

# Why Treaties Can Abrogate State Sovereign Immunity: Applying *Central Virginia Community College v. Katz* to the Treaty Power

Philip Tassin\*

*Can individuals sue state governments in federal court for violations of their treaty-based rights? For a long time, the answer to this question appeared to be no—the Supreme Court’s doctrine seemed to allow direct suits against states only where Congress properly used its powers under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity. But with its 2006 decision in *Central Virginia Community College v. Katz*, the Court opened a small breach in the seemingly insurmountable barrier of state sovereign immunity. In *Katz*, the Court held that state sovereign immunity did not bar a private action against a state under a federal bankruptcy statute. To reach this holding, the Court found it irrelevant whether the bankruptcy statute in question was a proper exercise of Congress’s powers under Section 5. Rather, the Court concluded that just by ratifying the Constitution, the states surrendered their sovereign immunity with regard to private suits based on federal bankruptcy law.*

*So far, *Katz* is unique in upholding a private right of action against a state based on an implied surrender of state sovereign immunity in the Constitution. However, its reasoning is applicable to contexts other than bankruptcy. This Comment applies *Katz*’s analytical framework to the treaty power. After considering the historical backdrop of the Constitutional Convention, the Framers’ understanding of the treaty power, and the function of the treaty*

---

Copyright © 2013 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

\* J.D., University of California, Berkeley, School of Law, 2012. I am grateful to Fred Smith for sharing his expertise and guiding me through the writing process; to Marci Hoffman for helping me navigate the vast resources of Boalt Hall’s library; and to Tim Sun, Chris Perdue, and the rest of the *California Law Review* staff for their insightful and challenging suggestions. I am especially grateful to Adam Shearer for his thoughtful comments and constant support.

*power in the U.S. federal system, this Comment concludes that just by ratifying the Constitution, the states surrendered their sovereign immunity with regard to treaty-based private suits.*

Introduction.....	757
I. State Sovereign Immunity and the Treaty Power in Supreme Court Jurisprudence and Academic Debate.....	762
A. Overview of the Supreme Court’s State Sovereign Immunity Jurisprudence .....	763
1. Origins of the Supreme Court’s State Sovereign Immunity Doctrine .....	763
2. Expansion of State Sovereign Immunity .....	764
3. Exceptions to State Sovereign Immunity.....	765
4. Congressional Abrogation of State Sovereign Immunity .....	766
B. The Treaty Power.....	768
C. Overview of the Supreme Court’s Treaty Power Jurisprudence..	769
D. Review of the Academic Literature Concerning the Treaty Power and State Sovereign Immunity.....	771
1. Arguments That the Treaty Power Does Not Override State Sovereign Immunity .....	772
2. Arguments That the Treaty Power Does Override State Sovereign Immunity .....	776
3. Toward a Historically Informed Clause-Specific Approach for Determining Whether an Enumerated Federal Power Overrides State Sovereign Immunity.....	778
II. The <i>Katz</i> Frameworks.....	779
A. <i>Central Virginia Community College v. Katz</i> .....	779
B. <i>Katz</i> ’s Express Analytical Framework: Identifying the Framers’ Intent.....	781
C. <i>Katz</i> ’s Alternative Analytical Framework: The Hamiltonian Approach.....	782
III. Why the Treaty Power Abrogates State Sovereign Immunity: Applying <i>Katz</i> ’s Frameworks.....	786
A. The Extension of <i>Katz</i> ’s Analytical Frameworks Beyond the Bankruptcy Clause.....	786
B. Applying <i>Katz</i> ’s Intent-Based Framework .....	787
1. The Historical Backdrop of the Treaty Power: Rampant Treaty Violations .....	787
2. How the Framers Understood the Constitution Would Solve the Historical Problems with Treaty Compliance .....	791
3. Treaties Made Immediately Following Ratification .....	793
4. Summary: The History of the Treaty Power.....	797

C.	Applying the Hamiltonian Framework to Assess the Treaty Power .....	798
1.	The Text of the Constitution and the Treaty Power .....	798
2.	The Nature of the Treaty Power .....	799
a.	Treaties as Contracts .....	800
b.	The Political Safeguards of the Treaty-Making Process .....	801
D.	Summary of the Treaty Power Under the Hamiltonian Approach .....	803
IV.	Significance and Questions of Application .....	803
A.	Practical Significance of Subjecting States to Treaty-Based Suits .....	804
1.	Closing the Rights-Remedies Gap .....	804
2.	Promoting U.S. Foreign Policy Interests Through Treaty-Based Suits .....	807
B.	Threshold Questions and Application .....	809
Conclusion	.....	811

#### INTRODUCTION

When it comes to honoring its treaty obligations, the United States has a record that is less than sterling. Since its founding in 1789, the International Court of Justice (ICJ) has held the United States in breach of its treaty obligations in three separate cases.<sup>1</sup> This fact alone is remarkable, but there is another aspect of the United States' spotty record that is striking: in two of the three ICJ cases, the treaty violations were the fault of state governments.<sup>2</sup>

In its 2001 *LaGrand* case, the ICJ held that the United States breached the Vienna Convention on Consular Relations (Vienna Convention)<sup>3</sup> when Arizona detained, tried, and sentenced to death two German nationals without informing them of their right to communicate with their consulate and without notifying the German consulate of their detention.<sup>4</sup> Similarly, in its 2004 *Avena* case, the ICJ held that the United States breached the Vienna Convention when nine states detained, tried, and sentenced to death fifty-one Mexican nationals

---

1. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 13–14, 71 (Mar. 31); *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. 466, 515 (June 27); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 147–48 (June 27).

2. In the third case, *Nicaragua*, the treaty violation was entirely the fault of the federal government. The ICJ found that the United States breached its Treaty of Friendship, Commerce, and Navigation with Nicaragua by embargoing trade, attacking Nicaragua's territory, and mining Nicaragua's territorial waters. *Nicaragua*, 1986 I.C.J. at 147–48.

3. Article 36 of the Vienna Convention provides that foreign nationals detained by a state-party's law enforcement agents have the right of communication and access to their consulate, and that consular officials have the right to visit those detainees and arrange for their legal representation. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

4. *LaGrand*, 2001 I.C.J. at 475, 515.

without consular notification.<sup>5</sup> The violations at issue in these cases were more than mere breaches of diplomatic niceties—the detainees faced death sentences, and legal observers and diplomats argued that if the detainees had been properly granted access to consular officials, they may have been able to secure better legal counsel and avoid death row.<sup>6</sup>

The *LaGrand* and *Avena* cases demonstrate how our federal system poses a special challenge for the enforcement of our country's treaty obligations. The U.S. government makes international commitments on behalf of the entire country, but adherence to those commitments varies across the fifty quasi-sovereign states. The Supreme Court has further compounded the challenge of treaty enforcement with two cases it decided in the wake of *LaGrand* and *Avena*. In *Medellin v. Texas*, the Court held that even though the Vienna Convention is a self-executing treaty—meaning that it is binding law without the need for Congress to enact separate implementing legislation—the ICJ's decisions attempting to enforce it are not binding on states because the treaties granting the ICJ jurisdiction are not self-executing, and Congress has not enacted legislation to implement them.<sup>7</sup> Similarly, in *Sanchez-Llamas v. Oregon*, the Court held that state courts need not suppress the incriminating statements of foreign nationals to remedy violations of the Vienna Convention.<sup>8</sup>

While *Medellin* and *Sanchez-Llamas* have fueled a vigorous debate over whether courts should presume treaties to be self-executing and whether treaties can impose additional procedural requirements under state criminal law,<sup>9</sup> the United States' repeated violations of the Vienna Convention have

---

5. *Avena*, 2004 I.C.J. at 13–14, 71. The Mexican nationals had been detained and sentenced in California (twenty-eight cases), Texas (fifteen cases), Illinois (three cases), Arizona (one case), Arkansas (one case), Nevada (one case), Ohio (one case), Oklahoma (one case), and Oregon (one case). *Id.* at 24. The United States also allegedly violated the Vienna Convention in 1998 when it prosecuted a Paraguayan national, Angel Francisco Breard. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 249 (Apr. 9). However, Breard was executed before the ICJ could adjudicate the matter, so the ICJ removed the case from its docket. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 426, 426–27 (Nov. 10); see also Dinah L. Shelton, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)* 43 ILM 581 (2004), 98 AM. J. INT'L L. 559, 559 n.1 (2004).

6. See Sandra Babcock, *The Limits of International Law: Efforts to Enforce Rulings of the International Court of Justice in U.S. Death Penalty Cases*, 62 SYRACUSE L. REV. 183, 184 (2012); Adam Liptak, *Texas Is Pressed to Spare a Mexican Citizen Days Away from Execution*, N.Y. TIMES, June 28, 2011, at A15.

7. 552 U.S. 491, 508 (2008). The Court also explained that treaties are presumed to be non-self-executing, “unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.” *Id.* at 505.

