer a *plenipotentiary* authority. A power "to make Treaties," granted in these indefinite terms, extends to all kinds of treaties and with all the latitude which such a power under any form of Government can possess.⁸³

To the extent he claimed implicit limits in Article II, Section 2, Livingston simply failed to demonstrate them, nor was there really any evidence in his favor; in particular, as discussed above, the experience under the Articles was

79. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 210-15 (1997).

80. *See id.* at 209-17; Golove, *supra* note 4, at 1164-86.

81. *See supra* text accompanying note 29 (Livingston's argument); Golove, *supra* note 4, at 1167-68 (providing other examples).

82. Hamilton and Rufus King wrote a series of 38 essays defending the treaty; the last three (by Hamilton) addressed its constitutionality. Camillus [Alexander Hamilton], *The Defence* Nos. XXXVI-XXXVIII, in 20 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 30, at 3, 13, 22. On the intensity of the debate, see ELKINS & MCKITRICK, *supra* note 76, at 406-49.

83. Camillus [Alexander Hamilton], *The Defence* No. XXXVI, in 20 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 30, at 3, 6.

heavily against him. That he asserted such a meaning in the midst of partisan debate is surely not evidence it existed.

A third problem for Republicans was that they seriously overplayed their hand in raising constitutional objections to the treaty. They also claimed, for example, that treaties could not address matters entrusted to Congress (that is, that the grant of, say, commerce power to Congress in Article I, Section 8 created a negative implication that treaties could not regulate commerce).⁸⁴ But as Hamilton pointed out, everyone at the drafting convention and in the ratifying debates had assumed that treaties would deal with commerce;⁸⁵ commercial treaties were a major part of the Congress' diplomacy under the Articles; and indeed, commercial treaties were a major part of all treaties negotiated at the time. Worse, putting their arguments together, Republicans ended up claiming that treaties could address neither matters committed to Congress *nor* matters left to the states – which would almost wholly disable the treaty power.⁸⁶ Even at the time, it must have been hard to escape the feeling that political opposition to the treaty was driving a hunt for constitutional arguments.

Fourth, the Republicans' arguments were not persuasive at the time. Of course they were not persuasive in the sense that the treaty was ultimately approved (and upheld by the Supreme Court many years later, for what that is worth).⁸⁷ But they were unpersuasive in a deeper sense. After the Federalist-controlled Senate approved the treaty, debate moved to the Republican-controlled House. By this time, though, Republicans largely abandoned their constitutional objections (especially those based on subject matter limitations) in the face of Hamilton's defense and retreated to more-tenable middle ground.⁸⁸ In particular, Madison, the Republican leader in the House, generally avoided Livingston's constitutional arguments.⁸⁹ Republicans now principally claimed the right to consider the treaty on the merits before funding it (arguably the treaty, as a "supreme Law of the Land" once ratified, commanded their acceptance; but the Republicans denied this, not without some basis).⁹⁰ Ultimately, even on the merits, enough Republicans acquiesced that

84. *E.g.*, Cato [Robert Livingston], Observations on Mr. Jay's Treaty, No. XIII, 1 THE AMERICAN REMEMBRANCER, *supra* note 29, 244, 249. Livingston raised a host of other unrelated constitutional objections as well, so many that merely listing them would be exhausting.

85. Camillus [Alexander Hamilton], The Defence No. XXXVII, in 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 30, at 15-19.

86. Golove, *supra* note 4, at 1172-73.

87. Fairfax's Devisee v. Hunter's Lessee, 11 U.S. 603, 627-28 (1812).

88. Golove, *supra* note 4, at 1149-93.

89. *See id.* at 1179-86.

90. *See* ELKINS & MCKITRICK, *supra* note 76, at 441-45. The Republicans' position ended up being that treaties touching Congress' powers required congressional implementation – i.e., could not be self-executing. *See* Golove, *supra* note 4, at 1183-845; John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2080-86 (1999). One

position in a partisan debate. When we return to the central textualist question – the historical meaning of Article II, Section 2 – there is not much support for the proposition that the clause contains subject matter limitations akin to those of Article I, Section 8.

