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Resurrecting *Missouri v. Holland*

Peter J. Spiro*

I. INTRODUCTION

For a decision that has never been put to work, *Missouri v. Holland*¹ has generated a good deal of academic discussion. At one level, that shouldn't be surprising. The case supplies a clean judicial pronouncement on a question of paramount constitutional importance. At another level, however, until recently there hasn't been much to talk about. *Missouri v. Holland* declared a broad vision of the Treaty Power and of the national government's authority to constrain the states in furtherance of international obligations. But the federal government failed to assimilate that version of the Treaty Power. Indeed, it is only recently that the exercise of powers available under *Holland* has become a realistic possibility.

This brief essay sketches the constitutional dormancy of *Missouri v. Holland* and the potential for its activation. The essay first describes how the treaty-makers declined the Treaty Power offered them by the Court. In the near century since the ruling, no treaty appears to have depended on the decision for authority. The treaty-makers have worked from contrary constitutional premises, establishing a sort of parallel constitutional universe in which the ruling was never handed down. Through these years, *Missouri v. Holland* has failed accurately to represent prevailing constitutional norms on the question. In other words, arguably, the decision is no longer good law if it ever was.

But *Holland* may yet live. The key moving part here is the transformed global context. On the one hand, globalization disaggregates nation-states, facilitating the global interactivity of constituent subnational jurisdictions.² This creates new spaces for the states as international actors, including as parties to international agreements. These new international capacities may lessen the need for *Holland*-like powers in the national government, as the states become more amenable to international discipline. To the extent that international law implicates areas of exclusive subnational authority, the architecture of global society now includes suitable channels of interaction. On the other hand, the transaction costs of managing treaty relationships with

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

2. For a consideration of how globalization and its disaggregating tendencies broadly impacts foreign relations law, see Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649 (2002); Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 LAW & CONTEMP. PROBS. 195 (2004).

multiple subnational entities argues for the maintenance of intermediary power in national governments. The discipline of subnational authorities may remain insufficient to address global imperatives. Some global issues can't wait for the perfection of the legal personality of subnational actors.

In other words, the world may need *Missouri v. Holland*. If *Holland* is to be resurrected, it probably won't be out of indigenous American concern. More likely, other actors will press the use of *Holland*'s powers on the United States, in the way of demands lodged with the national government to bring the states into line with international undertakings. Although the national government has finessed recent situations in which a broad interpretation of the Treaty Power might have been required, it has yet to be put to the test. But it is not hard to conjure up scenarios in which the balance would tip in favor of using a treaty to trump state authority.

So time may finally be catching up to *Missouri v. Holland*. Globalization is generating more robust international regimes. Whether or not globalization diminishes aggregate state power,³ it logically enlists states as agents of enforcement. *Holland* supplies the constitutional tool for perfecting that power in the American context. We may yet witness its use.

II. HOLLAND'S STILLBIRTH

For all its dramatic elegance and structural logic, *Missouri v. Holland* hasn't made much of a mark beyond the academy. Its validation of an expansive Treaty Power appears never to have been internalized by the political branches, who failed to take the Supreme Court up on its offer. This failure was not simply prudential, in the sense that the political branches consciously held the power in reserve. They consistently acted, now for something approaching a century, as if they didn't have the authorities ascribed to them by the Court. If history be our constitutional guide,⁴ that practice has established a constitutional counter-norm, under which the Treaty Power adds nothing to other authorities of the national government.

3. Compare DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP (1996), Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 LAW & CONTEMP. PROBS. 115 (2008), and Martin Wolf, *Will the Nation-State Survive Globalization?*, FOREIGN AFF., Jan.-Feb. 2001, at 178 (all arguing that globalization empowers states), with MARTIN VAN CREVELD, THE RISE AND DECLINE OF THE STATE (1999); JEAN-MARIE GUÉHENNO, THE END OF THE NATION-STATE (Victoria Elliott trans., 1995); SASKIA SASSEN, LOSING CONTROL?: SOVEREIGNTY IN AN AGE OF GLOBALIZATION (1996) (asserting that globalization will diminish state power).