8. 548 U.S. 331, 350 (2006).

9. For examples of commentary on *Medellin*'s presumption against self-execution, see Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540 (2008); Steve Charnovitz, *Revitalizing the U.S. Compliance Power*, 102 AM. J. INT'L L. 551 (2008); Carlos Manuel Vázquez, *Less Than Zero?*, 102 AM. J. INT'L L. 563 (2008). For examples of commentary on the *Sanchez-Llamas* decision's effect on criminal remedies for defendants, see generally Julian G. Ku, *Sanchez-Llamas v. Oregon: Stepping Back from the New World Court Order*, 11 LEWIS & CLARK L. REV. 17 (2007); Janet Koven Levit, *Sanchez-Llamas v. Oregon: The Glass Is Half Full*, 11 LEWIS &

raised another question concerning federalism, national power, and state sovereignty. The Supreme Court has long recognized that treaties can confer rights upon individuals that are enforceable in courts,<sup>10</sup> and as the *LaGrand* and *Avena* cases show, states can violate those rights. Assuming, then, that such treaties are properly ratified and implemented, can individuals sue states in federal court for violating their treaty-based rights?

Until 2006, the answer to this question appeared to be no. Over the preceding decade, the Supreme Court had stringently curtailed federal encroachment on state sovereignty, particularly by strengthening state sovereign immunity from unconsented lawsuits. In the 1996 case *Seminole Tribe of Florida v. Florida*, the Court held that Congress cannot use its power under the (Indian) Commerce Clause to abrogate state sovereign immunity.<sup>11</sup> Though the facts of *Seminole Tribe* concerned only Congress's power under the Commerce Clause, the Court's opinion swept more broadly to declare that Congress could use none of its powers under Article I to abrogate state sovereign immunity.<sup>12</sup> The only previously recognized power to abrogate, the Court explained, sprang from Section 5 of the Fourteenth Amendment, which grants Congress the power to enforce the Fourteenth Amendment's other provisions.<sup>13</sup> Three years later, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court reaffirmed in dicta that

---

CLARK L. REV. 29 (2007); Margaret E. McGuinness, Sanchez-Llamas, *American Human Rights Exceptionalism and the VCCR Norm Portal*, 11 LEWIS & CLARK L. REV. 47 (2007).

10. From the earliest days of the republic, the Supreme Court has recognized that treaties can confer rights on individuals and establish private causes of action so that individuals can enforce those rights in federal court. For example, in 1796 the Court held that the Treaty of Paris between the United States and Great Britain (commonly known as the Treaty of Peace) gave a British creditor the right to sue an American citizen in federal court to recover debts owed to him under contract. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 239 (1796) ("If a British subject . . . prosecuted his just right, it could only be in a court of justice.") (opinion of Chase, J.); see also *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454, 457 (1806); *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794). Likewise, in 1817 the Court held that the Treaty of Amity and Commerce between the United States and France gave a French subject the right to hold land in the United States, and therefore allowed his heirs to bring an action to prevent the land from escheating to the state. *Chirac v. Chirac's Lessee*, 15 U.S. (2 Wheat.) 259, 270–71, 277 (1817). In the modern era, courts have generally recognized that commercial treaties—commonly called Treaties of Amity or Treaties of Friendship, Commerce, and Navigation ("FCN")—can create judicially enforceable private rights, but at least one court has bucked the trend. *Oona A. Hathaway et al., International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 94 & nn.272–74 (2012). However, with regard to the Vienna Convention, only one circuit recognizes that violations of the Convention can give rise to implied private damages actions against states or individual state officers. *Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007) ("We conclude that even though many if not most parts of the Vienna Convention address only state-to-state matters, Article 36 confers individual rights on detained nationals."); *id.* at 835–36 (holding that the detained national could seek a remedy under § 1983 for the violation of the Vienna Convention). Other circuits reach the opposite conclusion. See *Mora v. New York*, 524 F.3d 183, 187 (2d Cir. 2008); *Gandara v. Bennett*, 528 F.3d 823, 827 (11th Cir. 2008); *Cornejo v. Cnty. of San Diego*, 504 F.3d 853, 860 (9th Cir. 2007).

11. 517 U.S. 44, 47 (1996), *overruling* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

12. *Id.* at 72–73 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.")

13. *Id.* at 65.

“Congress may not abrogate state sovereign immunity pursuant to its Article I powers.”<sup>14</sup>

The treaty power is an Article II power, not an Article I power.<sup>15</sup> Nevertheless, because it is an enumerated power of the federal government—specifically, of the President and the Senate—the treaty power likely could not abrogate state sovereign immunity according to *Seminole Tribe*, unless the Court found a treaty to be valid enforcement legislation under Section 5 of the Fourteenth Amendment.<sup>16</sup> Thus, in the years immediately following *Seminole Tribe*, it seemed that individuals could not hold states accountable for violations of treaty-based rights, unless Congress protected those rights through its power to enforce the Fourteenth Amendment.<sup>17</sup> Even then, the Court rarely recognized a congressional enactment to be valid enforcement legislation.<sup>18</sup> The Court’s state sovereign immunity barrier appeared impenetrable. But in 2006, that barrier cracked.

That year, in *Central Virginia Community College v. Katz*, the Court held that state sovereign immunity did not bar federal jurisdiction over bankruptcy proceedings to recover preferential transfers against a state agency.<sup>19</sup> The Court thus disavowed the sweeping language of *Seminole Tribe* and declined to apply that decision’s holding to the Bankruptcy Clause, which is an Article I power.<sup>20</sup> Instead, the Court concluded that “States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to ‘Laws on the subject of Bankruptcies.’”<sup>21</sup> In other words, by ratifying the Constitution, the states consented to federal court jurisdiction over suits brought under federal bankruptcy legislation. The Court reached this conclusion by examining the history of the Bankruptcy Clause—

---

14. 527 U.S. 627, 636 (1999). The Court’s pronouncement on Congress’s ability to abrogate state sovereign immunity using its Article I powers was not necessary for its holding because the parties contested only whether the Patent Remedy Act, 35 U.S.C. §§ 271(h), 296(a) (2006), was a valid exercise of Congress’s power to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment. *Id.*

15. U.S. CONST. art. II, § 2, cl. 2.

16. See *Seminole Tribe*, 517 U.S. at 64–73.

17. See *id.* at 65.

18. See *infra* notes 60–63 and accompanying text.

19. 546 U.S. 356, 359 (2006). A preferential transfer is a “prebankruptcy transfer [of assets] made by an insolvent debtor to or for the benefit of a creditor, thereby allowing the creditor to receive more than its proportionate share of the debtor’s assets.” BLACK’S LAW DICTIONARY 1298 (9th ed. 2009). Under certain circumstances, a bankruptcy trustee may recover a preferential transfer from the transferee for the benefit of the bankrupt’s estate. 11 U.S.C. § 547(b) (2006).

20. *Katz*, 546 U.S. at 363 (“We acknowledge that statements in both the majority and the dissenting opinions in *Seminole Tribe* . . . reflected an assumption that the holding in that case would apply to the Bankruptcy Clause. . . . Careful study and reflection have convinced us, however, that that assumption was erroneous.”). According to the Bankruptcy Clause, “Congress shall have the power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.” U.S. CONST. art. I, § 8, cl. 4.

21. *Katz*, 546 U.S. at 377. By “plan of the Convention,” the Court referred to the design of the Constitution.

specifically, the reasons the Founders included it in the Constitution and the legislation proposed and enacted under its auspices immediately after ratification.<sup>22</sup>

*Katz* proved that *Seminole Tribe*'s and *Florida Prepaid*'s holdings reached too far in declaring that Congress could not abrogate state sovereign immunity pursuant to *any* of its enumerated powers other than Section 5 of the Fourteenth Amendment. Though *Seminole Tribe* and *Florida Prepaid* still bar abrogation of state sovereign immunity under certain Article I powers—specifically, the Commerce Clause and the Patent Clause<sup>23</sup>—*Katz*'s clause-specific approach suggests that states could be subjected to suit in federal court through other enumerated federal powers. But since *Katz*, the Supreme Court has not shed any light on the full reach of its holding. At the same time, the full scope of the treaty power remains undefined. Though the Court long ago held that the treaty power, unlike Congress's Article I powers, is not limited by subject matter,<sup>24</sup> it has not yet determined whether individuals can hold states accountable for violations of treaty-based rights.

This Comment will attempt to resolve this ambiguity by applying the reasoning *Katz* applied to the bankruptcy power to the treaty power. Using the analytical frameworks established in *Katz*, this Comment will argue that in framing and ratifying the Constitution, the states surrendered the defense of sovereign immunity in all federal court proceedings brought to enforce the nation's treaty obligations.