How is it, then, that leading originalist analyses have argued so strongly against the result in *Holland*? The short answer is that they are not historical textualist arguments. As I will describe in the next section, they depend instead upon a supposed structural imperative: that the treaty-making power must be limited, or the states would be threatened by federal encroachment in a way that would have been manifestly unacceptable to the founding generation.

IV. STRUCTURAL OBJECTIONS: CAN THE TREATY-MAKING POWER DESTROY THE STATES?

This section examines two leading attacks on *Holland*'s conclusion: one from *Holland*'s era and one from modern debates. Their central case rests upon a combination of framers' intent and manifestly implausible outcome. It simply cannot be the case (it is said) that the framers, who created and described a limited federal government, would have allowed their entire edifice to be undermined by effectively unlimited treaty-making power. Contrasting these arguments with the ones made above illustrates the parameters of the approach I have called historical textualism.

A. Henry Tucker's Argument from Structure and Intent

I begin with Henry St. George Tucker, a leading critic of unlimited treaty power in the period in which *Holland* was decided. Writing in 1915, before the Supreme Court's decision, Tucker insisted that treaty-making power must be limited to protect the states.⁹⁶ He began his argument with a textual demonstration that treaties could not exceed other express constitutional limits on federal power, relying on Article VI's reference to treaties "made . . . under the Authority of the United States" (in a similar vein as I have argued above). From there, however, Tucker made a step beyond the text: if certain subject matters of interest to the states were protected from interference by Congress under the limits imposed by Article I, Section 8, they must also, he said, be protected from interference by the treaty-making

96. HENRY ST. GEORGE TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER UNDER THE CONSTITUTION OF THE UNITED STATES (1915). A prominent legal academic writer, Tucker served as dean of the law schools at Washington and Lee and George Washington Universities and edited a treatise on constitutional law. *See id.* (title page); JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION (Henry St. George Tucker ed., 1899).

power. He acknowledged that “[t]he general term ‘treaty’ may of course include all subjects,” but nonetheless found a necessary implication that Article II, Section 2 treaties could not affect subjects reserved to the States:

The argument is irresistible that if the whole scheme and genius of the Constitution was to save the ungranted powers of the States from interference by the Federal Government, that the framers of the Constitution would not have secured these against the ravages of all departments of the Government, and then quietly bestowed upon one of its branches, the treaty-power, the power to absorb them all.⁹⁷

As Tucker made clear, his argument rested on a conclusion about the framers’ intent, based on structural inferences:

The contrary view [to the one he proposed] drives us to this dilemma: That the Federal Convention, after weeks and months of intense labor in adjusting the views of the opposing factions in the Convention, and after arranging with delicate touch the location of each power, local and national, so as to secure the rights of the people in their local concerns, free from the control of those who could have no special interest in them, while giving into the hands of the Federal Government all national powers, free from the touch or control of local State power, that after this was all concluded in order to induce harmony and produce unity where discord had reigned, they had agreed practically in the last article of the Constitution to sweep it all away by the introduction of a power which recognized none of the limitations or restrictions theretofore laid on the Federal or State Governments⁹⁸

Tucker’s difficulty, of course, was that he could not point to anything in the document itself that limited treaty-making power to subjects elsewhere granted to the federal government. That limit must exist nonetheless, in his view, because the contrary approach would produce a result so fundamentally at odds with the framers’ core values and with the Constitution’s structure that one cannot believe the framers would have accepted it. The argument is structural and intentionalist, not textualist: although it refers to the document as whole, it never brings its conclusion back to an interpretation of any particular words or phrases that accomplish his preferred result.

Tucker’s position illustrates the difficulties that arise when structural and intentionalist arguments lose their anchor in the text’s particular clauses. No one reading the constitutional debates can doubt that the drafters and

97. *Id.* at 140.