4. As Justice Holmes himself would allow. See *Holland*, 252 U.S. at 433 ("The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."); see also Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 1001-16 (2001) (discussing use of historical practice in determination of constitutional norms).

The Bricker Amendment episode is crucial to this account of the Treaty Power. Several versions of the proposed constitutional amendment would have expressly confined the Treaty Power within the limits of other delegated authorities.⁵ In other words, the proposals would have formally reversed *Holland*. Of course, the Bricker Amendment was defeated. The episode is thus consistent with an account under which *Holland* remains an accurate statement of constitutional norms, and that is how most contemporary commentators process the episode.⁶

But this history also lends itself to an explanation less kind to *Holland*. The initiative was in the first place intended by way of “constitutional insurance,” in Senator John W. Bricker’s own conception of the campaign.⁷ Bricker acted in the face of *Holland*’s “dangerous potentialities” only, conceding that the “executive branch acts as though the *Holland* case had never been decided.”⁸ The decision had not been deployed to legitimize any treaty other than the migratory bird agreement upheld in *Holland* itself.⁹

The Bricker Amendment was prompted not by *Holland*’s use but by the postwar emergence of human rights conventions and the United Nations, which made those “potentialities” much more threatening to supporters of states’ rights. The elastic terms of human rights regimes made *Holland* look like a loaded weapon, especially as the domestic civil rights movement started to gain traction. Even after the entrenchment of New Deal jurisprudence, important spheres of activity seemed safely beyond the authority of the federal government, notably as they related to questions of race. Segregationists and other states-righters wanted to protect against the Treaty Power as Trojan horse.

And that they did, even if they failed in securing adoption of the proposed amendment formally reversing *Holland*. The proposal was high profile and hard fought. One version came within a single vote of Senate approval, with a 60-31 vote in its favor. By way of drawing support away from the effort, Eisenhower agreed not to pursue ratification of any of the human

5. For an excellent history of the Bricker Amendment, see DUANE TANANBAUM, *THE BRICKER AMENDMENT CONTROVERSY* (1988). As reported out of the Senate Judiciary committee, for instance, Senate Joint Resolution 1 would have provided that “[a] treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.” *Id.* at 224.

6. See, e.g., David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1273-78 (2000).

7. John W. Bricker, *Constitutional Insurance for a Safe Treaty-Making Policy*, 60 DICK. L. REV. 103, 116 (1956).

8. *Id.* at 115; see also *id.* at 118 (“[W]e haven’t been hurt yet.”).

9. See Richard A. Edwards, *The Constitution, the Treaty Power, and Juridical Isolationism*, 14 U. PITT. L. REV. 199, 202-03 (1953) (describing early “refusal” on the part of the national government to activate powers under *Holland*, “[c]ontrary to the weary maxim that all departments of government seek constantly to enlarge their own powers”).

rights conventions.¹⁰ At a time after which he could not have harbored much hope for the amendment's passage, Bricker lauded the Eisenhower Administration for "show[ing] great respect for the constitutional prerogatives of the States."¹¹ Eisenhower, for instance, had crafted a flight of friendship, commerce, and navigation treaties to allow for state regulation of alien property ownership, even though state law could have been trumped without a constitutional assist from the Treaty Power.

Nor would members in the Bricker movement have had cause for bitterness in the subsequent practice. They may not have gotten the insurance they wanted against the exercise of an expansive Treaty Power, but in the end they didn't really need it (although of course they lost the war on other constitutional fronts, as states' rights limitations on federal power fell by the judicial wayside). For many years, presidents stayed true to Eisenhower's undertaking not to accede to human rights conventions. When the United States did finally sign on to select regimes (this as it more aggressively pressed human rights norms on other states), it did so only to the extent that participation would coincide with existing U.S. practice. Ratification packages of reservations, understandings, and declarations (RUDs) aimed to ensure that accession to multilateral conventions would not require changes in U.S. law.¹² In other words (as is now well understood),¹³ U.S. ratification of human rights conventions has been for the most part a hollow exercise.