This limitation on sovereign immunity is significant for two reasons. First, as a practical matter, plaintiffs would have another way to enforce treaty-based rights. Although plaintiffs can, in theory, enforce their treaty-based rights against state officials through either *Ex parte Young*<sup>25</sup> injunctions or damages suits against individual officers, these remedies are limited.<sup>26</sup> Thus, opening federal courts to citizen-state treaty suits would significantly help close the rights-remedies gap. And as the number of multilateral treaties affecting human rights matters increases, plaintiffs would have more tools by which to hold states accountable for misconduct.<sup>27</sup>

In addition to providing individuals with another avenue to vindicate their rights, extending federal jurisdiction to citizen-state treaty suits would promote

---

22. *Id.* at 363–69.

23. “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

24. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

25. According to the Supreme Court's decision in *Ex parte Young*, individuals may sue state officers in their official capacities to enjoin them from violating federal law. 209 U.S. 123, 160 (1908).

26. *See infra* Part IV.A.1.

27. For examples of multilateral treaties touching on matters that were once the domain of state law, see Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 402–09 (1998).

the national interest in making and keeping international agreements. American political thinkers have long recognized the vital importance of honoring our country's treaty obligations. At the Founding, treaty violations threatened the survival of the early republic with attack from its more powerful European treaty partners.<sup>28</sup> While war may no longer be a likely or accepted outcome of treaty violations, repeated failure to comply with international agreements can still injure the United States' compelling interest in "ensuring reciprocal observance of [its treaties], protecting relations with foreign governments, and demonstrating commitment to the role of international law."<sup>29</sup> In particular, granting immunity to state violators of treaties could undermine U.S. credibility in international diplomacy.<sup>30</sup> Recognizing federal jurisdiction over citizen-state treaty suits will ensure that all actors within the United States, both private and governmental, are treated uniformly under the United States' treaty obligations. This in turn will strengthen U.S. credibility in international negotiations.

This Comment will begin in Part I by explaining briefly the Supreme Court's sovereign immunity jurisprudence, the treaty power, and the academic debate over treaties and state sovereign immunity. In Part II, it will derive from the *Katz* decision two analytical frameworks for determining whether a particular constitutional clause implies a surrender of state sovereign immunity. The first framework, which the Court applied explicitly in *Katz*, focuses on the original intent of the Framers. The second framework, which comes from the writings of Alexander Hamilton in *The Federalist*, focuses on the text of the Constitution and the nature of the power in question. In Part III, the Comment will apply these two frameworks to the treaty power. In Part IV, the Comment will reflect on the practical significance of barring assertions of state sovereign immunity in treaty-based cases and examine questions of application.

## I.

### STATE SOVEREIGN IMMUNITY AND THE TREATY POWER IN SUPREME COURT JURISPRUDENCE AND ACADEMIC DEBATE

Though the Supreme Court has acknowledged the broad scope of the treaty power, it has never expressly defined the treaty power's outer limits. Before the Court decided *Katz* in 2006, it appeared as though the treaty power could not be used to make states accountable to individuals for violations of treaty-based rights. But following *Katz*, the treaty power's broad scope may extend much further than previously imaginable. This Part introduces the Supreme Court's jurisprudence on the treaty power and state sovereign

---

28. The Founders recognized treaty violations to be *casus belli* ("just causes for war") under international law. See THE FEDERALIST NO. 3, at 42 (John Jay) (Clinton Rossiter ed., 1961).

29. *Medellín v. Texas*, 552 U.S. 491, 524 (2008).

30. Peter S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 LOY. L.A. L. REV. 1399, 1449 (1999).

immunity. It then reviews academic commentary concerning federalism-based limits on the treaty power.

*A. Overview of the Supreme Court's State Sovereign Immunity Jurisprudence*

To understand how *Katz* suggests that the treaty power can override state sovereign immunity, it is first necessary to trace briefly the Supreme Court's state sovereign immunity jurisprudence. This Section begins with the doctrine's origins in the founding era, follows its expansion in the late nineteenth century and late twentieth century, and concludes by detailing the exceptions to state sovereign immunity.

*1. Origins of the Supreme Court's State Sovereign Immunity Doctrine*

The Supreme Court's state sovereign immunity doctrine originated in the 1793 case *Chisholm v. Georgia*.<sup>31</sup> In that case, the Court upheld jurisdiction over a South Carolina citizen's action in assumpsit to compel the State of Georgia to repay war debts, even though Georgia had refused to even enter an appearance before the Court.<sup>32</sup> The basis of the Court's jurisdiction, according to the majority, was Article III, Section 2, which provides that "[t]he judicial power shall extend . . . to controversies . . . between a State and citizens of another State."<sup>33</sup> After establishing its jurisdiction to hear the citizen's suit against Georgia, the Court stated that it would enter a default judgment against Georgia unless it appeared before the Court by the next Term.<sup>34</sup>

The *Chisholm* opinion sparked a heated debate throughout the country over the nature of state sovereignty and the power of the federal government in relation to the states.<sup>35</sup> Within a year, members of Congress introduced proposals to amend the Constitution, and in 1795 the states ratified the Eleventh Amendment, which provided that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."<sup>36</sup>

---

31. 2 U.S. (2 Dall.) 419 (1793).

32. *Id.* at 479 (opinion of Jay, C.J.). Only Justice Iredell dissented, and did so only on the grounds that Congress had not specifically authorized the Supreme Court's jurisdiction over such citizen-state lawsuits. *Id.* at 449 (opinion of Iredell, J.).

33. *Id.* at 466 (opinion of Wilson, J.).

34. *Id.* at 479 (opinion of Jay, C.J.).

35. See *Alden v. Maine*, 527 U.S. 706, 720 (1999) ("The Court's decision 'fell upon the country with a profound shock.'" (quoting 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 96 (rev. ed., 1926))). Some commentators dispute whether the decision was as controversial as is commonly believed. See, e.g., John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1926 (1983).

36. U.S. CONST. amend. XI.

## 2. *Expansion of State Sovereign Immunity*

In the decades immediately after the states ratified the Eleventh Amendment, the Supreme Court read the Amendment narrowly to apply only to suits based on citizen-state diversity jurisdiction alone.<sup>37</sup> But in 1890, the Court, in *Hans v. Louisiana*, drastically expanded the Amendment's reach when it held that a citizen could not sue his own state for the violation of a federal right.<sup>38</sup> In *Hans*, the citizen petitioner sued the state of Louisiana to recover a bond debt that the state owed him.<sup>39</sup> Writing for the Court, Justice Bradley acknowledged that the express terms of the Eleventh Amendment did not apply to a case where a citizen was suing his own state; the Amendment's language concerned only suits between states and citizens of *another* state or citizens or subjects of a *foreign* state.<sup>40</sup> But if Hans could sue Louisiana, Justice Bradley reasoned, the Court would create an "anomalous result" where a state could not be sued in federal court by citizens of other states or foreign countries, but could be sued by its own citizens.<sup>41</sup> Because of this anomaly, the Court "filled in a missing term" in the Eleventh Amendment to extend its reach to suits by citizens against their own states.<sup>42</sup>

In 1934, the Court again filled in missing language by holding that the Eleventh Amendment prohibits suits against states by foreign states, even though the Eleventh Amendment's language refers only to suits by citizens or subjects of foreign states.<sup>43</sup> In doing so, the Court at least acknowledged that its sovereign immunity doctrine was becoming divorced from the words of the Eleventh Amendment.<sup>44</sup>

More recently, the Court completely abandoned any pretense that its sovereign immunity jurisprudence was rooted in the text of the Eleventh Amendment. In *Alden v. Maine*, Justice Kennedy wrote for the majority that the phrase "Eleventh Amendment immunity . . . is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment."<sup>45</sup> Rather than locating the source of states' sovereign immunity in the Eleventh Amendment, Justice Kennedy determined from "the Constitution's structure, its history, and the authoritative interpretations by this Court" that "the States'

---

37. See Gibbons, *supra* note 35, at 1941.

38. 134 U.S. 1, 10 (1890).

39. *Id.* at 1.

40. *Id.* at 10.

41. *Id.*

42. William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1299 (1989).

43. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934).

44. *Id.* at 322 ("Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control.")

45. 527 U.S. 706, 713 (1999).

immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.”<sup>46</sup>

As the Court has recognized a wider and wider reach for state sovereign immunity, it has untethered the doctrine from the Constitution’s express language. The question now, as explained in Part II below, is no longer whether an action against a state contravenes the express or implied terms of the Eleventh Amendment. Rather, the question is whether an action against a state violates an unwritten background principle of immunity—a “fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution.”<sup>47</sup> Only where this “fundamental aspect” of state sovereignty has been “altered by the plan of the Convention” or by constitutional amendment will a state be amenable to suit.<sup>48</sup>

### 3. *Exceptions to State Sovereign Immunity*

The Supreme Court has recognized several exceptions to state sovereign immunity that are relevant to the treaty power. State sovereign immunity does not bar the United States from suing a state in federal court.<sup>49</sup> Nor does it bar appeals of state criminal convictions or civil suits instituted by a state.<sup>50</sup> A state may also waive its immunity, either by voluntarily consenting to suit,<sup>51</sup> or by otherwise expressing waiver through its conduct in litigation.<sup>52</sup> These exceptions are rather narrow, leaving individuals with little recourse to hold states and their agents accountable under federal law. Thus, in *Ex parte Young*, the Court recognized an additional exception to sovereign immunity: individuals may sue state officers in their official capacities to enjoin them from violating federal law.<sup>53</sup> However, while injunctions under *Ex parte Young* have provided an important avenue for seeking relief from prospective harm, the Court has been reluctant to grant such injunctions to remedy past harm.<sup>54</sup>

---

46. *Id.*

47. *Id.*

48. *See id.*

49. *United States v. Mississippi*, 380 U.S. 128, 140–41 (1965).

50. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 302 (1821).

51. *Clark v. Barnard*, 108 U.S. 436, 447 (1883).

52. *See Lapidus v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002) (removing a state court action against the state to federal court waives sovereign immunity); *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947) (filing suit in federal court necessarily waives sovereign immunity with regard to the adjudication of the states’ claims and any defenses that may be asserted against those claims).

53. *Ex parte Young*, 209 U.S. 123, 160 (1908).

54. *See infra* Part IV.A.1.

#### 4. *Congressional Abrogation of State Sovereign Immunity*

In addition to the foregoing exceptions, the Supreme Court has recognized that Congress, under certain circumstances, may abrogate state sovereign immunity. Generally, the Supreme Court's cases concerning abrogation of state sovereign immunity form two groups—those dealing with abrogation under Section 5 of the Fourteenth Amendment, and those dealing with abrogation under other constitutional provisions.

According to Section 5 of the Fourteenth Amendment, “Congress shall have the power to enforce, by appropriate legislation, the provisions of [the Amendment].”<sup>55</sup> In the 1976 case *Fitzpatrick v. Bitzer*, the Supreme Court concluded, unanimously, that Congress's Section 5 enforcement power includes the authority to abrogate state sovereign immunity by providing for private causes of action that would otherwise be impermissible.<sup>56</sup> The Court came to its conclusion by reasoning that the Civil War Amendments to the Constitution represented a shift in the federal-state balance, specifically “the expansion of Congress' powers with the corresponding diminution of state sovereignty.”<sup>57</sup> Thus, “[w]hen Congress acts pursuant to § 5 . . . it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.”<sup>58</sup> Necessarily included within this limitation of state sovereignty is state immunity from suit.<sup>59</sup>

Although *Bitzer* would appear to establish a broad congressional power to abrogate state sovereign immunity, the Court has subsequently placed stringent limits on that authority. First, the Court requires that enforcement legislation under Section 5 include a clear statement of congressional purpose to abrogate state sovereign immunity.<sup>60</sup> Second, the Court requires enforcement legislation to be “congruen[t] and proportio[n]al[.]” to the constitutional harm it seeks to remedy.<sup>61</sup> This requirement effectively places a high evidentiary burden on Congress to show that states' constitutional violations are severe and widespread enough to justify subjecting the states to private suits. In many instances, the Court has struck down legislation as disproportionate to the

---

55. U.S. CONST. amend. XIV, § 5.

56. 427 U.S. 445, 456 (1976).

57. *Id.* at 455.

58. *Id.* at 456.

59. *See id.*

60. *Quern v. Jordan*, 440 U.S. 332, 343–45 (1979) (holding that § 1983 does not authorize suits directly against states because it lacks a clear statement of congressional purpose to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment).

61. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

alleged constitutional violations,<sup>62</sup> and has only rarely found enforcement legislation valid.<sup>63</sup>

For a brief interval, the Supreme Court recognized congressional authority to abrogate state sovereign immunity under a constitutional provision other than Section 5 of the Fourteenth Amendment. In the 1989 case *Pennsylvania v. Union Gas Company*, the Court held, 5–4, that Congress could subject states to private suits using its authority under the Commerce Clause.<sup>64</sup> But the Court’s majority was tenuous.<sup>65</sup> Seven years later the Court in *Seminole Tribe* overruled *Union Gas*, holding that Congress cannot use its authority under the (Indian) Commerce Clause to abrogate state sovereign immunity.<sup>66</sup>

Though the actual holding of *Seminole Tribe* was relatively narrow—Congress cannot abrogate state sovereign immunity from suit using its power to regulate interstate or Indian commerce—the majority opinion swept much more broadly than necessary. Writing for the majority, Chief Justice Rehnquist declared that “[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.”<sup>67</sup> He also suggested that Congress could abrogate *only* under its Section 5 power to enforce the provisions of the Fourteenth Amendment.<sup>68</sup> Declaring that no Article I power could abrogate state sovereign immunity was not necessary to the Court’s decision because Congress sought only to abrogate state sovereign immunity using its commerce power. Nevertheless, the decision’s overly broad language received strong confirmation three years later in *Florida Prepaid’s dicta*.<sup>69</sup>

---

62. See, e.g., *id.*; Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); United States v. Morrison, 529 U.S. 598 (2000); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

63. See, e.g., Tennessee v. Lane, 541 U.S. 509 (2004); Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721 (2003).

64. 491 U.S. 1, 14 (1989).

65. Justice White, who provided the fifth vote for the *Union Gas* majority, cryptically wrote in his concurrence that while he agreed with the conclusion of Justice Brennan’s majority opinion, he “[did] not agree with much of his reasoning.” *Id.* at 57 (White, J., concurring).

66. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996).

67. *Id.* at 72–73.

68. *Id.* at 65 (“Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment.”).

69. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999). In this case, College Savings Bank sued a state agency for patent infringement under the Patent Remedy Act, which Congress had passed specifically to subject states to suit for patent infringement. *Id.* at 631–32. The Supreme Court held that the Patent Remedy Act could not abrogate state sovereign immunity because it was not appropriate enforcement legislation under Section 5 of the Fourteenth Amendment. In passing the Act, Congress had identified no pattern of patent infringement or constitutional violations by the states that would make abrogation a proportional remedy. *Id.* at 647. But as in *Seminole Tribe*, Chief Justice Rehnquist’s majority opinion swept broader than necessary. None of the parties had contested or argued that Congress could abrogate state sovereign immunity under the Patent Clause or Commerce Clause, but Chief Justice Rehnquist nevertheless proclaimed that “Congress may not abrogate state sovereign immunity pursuant to its Article I powers.” *Id.* at 636.

But in 2006, the Supreme Court retreated from its broad statements in *Seminole Tribe* and *Florida Prepaid*. In *Central Virginia Community College v. Katz*, the Court held that a state agency could not assert sovereign immunity against a citizen's action to recover preferential transfers in a bankruptcy proceeding.<sup>70</sup> The state was amenable to suit, the Court held, because in ratifying the Constitution the states agreed not to assert their immunity against suits that are brought under the Bankruptcy Clause.<sup>71</sup> In making this holding, the Court disavowed its earlier language in *Seminole Tribe* and *Florida Prepaid* that suggested Congress cannot overcome sovereign immunity by using any of its Article I powers.<sup>72</sup>

### B. *The Treaty Power*

The Constitution says little about the treaty power. In fact, it mentions treaties only four times. According to Article II, “[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.”<sup>73</sup> The Supremacy Clause includes treaties as “the supreme Law of the Land,” along with the Constitution itself and any laws made pursuant to its provisions.<sup>74</sup> Under Article III, federal courts have jurisdiction to interpret treaties.<sup>75</sup> Finally, Article I categorically forbids states from entering into treaties<sup>76</sup> and requires congressional consent for states to enter into any other agreement or compact with a foreign power.<sup>77</sup>

---

70. 546 U.S. 356, 359 (2006).

71. *Id.* at 377. According to the Bankruptcy Clause, “Congress shall have the power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.” U.S. CONST. art. I, § 8, cl. 4.

72. 546 U.S. at 363 (“We acknowledge that statements in both the majority and the dissenting opinions in *Seminole Tribe* . . . reflected an assumption that the holding in that case would apply to the Bankruptcy Clause. . . . Careful study and reflection have convinced us, however, that that assumption was erroneous.”). In recent years, the Court has been more careful than it was in *Seminole Tribe* to point to only those instances where it has specifically rejected abrogation authority. *See, e.g., Va. Office for Prot. and Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 n.2 (2011) (“We have recognized that Congress may abrogate a State’s immunity when it acts under § 5 of the Fourteenth Amendment, *Seminole Tribe of Fla. v. Florida*, . . . but not when it acts under its original Article I authority to regulate commerce . . .”) (citations omitted).