98. *Id.* at 140-41.

ratifiers had strong attachments to state sovereignty. This was not, of course, true of all individual framers, especially the more nationalistic members of the Philadelphia convention, who might have been happy to abolish the states if they could. They could not, however, because the population generally, and especially the intellectual and political leadership, was attached to the idea of state government and distrusted the creation of a powerful superior federal entity.⁹⁹ At the same time, the founding generation wanted strong treaty-making powers – specifically, stronger ones than they had experienced under the Articles, in which the inability to make and enforce treaties hampered Confederation diplomacy. The question was how to reconcile and implement those competing values. Tucker assumes that they necessarily did so through a subject matter limitation on treaty-making, but that is far from obvious.

One way to limit power is to limit its scope; another way is to limit the ability to exercise it. From the Constitution's text, it is plain that its drafters chose (at least) the latter approach to limit treaty-making power. Most obviously, treaties require approval of two-thirds of the Senate (plus the President), rather than the simple majority required, for example, by the same section of Article II for appointments. True, the requirement of a supermajority in one branch is partially offset by omitting the second branch, the House, from treaty-making. Nonetheless, it seems safe to conclude that the supermajority rule was designed to render treaty-making difficult except on widely-agreed matters – and the modern trend to substitute congressional-executive agreements indicates pressure for an easier route.¹⁰⁰

More important than the mere supermajority, though, was the protection arising from the Senate's composition. Under Article I, Section 3, "[t]he Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years" As a result, Senators owed their jobs (and future re-election) to state legislatures, the entities most directly affected by federal overreaching. The consequence, in turn, was that Senators could be expected to be especially sensitive to the states' sovereignty-based concerns. That is, even if Senators found a proposal's substance beneficial, they might oppose it on the structural ground that it should be handled at the local level.

We often think of the Senate's composition as designed to protect geographic interests – that is, to assure that populous states and regions would

99. See especially JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 131-60 (1996).

100. See John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002). Some key framers, at least, apparently thought treaties would be difficult to conclude and would not be made often. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 392-93 (Max Farrand ed., 1966) (Morris); *id.* at 548 (Madison); see Bradley, *supra* note 4, at 410-11; HENKIN, *supra* note 4, at 442 n.2.

not oppress less-populated ones.¹⁰¹ That surely was part of the idea of the supermajority requirement for treaty-making as well,¹⁰² but this motivation does not explain the text's method of choosing Senators. Rather, the selection method was a direct carry-over from the Articles, where the state legislatures (under Article 5) chose their delegates to the Congress. That selection method reflected the idea that the Articles' system was an association of states, not a government of the people of the United States; delegates represented not the people of the respective states, but the states themselves. Making the new Constitution's Senate replicate this aspect of the Articles was the drafters' way of pursuing an intermediate path between the Confederation model and a fully nationalist model. For most functions, the Constitution divided legislative power between an entity representing the old model, founded upon the states, and the new model, founded upon the People directly.

Selection of Senators by state legislatures was not part of the more-nationalist Virginia Plan proposed at the Convention's outset; its Senators were selected by the popularly-elected federal House.¹⁰³ State control of the Senate appeared later, at the insistence of delegates more focused on state sovereignty. As George Mason said, supporting John Dickinson's motion to that effect, "The State Legislatures also ought to have some means of defending themselves agst. encroachments of the Natl. Govt. . . . And what better means can we provide than the giving them some share in, or rather to make them a constituent part of, the Natl. Establishment."¹⁰⁴ Once state control of the Senate was added, even nationalists began to see its advantages, particularly in defending the Constitution against anti-federalist claims of undue federal power. Wilson emphasized at the Pennsylvania ratifying convention that "in the making [of] treaties the states are immediately represented," and Hamilton in New York said that Senators would have "uniform attachment to the interests of their several states."¹⁰⁵

101. See CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, *DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787*, at 122-33 (1986) (describing compromise between large and small states over the composition of Congress).