That has methodically been the case with respect to those components of human rights regimes bearing on traditional state-level authorities. The federalism concern explained, for example, the U.S. reservation to the prohibition on the execution of juvenile offenders found in the International Covenant on Civil and Political Rights, notwithstanding near-universal rejection of the practice.¹⁴ The same approach held with respect to less controversial state-level policies implicated by the ICCPR, such as the segregation of juvenile and adult offenders in correctional facilities. The Senate has attached

10. See TANANBAUM, *supra* note 5, at 199.

11. See Bricker, *supra* note 7, at 114.

12. See generally Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000).

13. See, e.g., Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 342 (1995) ("By its reservations, the United States apparently seeks to assure that its adherence to a convention will not change, or require change, in U.S. laws, policies or practices, even where they fall below international standards.").

14. See 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992) (resolution conditioning ratification of ICCPR on reserved right to execute juvenile offenders); see also S. EXEC. REP. NO. 102-23, at 11-12 (1992) (reprinting proposed Bush Administration conditions). The practice has since been found unconstitutional under the Eighth Amendment. See *Roper v. Simmons*, 543 U.S. 551 (2005). The Court's decision in *Roper* specifically alluded to the ICCPR's prohibition, notwithstanding the reservation attached to U.S. ratification, as well as to the unratified United Nations Convention on the Rights of the Child. See *id.* at 567, 622.

boilerplate “federalism” understandings to its consent to the ratification of human rights treaties, under which attendant obligations “shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments.”¹⁵ Although the meaning of these conditions is contested, submittal statements evidence Brickerite intent.¹⁶

Federalism objections have been central to the U.S. failure to accede to the Convention on the Rights of the Child, with respect to which the United States stands essentially alone as a non-party.¹⁷ *Holland* would presumably supply authority for the national government to join this universal regime, and yet the treatymakers seem unwilling to resort to the power even where international isolation is the result.

Duncan Hollis documents other recent episodes, outside the human rights context, in which the executive branch has assiduously established the absence of state-law impacts before submitting treaties to the Senate for consent to ratification.¹⁸ Although the national government has and continues to adopt international agreements that intrude on state power, those agreements

15. For the ICCPR, for instance, see 138 CONG. REC. S4784 (daily ed. Apr. 2, 1992).

16. See Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1381 (2006) (Federalism understandings “signal[] to Congress and the states that the executive had no aspirations to bring *Missouri* into the human rights context.”); see also NATALIE HEVENER KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION 171-72* (1990) (Federalism understandings have “no doubt been proposed in order to provide reassurance of the maintenance of the traditional domains of authority that aroused so much controversy during the 1950s.”); Brad R. Roth, *Understanding the “Understanding”: Federalism Constraints on Human Rights Implementation*, 47 WAYNE L. REV. 891 (2001).

17. See, e.g., Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 175-77, 185 (2006).

18. See Hollis, *supra* note 16 (describing consideration of U.N. Convention Against Transnational Organized Crime; the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; and the Terrorist Bombings Convention). The fact that it is the executive branch undertaking these studies does not establish it as the causal actor in fixing the Treaty Power somewhere short of *Holland*. See *id.* at 1360 (asserting that the “executive [branch] plays the central role” in avoiding resort to *Holland*). The Bricker episode suggests the contrary, with the Senate pressing hard formally to reverse *Holland* over executive branch opposition. To the extent that the executive branch has understood that it will be unable to secure consent to any agreement resulting in changes of state law, it has a clear incentive to internalize the federalism constraints. In describing *Holland*’s long dormancy, however, it doesn’t make much difference which institution has played the lead role in entrenching longstanding practice against deployment of an expansive Treaty Power; the combined conduct of the political branches evidences a constitutional norm inconsistent with *Holland*’s holding.

have all enjoyed a constitutional basis outside the Treaty Power.¹⁹ In the modern era, that has not amounted to much of a constraint to the extent that other federal powers have been interpreted generously and put to work by the national government. Nonetheless, as the Supreme Court has ramped back those other sources of federal authority, at least at the margins, and as international law insinuates itself into the far reaches of regulatory space, there will be more contexts in which federal authority will rise or fall on the Treaty Power alone.²⁰ To date, the federal government has disclaimed its independent use. *Holland* has been alive only on the pages of the Restatement and the law reviews.