73. U.S. CONST. art. II, § 2, cl. 2.

74. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

75. U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”).

76. U.S. CONST. art. I, § 10, cl. 1.

77. U.S. CONST. art. I, § 10, cl. 3. The difference between agreements, compacts, and treaties is not clear in the text of the Constitution. Some have surmised that treaties refer to political agreements like alliances and other forms of political cooperation, while compacts and agreements refer to more minor matters. *See* David Golove, *The New Confederationism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1732 n.125 (2002) (citing 3

In the Constitution, treaties resemble regular federal legislation. Both are the supreme law of the land, and both fall within the jurisdiction of federal courts. But the treaty power, as written in the Constitution, is distinct from Congress's Article I law-making powers in two main ways. First, unlike regular federal legislation, treaties are not enacted through the regular Article I process, which requires majority approval in both houses of Congress and presidential signature.<sup>78</sup> Rather, the President forms treaties with the concurrence of two-thirds of senators present.<sup>79</sup> Second, even though states may pass their own laws, the Constitution significantly restricts state power to make treaties and international agreements.<sup>80</sup> In only a few other circumstances does the Constitution place such restrictions on state action.<sup>81</sup>

### C. Overview of the Supreme Court's Treaty Power Jurisprudence

The Supreme Court has recognized that the treaty power is distinct from Congress's Article I powers and is therefore limited in different ways. Most significantly, in a 1920 opinion by Justice Holmes, the Court held that the treaty power, unlike other enumerated powers, has no subject-matter limitations.<sup>82</sup> In *Missouri v. Holland*, the state challenged the Migratory Bird Treaty Act of 1918, which implemented a 1916 treaty between the United States and Great Britain.<sup>83</sup> That treaty sought to protect several species of migratory birds from overhunting, and provided that the signatories would take necessary measures to carry out the treaty.<sup>84</sup> Congress gave effect to the treaty with the Migratory Bird Treaty Act, which prohibited the killing, capture, or selling of certain migratory birds except as permitted by federal regulations.<sup>85</sup> Missouri sought to enjoin the enforcement of the Act as an unconstitutional interference with the rights reserved to the states under the Tenth Amendment—specifically, the right to regulate the killing and selling of birds within state territory.<sup>86</sup>

---

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1397 (1833)). But the settled understanding is that the designation of an agreement as a treaty or compact is a political decision that the courts would leave to Congress. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 302 (1987).

78. See U.S. CONST. art. I, § 7. International commitments in the form of congressional-executive agreements, however, are enacted using the same Article I process as regular federal legislation. For a discussion of such agreements' effect on state sovereign immunity, see Part IV.B.

79. U.S. CONST. art. II, § 2, cl. 2. Of course, if a treaty, by its own terms, is not self-executing, then the entire Congress must also pass implementing legislation—which the President must sign—before the treaty is binding law. See *Medellin v. Texas*, 552 U.S. 491, 505 (2008).

80. See U.S. CONST. art. I, § 10.

81. See *id.*

82. *Missouri v. Holland*, 252 U.S. 416 (1920).

83. *Id.* at 430–31.

84. *Id.* at 431.

85. *Id.* at 431–32.

86. *Id.* at 430–31.

The Supreme Court held that the Act was constitutional. Justice Holmes acknowledged that in the absence of a treaty, Congress would not have had authority to displace the states' "sovereign capacity" over migratory birds, a right reserved to the states in the Tenth Amendment.<sup>87</sup> But because Congress passed the challenged Act in pursuance of a valid treaty, the constraints on congressional power were different. Treaties often deal with matters of vital national importance where states are incompetent to act, and so "it is not lightly to be assumed that, in matters requiring national action, a power which must belong to and somewhere reside in every civilized government is not to be found."<sup>88</sup> Thus, even though "the great body of private relations usually fall within the control of the State, . . . a treaty may override its power."<sup>89</sup> The Court therefore held that because the Migratory Bird Treaty dealt with a "national interest of very nearly the first magnitude" that could be "protected only by national action in concert with that of another power," the treaty and its implementing statute overrode Missouri's right to control migratory birds within its territory.<sup>90</sup>

In holding that the Migratory Bird Treaty was not "forbidden by some invisible radiation from the general terms of the Tenth Amendment,"<sup>91</sup> the *Holland* Court sharply distinguished the treaty power from other enumerated federal powers, which *are* limited by the Tenth Amendment's reservation of general police powers to the states. However, at the same time that the Court recognized the treaty power's broad scope, Justice Holmes was careful to caution that the treaty power is not limitless. He noted that the Migratory Bird Treaty did not contravene any prohibitory words in the Constitution,<sup>92</sup> suggesting that the treaty power can be limited by express restrictions on federal power in the Constitution.

Nearly forty years after *Holland*, the Court confirmed Justice Holmes's suggestion that specific, express restraints in the Constitution limit the treaty power.<sup>93</sup> In *Reid v. Covert*, the respondents were dependents of U.S. military personnel and had been convicted by U.S. military tribunals for murders they committed on U.S. bases in Great Britain and Japan.<sup>94</sup> According to international agreements with Great Britain and Japan, the United States had granted military courts exclusive jurisdiction over crimes committed in those countries by U.S. military personnel and their dependents.<sup>95</sup> But at the time of

---

87. *Id.* at 432.

88. *Id.* at 433 (internal quotations omitted).

89. *Id.* at 434.

90. *Id.* at 435.

91. *Id.* at 434.

92. *Id.* at 433.

93. *Reid v. Covert*, 354 U.S. 1 (1957).

94. *Id.* at 3–4.

95. *Id.* at 15. The agreement with Great Britain was an executive agreement, while the agreement with Japan was a treaty. *Id.* at 15 nn.29–30.

the respondents' convictions, the military tribunals did not afford the full protection of the Bill of Rights, including the Sixth Amendment right to a trial by jury.<sup>96</sup> In granting the respondents' petitions for habeas corpus, the Court held that the United States' agreements with Great Britain and Japan could not override the Sixth Amendment.<sup>97</sup> The Court reasoned that allowing international agreements to override the Bill of Rights would effectively amend the Constitution without following the requirements of Article V.<sup>98</sup> Thus, *Reid* established that, at the very least, the express restrictions on federal power in the Bill of Rights limit the treaty power.

Since *Reid*, despite some resistance from Congress, limitations on the treaty power have changed little. In the 1950s, U.S. Senator John Bricker of Ohio launched a campaign to amend the Constitution to overrule *Holland* and limit the scope of the treaty power according to the same subject matter restrictions as other federal powers.<sup>99</sup> Bricker's campaign ultimately failed, cementing Justice Holmes's broad characterization of the treaty power.<sup>100</sup> Nevertheless, the treaty power's boundaries remain undefined, particularly as to whether the treaty power can override constitutional principles, like state sovereign immunity, that are not express in the words of the Constitution.

To summarize, for a long time the Supreme Court's jurisprudence appeared to bar the federal government from using any of its enumerated powers—other than Section 5 of the Fourteenth Amendment—to override state sovereign immunity. But with *Katz*, the Supreme Court retreated from this categorical doctrine and appeared to embrace an approach that examines each clause of the Constitution to determine if a particular enumerated power can overcome state sovereign immunity. At the same time, the Supreme Court has recognized that the treaty power is expansive, apparently limited only by express restrictions on federal power like those enumerated in the Bill of Rights. In the wake of *Katz*, the question now arises whether states may be subject to citizens' suits for violations of treaty-based rights. The following Section will turn to the academic literature to review what arguments have been offered to answer this question.

#### *D. Review of the Academic Literature Concerning the Treaty Power and State Sovereign Immunity*

Most of the scholarship concerning federalism and the scope of the treaty power has focused on whether treaties should be limited by subject matter or

---

96. *See id.* at 15–16.

97. *Id.* at 17–19.

98. *See id.* at 16–17.

99. *See* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1273–75 (2000).

100. *See id.* at 1277.

anti-commandeering principles.<sup>101</sup> Only a few commentators have considered whether state sovereign immunity principles should limit treaties, and those who have considered the question have split rather evenly. Before the Supreme Court decided *Katz*, those who maintained that states are immune from treaty-based suits appeared to have the stronger doctrinal basis for their argument. But *Katz* weakened their rationale by holding that state sovereign immunity can yield to the federal government's exercise of enumerated powers other than Section 5 of the Fourteenth Amendment. Meanwhile, several of the commentators who maintained that states are not immune from individuals' treaty-based suits relied on flawed premises.

*I. Arguments That the Treaty Power Does Not Override State Sovereign Immunity*

Commentators who advocate for state sovereign immunity from treaty-based suits generally offer four different arguments to support their conclusion. The first argument is that under the Supreme Court's decision in *Reid v. Covert*, state sovereign immunity trumps the treaty power.<sup>102</sup> In *Reid*, the Court held that express constitutional restraints on federal power limit the treaty power.<sup>103</sup> Professor Scott Dodson and Professors Mitchell Berman, R. Anthony Reese, and Ernest Young observe that the Eleventh Amendment is an express constitutional restraint on federal power, and accordingly argue that, under *Reid*, state sovereign immunity must limit the treaty power.<sup>104</sup> While these commentators are certainly correct that the Eleventh Amendment is an express limit on federal power, the Supreme Court has abandoned the pretense that the Eleventh Amendment fully embodies the principle of state sovereign immunity.<sup>105</sup> Thus, it can no longer be fairly said that the principle of state

---

101. For two examples of scholarship arguing that the treaty power should be subject to the same general subject-matter and anti-commandeering restraints as Congress's enumerated powers in Article I, see Bradley, *supra* note 27, and Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000). For a response to Professor Bradley, see Golove, *supra* note 99 (arguing that because the treaty power is separately enumerated from Congress's Article I powers, it is generally not limited by the same federalism constraints).