102. See Lance Banning, *Virginia: Sectionalism and the General Good*, in *RATIFYING THE CONSTITUTION*, *supra* note 71, at 280-81 (discussing importance of the two-thirds rule in protecting Virginia's interest in preserving free navigation of the Mississippi River, which many Virginians feared Northerners would be willing to surrender by treaty).

103. 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 100, at 46.

104. *Id.* at 155-56 (Mason); *see id.* at 150 (Dickinson motion); *id.* at 156 (adoption of Dickinson motion).

105. 2 *DOCUMENTARY HISTORY*, *supra* note 53, at 563 (Wilson); 2 *ELLIOT, DEBATES*, *supra* note 70, at 306 (Hamilton); *see also* *THE FEDERALIST* NO. 64, at 376 (John Jay) (Isaac Kramnick ed., 1987); *THE FEDERALIST*, NO. 45, at 294 (Madison)

Giving treaty-making power to a supermajority of only one part of this system, then, assumes considerable importance. Treaties would be less acts of the people-plus-the-states (as with ordinary legislation) and more acts of the states only – and a supermajority of the states, something required for only three other constitutional acts (overriding vetoes, amending the Constitution and removing federal officers after impeachment). In sum, treaty-making under the Constitution ended up looking much like treaty-making under the Articles, requiring, in effect, a supermajority of the states (as had the Articles' Article 9). The difference, of course, was that once treaties were made, Article VI legally obligated states to follow them (which nationalists claimed should have been true under the Articles as well). But states' control over treaty *making* (as opposed to enforcement) remained similar in the two documents.¹⁰⁶ As David Golove argues, "the Senate, fortified by a minority veto, was charged with the special political task of refusing its consent to any treaty that trenched too far on the interests of the states This political safeguard goes a long way in explaining why the Founders felt content with a system that delegated the whole treaty power to the national government."¹⁰⁷ Once viewed this way, the treaty-making power's threat to the states seems less formidable. Article II, Section 2 could dispense with Article I's subject matter limitations, because it had a different limit: two-thirds of the representatives *of the states* would have to agree to restrictions on state power effected through the treaty-making clause.¹⁰⁸

Of course, this development does not prove that Article II, Section 2 did not also incorporate implicit subject matter limitations, as Tucker contended. It does, though, undermine Tucker's claim that Article II, Section 2 *must* incorporate implicit subject matter limitations or contravene fundamental

(Isaac Kramnick ed., 1987). The point is elaborated in GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 558-59 (2d ed. 1998).

106. See *supra* notes 54-63 and accompanying text. One difference, which anti-federalists quickly seized upon, was that the Articles required a supermajority of all states, whereas the Constitution required only a supermajority of a quorum. See *supra* notes 61-62.

107. Golove, *supra* note 4, at 1098-99.

108. Modern debates may overlook the structural centrality of the state-controlled Senate because the Seventeenth Amendment (1913) provided for direct election of Senators by the people of the respective states. Various theories have been advanced for the change. See Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347 (1996); Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007 (1994). Whatever its motivation, the amendment's implications for treaty-making power do not appear to have been generally understood. (No mention was made, for example, in *Holland*, decided only seven years later.) The implications, though, are substantial. Once Senators ceased to owe their offices to state legislatures, they ceased to have personal interests in protecting the state legislatures' prerogatives. Indeed, the Seventeenth Amendment changed Senators from extensions of the state legislatures to potential competitors.

the treaty got its funding anyway. The key, though, is that after suffering through Hamilton's blistering counterattack, Republicans largely decided not to fight on constitutional grounds. This cannot say much in favor of the persuasiveness of their claims.⁹¹

In the aftermath of the treaty debate, Jefferson published a manual on Senate practice, in which he made comments that form the centerpiece of at least one important modern attack on *Holland*.⁹² According to Jefferson, the Constitution "must have meant to except out of [the treaty-making power] the rights reserved to the states; for surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way."⁹³ By this he meant, as he said in a private letter, that the Constitution

specifies & delineates the operations permitted to the federal government, and gives all the powers necessary to carry these into execution. Whatever of these enumerated objects is proper for a law, Congress may make the law; whatever is proper to be executed by way of a treaty, the President & Senate may enter into the treaty⁹⁴