III. *HOLLAND'S* ACTIVATION

But this institutional modesty on the part of the national government may face more powerful challenges as international law flourishes not only in scope but in effect. International legal regimes have remained largely a take-it-or-leave-it proposition. The costs of opting out have not been high, at least not with respect to the sorts of agreements that implicate state-level authorities. Given federalism's centrality in the American constitutional scheme, it has handily outweighed the benefits accruing to international agreements testing the limits of federal power. That calculation may not be so obvious in the future. As the costs of opting out of international regimes rise, state authorities may be subdued. Federalism may yet be sacrificed at the altar of globalization.

To date, international agreements extending federal power (that is, agreements requiring *Holland* by way of constitutional support) have not enhanced the national interest in such a way as to make up for their political costs. Consider the question through the lens of the two-level game, in which the national government takes account of international and domestic political interests on separate planes.²¹ In the face of the post-Bricker tradition

19. For instance, treaties clearly implicating foreign economic relations, such as the Convention on Contracts for the International Sale of Goods and bilateral and multilateral trade agreements, comfortably fall within federal authority under the Foreign Commerce Clause. The Vienna Convention on Consular Relations (VCCR), the UN Headquarters Agreement, and other treaties implicating foreign nationals are covered either by the Commerce Power or by the federal power over immigration. That explains why *Holland* has not been at issue, at least not directly, in the high-profile litigation surrounding U.S. violation of consular notification rights under the VCCR. See *Medellin v. Texas*, 128 S. Ct. 1346 (2008) (not citing or discussing *Holland* in the context of attempted executive branch imposition of VCCR ruling on state courts).

20. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 395-406 (1998).

21. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988).

described above, to push for adoption of such an agreement would provoke opposition framed in constitutional terms. Overcoming the entrenched practice under which standard federalism constraints apply to the making of international agreements would involve the expenditure of significant domestic political capital. Treaties challenging that practice haven't been worth the trouble.

Take the Convention on the Rights of the Child. The treaty is consistent with U.S. foreign policy interests. That is, all other things being equal, it would be rational for the United States to accede to the agreement. But all other things are not equal. To press for ratification of the treaty would implicate clear domestic political costs. The objections would not be advanced as matters of policy but rather of constitutional moment. That ups the political ante. Even though the United States has stood alone in failing to ratify the Children's Rights Convention, the benefits of ending that isolation in the international game haven't been so great as to overcome the costs in the domestic one.

The RUD packages accompanying the ICCPR and Race Convention, meanwhile, have finessed the conflicting international and domestic equations by having it both ways. The United States has reaped the benefits of participation in these regimes (and accompanying signaling effects) while avoiding a constitutional showdown on the home turf.²² In other words, the RUD packages by design uncouple the international and domestic elements of the deal, arriving at a win/no lose result.

That strategy is looking shaky going forward. The RUD dodge worked until the rest of the world caught on to the fact that the United States was doing effectively nothing by acceding to human rights treaties. The practice has attracted fire from other states and human rights advocates.²³ Charged under the ICCPR with interpreting the convention, the Human Rights Committee questioned the legality of the U.S. RUDs as inconsistent with the convention's "object and purpose."²⁴ No one will be fooled by subsequent attempts to sanitize U.S. ratification of multilateral agreements. That perception will cancel out any gain at the international level from accession. It is also possible (partly in response to the U.S. practice) that a growing propor-

22. See Bradley & Goldsmith, *supra* note 12, at 414-16 (noting foreign policy costs of nonparticipation in human rights regimes and use of RUDs to mitigate "countervailing considerations").