102. See Mitchell N. Berman et al., *State Accountability for Violations of Intellectual Property Rights: How to "Fix" Florida Prepaid (and How Not To)*, 79 TEX. L. REV. 1037, 1191–94 (2001); Scott Dodson, *The Metes and Bounds of State Sovereign Immunity*, 29 HASTINGS CONST. L.Q. 721, 755, 758 (2001).

103. *Reid*, 354 U.S. at 15–19; see *supra* notes 93–98 and accompanying text.

104. See Berman et al., *supra* note 102, at 1192; Dodson, *supra* note 102, at 758.

105. See *supra* Part I.B.2; see also Va. Office for Prot. and Advocacy v. Stewart, 131 S. Ct. 1632, 1637 (2011) (“The language of the Eleventh Amendment only eliminates the basis for our judgment in the famous case of *Chisholm v. Georgia* . . . which involved a suit against a State by a noncitizen of the State. Since *Hans v. Louisiana*, . . . however, we have understood the Eleventh Amendment to confirm the structural understanding that States entered the Union with their sovereign immunity intact, unlimited by Article III’s jurisdictional grant.”); Alden v. Maine, 527 U.S. 706, 713 (1999) (“[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.”).

sovereign immunity is an *express* restraint on federal power. Rather, it is an unwritten background principle, and therefore not the kind of express constitutional provision contemplated in *Reid*.

A second argument supporting state immunity from treaty-based suits is based on the perceived impracticalities that would result from the interaction between the “last-in-time” rule and any treaty exception to state sovereign immunity. Under the last-in-time rule, a later statute may override an earlier treaty, and vice versa.<sup>106</sup> As Professor Dodson explains, if statutes passed under Congress’s Article I powers cannot override state sovereign immunity, but treaties can, then a statute passed after a treaty “could only reduce—as opposed to expand—the states’ exposure” to private lawsuits.<sup>107</sup> That would present what he deems to be the “rather peculiar” difficulty that statutes enacted to implement non-self-executing treaties could not give effect to treaty provisions requiring states to be amenable to suit.<sup>108</sup> This assumes, however, that “implementing statutes are identical to Article I statutes for state sovereign immunity purposes . . . [b]ecause both derive their authorization from the Necessary and Proper Clause.”<sup>109</sup> This assumption is not as strong in the wake of *Katz* because statutes effectuating Congress’s power under the Bankruptcy Clause presumably derive their authorization from the Necessary and Proper Clause and nevertheless override state sovereign immunity. Thus, if treaties can override state sovereign immunity, implementing statutes should as well, thereby avoiding Professor Dodson’s paradox. And even if implementing statutes could not override state sovereign immunity, the situation may be workable. It would just mean that only self-executing treaties could overcome state sovereign immunity.

The third argument for state immunity from treaty-based suits is based on the temporal relationship between the treaty power and the Eleventh Amendment. Since the treaty power came before the Eleventh Amendment in time, the Supreme Court’s resurgent state sovereign immunity doctrine does not permit abrogation.<sup>110</sup> In *Seminole Tribe*, the Supreme Court justified its holding in part on the “temporal” theory of abrogation, which posits that Congress has abrogation authority under Section 5 of the Fourteenth Amendment because the Fourteenth Amendment came after, and therefore limited, the Eleventh Amendment.<sup>111</sup> Because the Eleventh Amendment came

---

106. *Reid*, 354 U.S. at 18.

107. See Dodson, *supra* note 102, at 759. For more on treaty self-execution, see Part IV.B.

108. Dodson, *supra* note 102, at 759.

109. *Id.* at 759 n.194.

110. See Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 435 (2003); Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT’L L. 713, 726 (2001).

111. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996) (“[*Fitzpatrick v. Bitzer*] cannot be read to justify limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution.”) (internal quotations omitted).

after the treaty power, the argument goes, the Eleventh Amendment limits the treaty power. Therefore, Professor Carlos Vázquez concludes that “[t]here is little support in state sovereign immunity doctrine for an exemption for exercises of the Treaty Power.”<sup>112</sup>

Prior to *Katz*, Professor Vázquez’s conclusion seemed like the soundest reading of the Court’s sovereign immunity jurisprudence. The Court had strongly insinuated in *Seminole Tribe* and *Florida Prepaid* that Congress could abrogate state sovereign immunity only with valid enforcement legislation under Section 5 of the Fourteenth Amendment.<sup>113</sup> Even though this broad approach was not necessary to the holdings in those cases, the overall arc of the Court’s sovereign immunity jurisprudence certainly seemed to support Professor Vázquez’s argument. But since the Supreme Court held in *Katz* that states are not immune to suits brought under the Bankruptcy Clause—a constitutional provision antecedent to the Eleventh Amendment—the mere fact that a constitutional power is located in a provision antecedent to the Eleventh Amendment can no longer be determinative.<sup>114</sup> Thus, there is no longer any meaningful reason to assume that the Supreme Court’s state sovereign immunity jurisprudence applies equally to the treaty power as it does to the commerce power.

The fourth, and perhaps strongest, pro-immunity argument comes from Michael Schwaiger, who contends that the drafters of the Eleventh Amendment specifically intended it to limit the treaty power.<sup>115</sup> According to Schwaiger, the 1783 Treaty of Peace, which ended the Revolutionary War, was deeply unpopular in the early republic because it guaranteed that British creditors would be able to collect on debts, many of which the states owed.<sup>116</sup> Following the Supreme Court’s decision in *Chisholm*, which held that citizens could sue states in federal court, this popular dissatisfaction intensified into an uproar over the prospect that British creditors could bombard the states with treaty-based debt collection suits.<sup>117</sup> These fears, claims Schwaiger, largely motivated the Eleventh Amendment, whose express terms would prevent British creditors (as subjects of a foreign country) from bringing suits to recover debts from the states.<sup>118</sup> Thus, under Schwaiger’s interpretation of the history, the Eleventh

---

112. Vázquez, *supra* note 110, at 726; *see also* Swaine, *supra* note 110, at 435–46.

113. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999) (“Congress may not abrogate state sovereign immunity pursuant to its Article I powers.”); *Seminole Tribe*, 517 U.S. at 65 (“Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment.”).

114. *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 379 (2006).

115. Michael T. Schwaiger, *A Visible Radiation: Interpreting the History of the Eleventh Amendment as Foreign Policy to Circumscribe the Treaty Power*, 2 DUKE J. CONST. L. & PUB. POL’Y 217 (2007).

116. *Id.* at 246.

117. *Id.* at 251, 255–56.

118. *Id.* at 269–70.

Amendment established state immunity from the treaty-based suits of out-of-state and foreign citizens.<sup>119</sup>

In two ways, Schwaiger's historical interpretation actually supports the proposition that states should not be generally immune from treaty-based suits. First, he assumes that states were not immune to such suits prior to the Eleventh Amendment's ratification, thereby supporting the argument that states originally surrendered their immunity in the plan of the Convention.<sup>120</sup> Second, he concedes that the Eleventh Amendment, by its own terms, does not bar treaty-based suits by in-state citizens.<sup>121</sup> The only point of contention, then, is whether the Eleventh Amendment was specifically intended to bar out-of-state and foreign citizens from suing states for violations of treaty-based rights.

If Schwaiger is correct about the intent of the Eleventh Amendment's drafters, then the Amendment is a major limitation on the treaty power. It is not at all clear, however, that Schwaiger is correct—many pages have already been devoted elsewhere to divining the precise intent of the Amendment's drafters,<sup>122</sup> with an essentially indeterminate result.<sup>123</sup> And even if he is correct, the Eleventh Amendment does not totally preclude a treaty exception to state sovereign immunity; it would still allow treaty-based suits by in-state citizens. In any case, what is most important for this Comment's purposes is that Schwaiger acknowledges that the plan of the Convention likely left states amenable to treaty-based suits.

In sum, the strongest argument against a general treaty exception relies on heavily contested and unresolved assumptions about the original intent of the Eleventh Amendment's drafters. Meanwhile, the other arguments against a treaty exception to state sovereign immunity have been severely undermined by *Katz* and the Supreme Court's recognition that state sovereign immunity is a background principle of the Constitution, rather than an express textual restraint on federal power. Thus, the arguments in favor of finding a treaty exception to state sovereign immunity are left in a stronger position. Still, as explained below, these arguments have their own shortcomings.