This claim, though, merely repeated Republican arguments that had proved unpersuasive earlier, and is subject to the same objections. Although it counts as some evidence for Missouri's argument in *Holland*, we must remember that Livingston, Jefferson and others reached this conclusion in the midst of a highly partisan debate, without much reliance on constitutional text or historical understandings, and without convincing many listeners.⁹⁵

In sum, the historical textualist argument against *Holland*, while not wholly non-existent, suffers serious weaknesses. It does not seem to be the best reading of the text standing alone; it seems strongly counter to the text's historical and linguistic background in the Articles of Confederation; it finds little support in the drafting and ratifying debates, in which the lack of discussion of subject matter limits seems to confirm that there were none; and it relies almost entirely on post-ratification statements that formed the losing

federalist representative said, with little objection, that the treaty's constitutionality "is [now] allowed on all hands." 5 ANNALS OF CONG. 1204 (1796).

91. This point is powerfully presented in Golove, *supra* note 4, at 1149-93.

92. Lawson & Seidman, *supra* note 4, at 13-16.

93. JEFFERSON'S MANUAL, *supra* note 28, § 52. Jefferson also embraced, in the same discussion, the argument that matters within Congress' authority could not form part of the treaty-making power. *Id.* As discussed above, this claim is even less plausible, and in combination they almost eliminate any scope for the treaty-making power.

94. Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 28, at 247-48.

95. Lawson & Seidman, *supra* note 4, at 3, while relying on Jefferson's view, acknowledge (with some understatement) that "Jefferson's position was never historically ascendant."

framing principles. To the contrary, it seems plausible that the drafters relied on an enhanced structural check, rather than a subject matter check, to limit the treaty-making power's threat to the states.¹⁰⁹ That conclusion in turn is crucial, because – as even opponents of the treaty-making power concede – a broad subject matter restriction is not the text's most natural reading; it depends on the supposed necessity of avoiding unbounded treaty power.

No doubt Tucker thought the Constitution's procedural protections against overreaching treaties were insufficient (although he did not make that case). Whatever he thought of them, though, his argument fundamentally depends upon the proposition that the framers *necessarily* thought the procedural protections were insufficient (and thus that they must have included subject matter restrictions as well). Once the argument is put this way, however, it is impossible to sustain. There is no evidence (and Tucker supplies none) that the framers thought the Constitution's procedural protections were insufficient. To be sure, some anti-federalists thought they did not offer enough protection, but some federalists said in response that they did. Appeals to structure and intent cannot supply an answer distinct from the best reading of the text itself.

I do not mean to say that Tucker's objection to broad treaty-making power, and the structural response given above, are irrelevant to a historical textualist analysis. To the contrary, it is surely right to ask whether a proposed interpretation of the text is plausible in light of the framers' goals and the broader historical context. What must be kept in mind, though, is the high standard such objections must meet. The question is whether we find it unimaginable that the framers would have adopted the proposed meaning. Tucker's rhetoric suggests that this is what he thought. If the treaty-making power were truly unlimited, perhaps his argument would be persuasive, but closer examination shows that under the text's most natural reading the treaty-making power *is* limited, procedurally rather than substantively. It is surely imaginable that the framers relied on procedural rather than substantive limits. That is all a historical textualist needs to conclude on the matter.

B. Lawson and Seidman's Truncated Textualism

I now turn to Gary Lawson and Guy Seidman's sophisticated modern argument for subject matter limitations on treaty-making.¹¹⁰ Unlike Henry Tucker, Lawson and Seidman expressly embrace textualism; together and separately they have made important (and immensely readable) contributions

109. See *supra* notes 97-98 and accompanying text. Even after the Seventeenth Amendment, some scholars argue that the "political safeguards of federalism" give sufficient structural protection to the states. See, e.g., Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

110. Lawson & Seidman, *supra* note 4.

both to textualist theory and to its particular applications.¹¹¹ In *The Jeffersonian Treaty Clause*, however, they allow over-reliance on a version of Tucker's structuralism to short-circuit complete textual analysis of the treaty-making clause.