23. See, e.g., Antonia Chayes, *How American Treaty Behavior Threatens National Security*, 33 INT'L SECURITY 45, 52-53 (2008); Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347 (2000).

24. See ICCPR Human Rights Comm., General Comment 24(52) ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994); see also David P. Stewart, *Ratification of the Convention on the Rights of the Child*, 5 GEO. J. ON FIGHTING POVERTY 161, 164 (1998) (explaining why RUD strategy would not likely work with respect to Children's Rights Convention).

tion of treaties will bar reservations in the first place, which would categorically eliminate the option.²⁵

Unable, then, to detach the two games, the United States would be pressed back to up-or-down decisions on treaty regimes that threaten federalism values. Many treaty regimes, of course, do not implicate protected spheres of state authority, either because state interests are not at stake (as with an arms control agreement, for example) or because they are enabled by other constitutional powers (such as the Commerce Power). Other agreements will be consistent with existing state-level practice, thus avoiding a Treaty Power showdown. But some will force the question. And in some of those cases, international interests in participation may trump associated domestic costs, even if it means running the constitutional gauntlet.

That prospect becomes more likely with the further entrenchment of international human rights as well as the insinuation of international law into other regulatory spheres. Take the protection of endangered species, the regulation of which might plausibly be located beyond federal authority under the Commerce Power.²⁶ If so, *Holland* could be necessary for some subset of international biodiversity regimes.²⁷ In light of heightened global ecotoxicities, international pressure on the United States to participate in such regimes could be strong, the constitutional obstacle notwithstanding.

Even with respect to the Children's Rights Convention, the balance may change. At both levels, the game is dynamic. On the international plane, as more attention is focused on human rights regimes, the costs of non-participation rise. Other countries and other international actors (human rights NGOs, for example) will train a more focused spotlight on U.S. non-participation.²⁸ From a human rights perspective, it's low-hanging fruit; the mere fact that the United States finds itself alone with Somalia outside the regime suffices to demonstrate the error of the American stance as a leading example of deplored American exceptionalism. For progressive advocacy groups focusing on children's rights, the Convention is emerging as an

25. See, e.g., Rome Statute of the International Criminal Court art. 120, July 1, 2002, 2187 U.N.T.S. 90; Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, Dec. 10, 1982, 33 I.L.M. 1309 (both prohibiting reservations).

26. See Bradford C. Mank, *After Gonzales v. Raich: Is the Endangered Species Act Constitutional Under the Commerce Clause?*, 78 U. COLO. L. REV. 375 (2007).

27. A 2000 U.S.-Russia agreement relating to the protection of polar bears included provisions relating to the subsistence taking of polar bears by native populations. See Agreement with Russian Federation Concerning Polar Bear Population, U.S.-Russ., Oct. 16, 2000, S. TREATY DOC. NO. 107-10. Whether or not the agreement enjoys Commerce Clause authority, see Hollis, *supra* note 16, at 1384 & n.319, it would seem enabled by the federal government's power to regulate Native American affairs. The agreement nonetheless establishes the plausibility of treaty regimes governing intrastate activity.

28. See, e.g., Maggie Farley, *With Conservative Stand on Minors' Rights, U.S. Irks Its Allies*, L.A. TIMES, Aug. 31, 2001, at A5.

agenda item.²⁹ More powerful actors, including states and such major human rights groups as Amnesty International and Human Rights Watch, may be unlikely to put significant political resources into the effort, but there is the prospect of a drumbeat effect and accompanying stress to U.S. decisionmakers.³⁰ In the wake of international opprobrium associated with post-9/11 anti-terror strategies, U.S. conformity with human rights has come under intensive international scrutiny. That scrutiny is spilling over into other human rights-related issues; there will be no more free passes for the United States when it comes to rights.³¹ Human rights may present the most obvious flash point along the *Holland* front, but it will not be the only one. As Antonia Chayes notes, “resentment runs deep” against U.S. treaty behavior.³² International pressure on the United States to fully participate in widely-subscribed international treaty regimes, some of which could constitutionally ride on the Treaty Power alone, will grow more intense.