---

119. *Id.* at 284.

120. *See id.* at 219 (“Whatever the original meaning of the Treaty Power was at the Framing, the Eleventh Amendment redefined and curtailed it dramatically. In fact, the Framers of the Eleventh Amendment saw the Supremacy Clause, and the policy reasons underlying it, not as grounds to tolerate an expansive Treaty Power, but rather as the very reasons to amend the Constitution.”).

121. *Id.* at 284.

122. *See, e.g.,* Fletcher, *supra* note 42; Gibbons, *supra* note 35; Calvin R Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989).

123. *See* Fletcher, *supra* note 42, at 1287.

## 2. *Arguments That the Treaty Power Does Override State Sovereign Immunity*

In the last ten years, a few writers have argued that states should not be immune from individual suits for violations of treaty-based rights.<sup>124</sup> Most have argued against immunity on the basis of the federal government's exclusive control over foreign affairs. Cory Eichhorn's argument is perhaps the most straightforward: according to the Supremacy Clause, treaties are the supreme law of the land, and so states must be suable for treaty violations.<sup>125</sup> Otherwise, Eichhorn argues, the ability of states to avoid treaty obligations could upset the "delicate federal/state balance" in foreign affairs mandated by the Supremacy Clause.<sup>126</sup> This supremacy argument makes intuitive sense, but Eichhorn fails to explain why treaties should be different from other federal laws, which, though they are also supreme under the Constitution,<sup>127</sup> cannot override state sovereign immunity.<sup>128</sup> Thus, Eichhorn's argument cannot be the answer.

John O'Connor goes further than Eichhorn in distinguishing the treaty power from other federal powers, but he goes too far. O'Connor reads the

---

124. Judge Gibbons also argued in his seminal article that the Framers did not understand state sovereign immunity to bar treaty-based claims. See Gibbons, *supra* note 35, at 1895–1941. Specifically, he presented historical evidence that the founding generation understood that the 1783 Treaty of Peace with Great Britain authorized creditors to bring actions against states for the repayment of debts. See *id.* at 1914–20. He then argued that the Eleventh Amendment did not bar treaty-based claims because the Federalist drafters of the Amendment shrewdly crafted it to both temper the uproar over *Chisholm* and placate Great Britain by leaving open the door to individual enforcement of treaties against the states. *Id.* at 1894. In making this historical argument, however, Judge Gibbons addressed the treaty power in a fundamentally different way than this Comment and the other scholarship discussed in this Section do. Judge Gibbons used the Treaty of Peace in the political context of the 1790s to show that the Eleventh Amendment did not bar *any* federal claims—based on treaty, statute, or the Constitution—brought against the states. See *id.* Of course, the Supreme Court has rejected this understanding of the Eleventh Amendment and state sovereign immunity, barring some citizen-state suits regardless of whether jurisdiction is based on diversity or a federal question. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (barring suit even though jurisdiction was premised on Congress's power under the Commerce Clause); *Hans v. Louisiana*, 134 U.S. 1, 10 (1890) (barring citizen-state suit even though jurisdiction was premised on violation of Contracts Clause). Therefore, the task now is to *distinguish* the treaty-based claims from other federal question cases for the purposes of state sovereign immunity. That is the task of this Comment and the scholarship examined in this Section.

125. Cory Eichhorn, Comment, *Eleventh Amendment Immunity Jurisprudence in an Era of Globalization: The Tension Between State Sovereign Rights and Federal Treaty Obligations*, 32 U. MIAMI INTER-AM. L. REV. 523, 534 (2001).

126. *Id.* at 536.

127. See U.S. CONST. art. VI, cl.2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.")

128. See, e.g., *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (1999) (Patent Clause); *Seminole Tribe*, 517 U.S. at 47 (Commerce Clause). Professor Vázquez makes this point as well. Because the Supremacy Clause refers to treaties and laws equally, that provision alone cannot be used to distinguish treaties and laws for purposes of state sovereign immunity. Vázquez, *supra* note 110, at 739.

Supreme Court's decisions in *Missouri v. Holland*<sup>129</sup> and *Curtiss-Wright*<sup>130</sup> to stand for the proposition that the federal government wields extra-constitutional power over foreign affairs.<sup>131</sup> Therefore, he writes, treaties are not only the supreme law of the land; they are totally unbounded by constitutional restraints like the principle of state sovereign immunity.<sup>132</sup> While O'Connor does provide a distinction between the treaty power and other federal powers for state sovereign immunity purposes, he overlooks two fatal objections. First, the Court in *Reid* recognized that the treaty power *is* limited by at least one kind of constitutional restraint—specifically, express constitutional provisions imposing restraints on federal power, like the Bill of Rights.<sup>133</sup> Second, if the treaty power were extraconstitutional, then it would be capable of amending the Constitution outside the process prescribed in Article V—a result at odds with the very idea of the Constitution itself, as the Supreme Court explained in *Reid*.<sup>134</sup> Because of these oversights, O'Connor's argument cannot be the answer either.

Professor Peter Menell provides the most persuasive explanation for why the treaty power is different. He argues that Congress should be able to use the treaty power to abrogate state sovereign immunity for foreign policy purposes because states possess sovereign immunity with regard to domestic affairs, but not with regard to foreign affairs.<sup>135</sup> While this argument goes a long way toward explaining why treaties should be treated differently than other legislation for the purposes of state sovereign immunity, it does not provide a fully adequate distinction for two reasons. First, the line between domestic and foreign affairs is often blurry—many treaties address subjects traditionally controlled by state law, and states are increasingly becoming involved in foreign affairs.<sup>136</sup> Second, the Supreme Court has rejected the suggestion that exclusive federal authority, by itself, confers the power to abrogate state sovereign immunity.<sup>137</sup> Therefore, exclusive federal authority alone does not provide a meaningful reason to distinguish the treaty power for sovereign immunity purposes.

---

129. 252 U.S. 416 (1920).

130. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

131. John O'Connor, Note, *Taking TRIPS to the Eleventh Amendment: The Aftermath of the College Savings Cases*, 51 HASTINGS L.J. 1003, 1039 (2000).

132. *Id.*

133. *See Reid v. Covert*, 354 U.S. 1, 17–19 (1957).

134. *See id.* at 17; Berman et al., *supra* note 102, at 1192.

135. Menell, *supra* note 30, at 1460–61 & n.240.

136. *See Berman et al., supra* note 102, at 1189 (citing as an example of the increasing overlap between domestic and foreign affairs Virginia's execution of Angel Breard, a Paraguayan national, which "involved both a core aspect of state sovereignty—the power to punish crimes under state law—as well as a serious problem for U.S. foreign policy").

137. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996) ("[W]e reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government.").

In sum, the arguments for recognizing that the treaty power overrides state sovereign immunity have significant shortcomings. Each one seeks to distinguish the treaty power based on its foreign affairs function, but fails to account for the similarities the Supreme Court has recognized between treaties and legislation limited by state sovereign immunity. With the benefit of the analytical approach explained next, these shortcomings can be avoided.

3. *Toward a Historically Informed Clause-Specific Approach for Determining Whether an Enumerated Federal Power Overrides State Sovereign Immunity*

In a 2002 response to Professor Vázquez, Professor Susan Bandes suggested a history-based inquiry to discern whether the treaty power should be able to override state sovereign immunity.<sup>138</sup> She argued that despite the Supreme Court's sweeping language in *Seminole Tribe*, the Court at the time was actually taking a clause-by-clause approach to analyzing Congress's power to abrogate state sovereign immunity.<sup>139</sup> She gleaned this insight from the Court's statements in both *Seminole Tribe* and *Alden* that states are immune from suit *except where they have surrendered their immunity in the plan of the Convention*.<sup>140</sup> The key questions, she argued, were what role the treaty power played in the plan of the Convention, and whether that role means that the treaty power should be treated differently for the purposes of state sovereign immunity.<sup>141</sup>

Professor Bandes was quite prescient in posing a historically informed clause-by-clause analysis—three years later, the Supreme Court followed a clause-specific approach in *Katz* and repudiated the sweeping language of *Seminole Tribe*, on which Professor Vázquez relied to conclude that state sovereign immunity had no treaty exception.<sup>142</sup> The Court decided, based on a historical analysis, that by ratifying the Constitution with the Bankruptcy Clause, the states surrendered their sovereign immunity to suits in bankruptcy proceedings.<sup>143</sup>

Though Professor Bandes foretold the Supreme Court's approach in *Katz*, she only posed, and did not fully answer, whether the states surrendered their immunity to treaty-based suits when they ratified the Constitution.<sup>144</sup> In light of

---

138. Susan Bandes, *Treaties, Sovereign Immunity, and "The Plan of the Convention,"* 42 VA. J. INT'L L. 743, 745 (2002).

139. *Id.*

140. *Id.* at 746–47 (citing *Alden v. Maine*, 527 U.S. 706, 728 (1999); *Seminole Tribe*, 517 U.S. at 68).