Unlike Tucker, Lawson and Seidman focus at length on the text's particular clauses, especially Article II, Section 2. In an extended argument, they develop a reading of that clause that amounts to something resembling the "implementational" reading offered by Livingston and Jefferson in the 1790s.¹¹² Although the argument is complex and any summary is unlikely to do it justice, ultimately it follows from three propositions: (a) that the treaty-making power is an aspect of the executive power granted by Article II, Section 1; (b) that under eighteenth-century English law and practice, a delegated executive power was subject to an implied limit that it be exercised reasonably; and (c) that a reasonableness limit on the treaty-making power should be understood to contain the limitation that treaties' subject matter not extend to areas beyond those already granted elsewhere in the document to the federal government.

Several parts of this argument may appear textually problematic. More important for present purposes, however, is that Lawson and Seidman ultimately can conclude, on the basis of textual analysis, only that their "implementational" reading is a possible one – not that it is manifestly superior to the more natural reading of the clause as a general grant of power.

At this point in the argument, Lawson and Seidman turn to structural necessity in terms that echo Tucker, albeit much more firmly linked to particular text.¹¹³ First, they point out that the consequences of a treaty-making power without subject matter limitations are quite alarming, even apart from the effect on state sovereignty: it might allow, for example, the treaty-makers to forbid criticism of foreign countries, declare Catholicism the nation's official religion, or prohibit the slave trade prior to 1808. The latter point is particularly troubling, because the framers were so protective of the pre-1808 slave trade – at the insistence of Georgia and South Carolina delegates – that Article I prohibited Congress from abolishing it and Article V insulated this limit against even a constitutional amendment. The *Holland* view of the treaty-making power, though, would seemingly allow the treaty-makers to abolish it (and to do the other things Lawson and Seidman find troubling).

111. See, e.g., Lawson & Seidman, *supra* note 6; GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* (2004); Lawson, *supra* note 6; Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007); Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. 289 (2007); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002) [hereinafter Lawson, *Delegation and Original Meaning*].

112. Lawson & Seidman, *supra* note 4, at 9-54.

113. *Id.* at 54-59.

For Lawson and Seidman, these consequences are enough to make *Holland's* analysis structurally untenable. Under it, they say, “the entire federal structure . . . is a President and two-thirds of a quorum of senators (and perhaps a bona fide demand from a foreign government) away from destruction.”¹¹⁴ Although they initially observe that this is “not an impossible circumstance,”¹¹⁵ after a look at the procedural limitations on treaty-making they find, in much stronger terms: “[t]o put it bluntly, an authorization to implement other grants of jurisdiction [through the treaty-making clause] makes sense in the overall context of the Constitution, while a grant of jurisdiction to pursue independent ends does not.”¹¹⁶ Or, as they say even more strongly in the next paragraph, “[t]o read the Treaty Clause as an end-setting provision, with no direct connection to the otherwise careful enumerations of federal powers, simply does too much damage to the rest of the Constitution to be a plausible reading of a brief clause in Article II, Section 2.”¹¹⁷

This analysis is incomplete in two respects. The first replicates Tucker’s error. To reach the conclusion that the broad view of treaty-making power is not plausible, Lawson and Seidman rather summarily find that the procedural protections against overreaching treaties are insufficient. But that conclusion is simply their assessment of a debateable proposition. The framers might have shared it, but might not have. Surely the matter is not self-evident. Some work needs to be done beyond mere assertion to show that the framers could not have believed the procedural protections adequate. In fact, as discussed above, several leading anti-federalists argued in the ratifying debates that the procedural protections *were* insufficient (and that no other protections existed); several leading federalists replied that the procedural protections were sufficient (with little or no firm reliance on subject-matter protections). Lawson and Seidman themselves concede that “Jefferson’s position [on the treaty-making power’s subject-matter limitations] was never historically ascendant.”¹¹⁸ Thus they apparently admit – correctly, in my judgment – that the opposing view (Hamilton’s view that the principal protections against unwise treaty-making were procedural rather than substantive) *was* “historically ascendant” (or at least was widely held). It seems especially perilous to move from these facts to a conclusion that the drafters and ratifiers *could not have* relied primarily on procedural protections.