At the same time that the international price of non-participation rises, a subtle socialization may be working to lower the domestic cost of exercising *Holland*-like powers. Globalization is massaging international law into the sinews of American political culture. The United States may not have ratified the Convention on the Rights of the Child, for example, but it has acceded to Hague Conventions on abduction³³ and adoption,³⁴ as well as optional protocols to the Children’s Rights Convention itself,³⁵ and has enthusiastically

29. See The Campaign for U.S. Ratification of the Convention on the Rights of the Child, www.childrightscampaign.org (last visited Oct. 18, 2008).

30. See, e.g., Amnesty International, United States of America: Rights of Children Must Be Respected (Apr. 25, 2003), <http://www.amnesty.org/en/library/info/AMR51/058/2003> (calling on United States to ratify the convention); see also *Jolie Ashamed of US*, SUNDAY TELEGRAPH, Jan. 29, 2006, at 43 (reporting remarks of actress Angelina Jolie at 2006 Davos conference regarding failure of United States to ratify the treaty).

31. See, e.g., U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, United States of America*, ¶ 10, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) (treaty committee’s broad critique of U.S. human rights practices). Anti-terror practices and children’s rights have converged in cases involving U.S. detention of alleged enemy combatants. See Tim Harper, *Guantanamo Policy on Trial*, TORONTO STAR, Apr. 21, 2004, at A10 (discussing the case of 17-year-old Omar Khadr).

32. Chayes, *supra* note 23, at 74.

33. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

34. Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption, May 29, 1993, S. TREATY DOC. NO. 105-51, 32 I.L.M. 1134.

35. Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, U.N. Doc. A/RES/54/263 (Mar. 16, 2001).

pursued an agreement on the transboundary recovery of child support.³⁶ As international law becomes familiar as a tool of family law, the Children's Convention will inevitably look less threatening even against America's robust sentiments regarding federalism. Regimes in other areas should be to similar effect and will span the political divide. It is highly significant, for instance, that conservative Americans have become vocal advocates of international regimes against religious persecution, a key factor in the aggressive U.S. stance on Darfur.³⁷ To the extent that conservatives see utility in one regime they will lose traction with respect to principled category arguments against others.

Which is not at all to say that *Holland* will be activated with consensus support. A clear assertion of the Treaty Power against state prerogatives would surely provoke stiff opposition in the Senate and among anti-internationalist conservatives, setting the scene for a constitutional showdown.³⁸ The adoption of a treaty regime invading protected state powers would require the expenditure of substantial political capital. Any president taking the Treaty Power plunge would be well advised to choose a battle to minimize policy controversy on top of the constitutional one. A substantively controversial regime depending on *Holland's* authority (say, relating to the death penalty) would increase the risk of senatorial rebuke. Perhaps the best strategy would be to plant the seeds of constitutional precedent in the context of substantively obscure treaties, ones unlikely to attract sovereigntist flak. If a higher profile treaty implicating *Holland* were then put on the table, earlier deployments would undermine opposition framed in constitutional terms. Such was the case with the innovation of congressional-executive agreements, which, before their use in adopting major institutional regimes in the wake of World War II, had been used with respect to minor agreements in the interwar years.³⁹

In contrast to the story of congressional-executive agreements, advocates of an expansive Treaty Power will have the advantage of *Holland* itself, that is, a Supreme Court decision on point and not superseded by a

36. Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=131 (last visited Oct. 18, 2008); see John R. Crook, *United States Signs New Multilateral Convention on Child Support Obligations*, 102 AM. J. INT'L L. 377, 378 (2008) (quoting U.S. signing statement expressing "delight[]" with the new accord); see also Barbara Stark, *When Globalization Hits Home: International Family Law Comes of Age*, 39 VAND. J. TRANSNAT'L L. 1551, 1578 (2006).