This difficulty points to the argument’s second shortcoming. Lawson and Seidman’s analysis, sophisticated though it is, largely consists of two elements: pure textual analysis and appeals to broad structural values and historical themes. This approach omits a central feature of historical textualism, at least as I would describe it. Lawson and Seidman make no inquiry into how the key phrases related to treaty-making were used prior to the

114. *Id.* at 57.

115. *Id.* at 58.

116. *Id.* at 59.

117. *Id.* at 59.

118. *Id.* at 3.

drafting convention, especially in the Articles of Confederation, and very little inquiry into how contemporary observers read them and reacted to them. It appears, moreover, that these are, at least in part, conscious methodological choices.¹¹⁹ I regard them as misconceived.

To be sure, as Lawson and Seidman intimate, founding-era historical materials are often incomplete and inconsistent, and it is often difficult to work out how particular phrases were used before the Convention and understood afterward. Nonetheless, had they undertaken this inquiry, I believe they would have found sufficient evidence to, at minimum, think it “plausible” that the framers understood the treatymaking clause to be a general grant of power, bound principally by procedural limitations. (As described above, I find the evidence sufficient to support a much stronger conclusion). By omitting this evidence, they allow themselves to reach a conclusion about textual meaning that seems contrary to the way most contemporaneous observers saw the matter. Of course, members of the founding generation could be wrong about the meaning of their own document. But they were much closer to the document – in time and in historical and linguistic context – than we are. To ignore what they said, and rely on how the document now strikes us, seems to ignore potentially important evidence.

This is not to say that Lawson and Seidman do not make important points. Far more effectively than Tucker, they raise textual objections to the broad reading of the treatymaking clause. In particular, their reliance on the slave trade clause is not easily answered.¹²⁰ But ultimately their position seems incomplete because they do not address the historical evidence of the treatymaking clause’s meaning. Perhaps they would have effective responses. By ignoring this core component of historical textualism, however, their position is rendered much less persuasive.

V. SUMMARY AND CONCLUSION

This essay seeks to illustrate the interpretive methodology I have called historical textualism by applying it to the debate over *Missouri v. Holland* and contrasting it with two leading analyses reaching the opposite conclusion. The approach I suggest begins with the particular phrase most at issue, the treatymaking clause of Article II, Section 2. That clause in itself contains procedural limits upon treatymaking (that it be done by the President plus two-thirds of the Senate, with the Senate constituted in effect as representatives of the states), but it does not appear to limit the subject matter treaties can encompass. The approach then expands the focus to examine how the

119. See Lawson, *Delegation and Original Meaning*, *supra* note 111.

120. Perhaps this was simply an oversight by leaders in South Carolina and Georgia. Concern over the slave trade was largely limited to those two states. Although a treaty abolishing the trade would have been a real possibility in the early nineteenth century, in the late 1780s it was probably not within anyone’s focus.

treatymaking clause relates to other parts of the text. Of special importance here is the contrast with Article I, Section 8 (which imposes subject matter limitations on federal legislation). Further, treaties are limited by other generally-applicable constitutional restrictions through the provision of Article VI that requires treaties to be made “under the Authority” of the United States. However, it does not appear that any particular text – including the sometimes-cited Tenth Amendment – on its face imposes any broad subject matter limits on treaties akin to those imposed on federal legislation.

The historical textualist analysis then turns to contextual considerations, while retaining its focus on particular textual clauses. Most importantly, in this case, Article 9 of the Articles of Confederation contained a parallel grant of treatymaking power to the Continental Congress. Practice and commentary under the Articles indicates that this provision was not generally thought to contain a broad subject matter limitation, despite the Articles’ structure of delegated powers. This pre-drafting evidence is especially probative because it reflects the drafters’ and ratifiers’ linguistic context without being colored by constitutional outcomes. The analysis then takes up the more conventional “originalist” sources of drafting and ratifying history, again with a focus on the particular clauses at issue. These materials tend to confirm that the drafters and ratifiers invoked procedural rather than subject matter limitations on treatymaking. For example, when the Constitution’s anti-federalist opponents complained of the treatymaking power’s unlimited scope, the principal federalist rejoinder was that procedural limitations on the power were sufficient protection; in any event, there was no sustained argument that the power carried implicit subject matter limitations. These events, although they should be treated cautiously, are consistent with the treatymaking clause’s most natural reading.

The last step in the clause-specific examination of context is to consider post-ratification practice and commentary. Here we must acknowledge the sharp difference of opinion that arose in the Jay Treaty debates and their aftermath regarding treaty-power limitations. In particular, Thomas Jefferson and Robert Livingston, among other treaty opponents, argued for subject matter limitations. But this should not be persuasive evidence, first because it came in the context of partisan debate in which the opposing side was voiced at least as strongly, second because it was only weakly linked to a plausible interpretation of text, and third because it did not prove persuasive at the time. Thus the Jay Treaty debates, considered as a whole, also tend to confirm the text’s most natural reading.

Finally, the historical textualist analysis will again expand its focus to consider the broader historical and intellectual context of the founding period. The goal here is not to derive particular rules from the broader context, but to ask whether the interpretation developed from the text and its specific context fits plausibly with the wider setting. With the question framed in this way, the lack of subject matter restrictions seems plausible. The founding-era concern over protecting state sovereignty would call into question a truly unbounded grant of treatymaking power. But, as noted, the Constitution’s

treatymaking power contained substantial procedural protections. Even if modern observers might think these protections insufficient, it is far from clear that the framers necessarily agreed.

This somewhat over-simplified description of the historical textualist approach can be contrasted with two leading defenses of subject matter limitations on treatymaking power. First, Henry St. George Tucker's classic account relies almost entirely on a structural argument: that the Constitution's carefully-constructed system of delegated powers and reserved state sovereignty is inconsistent with an unlimited treatymaking power. As discussed, however, the treatymaking power is not unlimited: it is restrained procedurally. Tucker thought these restraints were manifestly insufficient. But, because he did not rely on any specific text or any specific contextual evidence from the founding era, he allowed himself to substitute his own view for the best evidence of the founding era's view.

Second, Gary Lawson and Guy Seidman's modern account, though much richer and more textualist than Tucker's, ultimately suffers the same difficulty. Lawson and Seidman make an elegant, though somewhat strained, argument for subject matter limitations on treatymaking based on the text of Article II. However, they do not substantiate it with any specific contextual evidence, nor do they dispute the specific contextual evidence that appears to favor a simpler reading of Article II. Instead, they move directly to a structural argument that echoes Tucker: it is not plausible, they say, to believe that the text lacks subject matter limitations on treaties given its concern with subject matter limitations elsewhere. Lawson and Seidman give more consideration than Tucker to the text's procedural protections, but like Tucker, Lawson and Seidman ultimately dismiss them on little more than Lawson and Seidman's own assessment of their effectiveness. Again, over-reliance on untethered structural claims allows the substitution of their own view for the best evidence of the founding era's view.

In sum, historical textualism keeps the focus on the best evidence of the Constitution's original meaning. Other approaches, which depend on appeals to structure and intent not anchored in specific text and specific context, run the risk of introducing subjective structural assessments. In the case of *Missouri v. Holland*, historical textualism indicates that the Constitution's original meaning most likely did not include subject matter limitations on treaty-making. Studies reaching the opposite conclusion depend more on structural intuitions than on the text and its specific historical context.