37. See Alan Cooperman, *Evangelicals Urge Bush to Do More for Sudan*, WASH. POST, Aug. 3, 2004, at A13.

38. See Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991 (2008).

39. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 840 (1995).

subsequent ruling. That would lend constitutional credibility to the proposed adoption of any agreement requiring the Treaty Power by way of constitutional support. But it wouldn't settle the question in the face of the consistent practice described above. *Holland* is an old, orphaned decision, creating ample space for contemporary rejection. An anti-*Holland* posture, the decision's status as good law notwithstanding, would also be bolstered by the highly credentialed revisionist critique.⁴⁰

That of course begs the question of what the Supreme Court would do with the question were it presented. The Court could reaffirm *Holland*, in which case its resurrection would be official and the constitutional question settled, this time (one suspects) for good. That result would comfortably fit within the tradition of the foreign affairs differential (in which *Holland* itself is featured).⁴¹ One can imagine the riffs on Holmes, playing heavily to the imperatives of foreign relations and the increasing need to manage global challenges effectively. The opinion might not write itself, but it would require minimal creativity. Recent decisions, *Garamendi* notably among them,⁴² would supply an updated doctrinal pedigree. And since the question would come to the Court only after a treaty had garnered the requisite two-thirds' support in the Senate, the decision would not likely require much in the way of political fortitude on the Court's part. It would also likely draw favorable international attention, reaffirming the justices' membership in the global community of courts.⁴³

IV. CONCLUSION: CONSTITUTIONAL LIFE WITHOUT *MISSOURI V. HOLLAND*

Holland's judicial validation would hardly be a foregone conclusion. The Supreme Court has grown bolder in the realm of foreign relations. Much of this boldness has been applied to advance the application of international norms to U.S. lawmaking, the post-9/11 terror cases most notably among them.⁴⁴ The VCCR decisions, on the other hand, have demonstrated the Court's continued resistance to the application of treaty obligations on the states. In *Medellin*, where the Court found the President powerless to enforce the ICJ's *Avena* decision on state courts, that resistance exhibited itself over

40. See Bradley, *supra* note 20.

41. See Spiro, *supra* note 2, at 653.

42. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (striking down state Holocaust-related insurance measure).

43. See Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003). In the most recent report of the ICCPR's Human Rights Committee on U.S. practice, four of five "[p]ositive aspects" were decisions of the Supreme Court. See U.N. Human Rights Comm., *supra* note 32, ¶¶ 5-9.

44. See, e.g., Boumediene v. Bush, 128 S. Ct. 2229 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004).

executive branch objections. The Court rebuffed the President with the result of retarding the imposition of international law on the states and at the risk of offending powerful international actors.

If the Court did it in *Medellín*, it could do the same thing with *Holland*. Whatever the stakes, they are not likely to be so great as to appear incommensurable. The kinds of treaty regimes that will implicate *Holland* may involve important national interests on the international plane, but those interests will not be imperative. Mexico may have been predictably unhappy with the *Medellín* ruling, but there was no risk of bilateral relations spinning out of control. The Republic's survival will not hinge on confirming *Missouri v. Holland*, and the Court will know it. That allows a return to baseline constitutional values and the constraint of national power in the name of federalism.

And in fact we could survive without *Holland*, as we have as a matter of practice for so long now. Were *Holland* overruled, the international community would come to understand the lack of federal capacity to impose certain treaty obligations on the states. International actors could then move directly against state and local jurisdictions to secure adoption of regimes implicating protected subfederal authority. This prospect should be less scary as state and local governments display a capacity autonomously to adopt international norms.⁴⁵ *Holland's* reversal would not be welcomed by those who work to advance global governance. But it would have the silver lining of redirecting advocacy to the subfederal level, where decisionmaking power has resided in any case. *Holland* has held out the hope of federal action. To date that hope has been a false one.

All of which may be by way of saying that *Holland's* fate may not be as important as scholars have assumed it to be. Activating *Holland* after its many years of dormancy would clear the path to greater U.S. conformity with the broadening scope of international law. If not, that conformity will be secured by other means.

45. Judith Resnik, *The Internationalism of American Federalism*, 73 MO. L. REV. 1165 (2008); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001).