141. *Id.* at 747–48.

142. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006).

143. *See id.* at 373–78.

144. She does note that “[t]reaties are different from federal statutes in obvious ways” because the treaty power is located in Article II, the Framers understood treaties to be a unique mix of legislative and executive power, and they contain unique structural safeguards. Bandes, *supra* note

her insights and the Supreme Court's analysis in *Katz*, this Comment answers that question by applying the reasoning of *Katz* to conclude that the treaty power, like the bankruptcy power, overrides state sovereign immunity.

## II.

### THE *KATZ* FRAMEWORKS

The Supreme Court's decision in *Central Virginia Community College v. Katz* broke through what until then had seemed like an impenetrable barrier of state sovereign immunity. Though *Katz* dealt specifically with Congress's power under the Bankruptcy Clause, its broad approach can apply to other federal powers, including the treaty power. This Part explains the *Katz* decision and its analytical frameworks. Part III then applies *Katz*'s analytical frameworks to the treaty power and shows that states should not be immune from individuals' treaty-based suits.

#### A. *Central Virginia Community College v. Katz*

In *Katz*, the Supreme Court held that a state could not assert sovereign immunity in a bankruptcy proceeding. It found that, by ratifying the Constitution and the Bankruptcy Clause—which grants to Congress the power to enact uniform bankruptcy laws—the states agreed to surrender their immunity in such proceedings.<sup>145</sup> A bookstore company that did business with Virginia state colleges filed for chapter 11 bankruptcy, but before it did so, it allegedly made preferential transfers to those state colleges.<sup>146</sup> The court-appointed liquidating supervisor, Bernard Katz, sought to nullify and recover those preferential transfers by filing an action in the bankruptcy court against the state colleges pursuant to § 547(b) and § 550(a) of the Bankruptcy Code.<sup>147</sup> The state colleges moved to dismiss the proceedings, arguing that as arms of the state they were entitled to sovereign immunity.<sup>148</sup> The bankruptcy court

---

138, at 748. But beyond noting these differences, she does not explain how these differences matter for purposes of sovereign immunity.

145. *Katz*, 546 U.S. at 377.

146. *Id.* at 360. As explained above in note 19, a preferential transfer is a “prebankruptcy transfer [of assets] made by an insolvent debtor to or for the benefit of a creditor, thereby allowing the creditor to receive more than its proportionate share of the debtor’s assets.” BLACK’S LAW DICTIONARY, *supra* note 19, at 1298.

147. Under § 547(b) of the Bankruptcy Code, a bankruptcy trustee “may avoid any transfer [to the creditor] of an interest of the debtor in property . . . made . . . on or within 90 days before the date of the filing of the [bankruptcy] petition” that would enable the creditor to receive more than it otherwise would be entitled to under the Bankruptcy Code. 11 U.S.C. § 547(b) (2006). Under § 550(a), the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or (2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550(a) (2006).

148. *Katz*, 546 U.S. at 360.

denied the motion, and both the district court and court of appeals affirmed.<sup>149</sup> In a 5–4 decision, the Supreme Court affirmed the judgment of the lower courts and rejected the state colleges’ sovereign immunity defense.<sup>150</sup>

Initially, the Court granted certiorari to consider whether Congress had validly abrogated state sovereign immunity by passing 11 U.S.C. § 106(a), which provides a clear statement that states may not assert immunity with respect to § 547 and § 550 of the Bankruptcy Code.<sup>151</sup> But for the *Katz* majority, that question was beside the point.<sup>152</sup> The majority found that the clear statement of abrogation in § 106(a) was never necessary to authorize *Katz*’s suit against the state because the “[s]tates agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to the ‘Laws on the subject of Bankruptcies.’”<sup>153</sup> In other words, the Court recognized that a state may not only consent to a particular lawsuit,<sup>154</sup> but may also have consented in advance to an entire category of lawsuits simply by having ratified the Constitution or joined the Union.<sup>155</sup> Once a court determines that a particular constitutional provision reflects the states’ consent not to assert sovereign immunity, the only remaining question is whether that provision authorizes a particular federal court proceeding.<sup>156</sup>

To decide whether a particular constitutional provision overrides state sovereign immunity, a court must determine whether the “[s]tates agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to” that provision.<sup>157</sup> The *Katz* decision suggested two analytical frameworks for making this determination: one that the Court expressly relied upon, and an alternative that the Court did not rely upon, but nevertheless acknowledged with approval. The frameworks

---

149. *Id.* at 361.

150. *Id.* at 379.

151. *Id.* at 361.

152. *Id.* at 379.

153. *Id.* at 377 (quoting U.S. CONST. art. I, § 8, cl. 4).

154. *See supra* notes 51 and 52 and accompanying text describing how states may consent to particular lawsuits through either express waiver or their conduct in litigation.

155. *Katz*, 546 U.S. at 377; *see also* *Alden v. Maine*, 527 U.S. 706, 713 (1999) (“States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention.”); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (“[A] State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the ‘plan of the convention.’”); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934) (“States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been ‘a surrender of this immunity in the plan of the convention.’” (quoting THE FEDERALIST NO. 81, *supra* note 28, at 455 (Alexander Hamilton))).

156. *Katz*, 546 U.S. at 379.

157. *See id.* at 377.

are closely intertwined. Both look to whether the Constitution subordinates state sovereignty so as to preclude immunity from suit.

*B. Katz's Express Analytical Framework: Identifying the Framers' Intent*

Justice Stevens's opinion for the majority focused on the Framers' intent for the Bankruptcy Clause.<sup>158</sup> The Bankruptcy Clause gives Congress the power to establish uniform, national bankruptcy laws, and thus represents an agreement on the part of the states to consent to federal court jurisdiction over private suits. By examining “[t]he history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution,” Justice Stevens concluded that the Bankruptcy Clause “was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena.”<sup>159</sup> This intent-based approach can be condensed into three steps: first, look at the historical backdrop of the constitutional provision; second, use that historical backdrop to establish why the provision was included in the Constitution; and third, determine from the legislation enacted under its auspices immediately following ratification whether the founding generation understood the provision to entail a surrender of state sovereign immunity.

To build a picture of the Bankruptcy Clause's historical backdrop—the first step of the analysis—Justice Stevens examined founding-era history and court cases.<sup>160</sup> At the time of the Founding, he discovered, debtors in England and America were commonly imprisoned in harsh conditions.<sup>161</sup> But unlike in England, where a discharge by the sovereign sufficiently protected a debtor from further imprisonment, the deeply dysfunctional system in the young United States caused significant injustice to debtors.<sup>162</sup> Specifically, the states had “wildly divergent schemes for discharging debtors and their debts,” which meant that a debtor could be discharged in one state and then imprisoned in another state for the same debt.<sup>163</sup>

For the second step of his analysis—identifying the reasons for the Bankruptcy Clause's inclusion in the Constitution—Justice Stevens found that the Framers adopted the Bankruptcy Clause to remedy the dysfunction and

---

158. U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have Power . . . To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.”).

159. *Katz*, 546 U.S. at 362–63.

160. *Id.* at 365–69.

161. *Id.* at 365 (citing BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 78–108 (2002)).

162. *Id.* at 365–66 (citing PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900* (1999)).

163. *Id.* at 365.

injustice of a nonuniform bankruptcy system.<sup>164</sup> At the Constitutional Convention, the members submitted to the Committee of Detail a proposal to include insolvency laws within the Full Faith and Credit Clause.<sup>165</sup> The Committee of Detail instead recommended adding the power to establish uniform laws of bankruptcy to the Naturalization Clause of Article I, which the Convention did with little debate.<sup>166</sup> Justice Stevens took this history to show an intention to “authoriz[e] a uniform federal response” to the messy and unjust bankruptcy schemes of the states.<sup>167</sup>

The last step of Justice Stevens’s analysis—examining legislation considered and enacted under the Bankruptcy Clause’s auspices immediately following the Constitution’s ratification<sup>168</sup>—is perhaps the most important because it established the Framers’ understanding that bankruptcy laws may override state sovereignty. Justice Stevens explained that the Bankruptcy Act of 1800, enacted by the Sixth Congress, involved an exceptional invasion of state sovereignty—for instance, it granted federal courts the power to issue writs of habeas corpus to release debtors from *state* prisons.<sup>169</sup> As Justice Stevens noted, it would take another sixty-seven years and a Civil War before federal courts would have the general power to issue writs of habeas corpus for state prisoners.<sup>170</sup> Moreover, this grant of habeas power was adopted without objection in the midst of the debate over the Eleventh Amendment, when “state sovereign immunity could hardly have been more prominent among the Nation’s concerns.”<sup>171</sup> Because the Bankruptcy Clause “was understood to carry with it the power to subordinate state sovereignty, albeit within a limited sphere,” Justice Stevens came to the “ineluctable conclusion” that the “States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to ‘Laws on the subject of Bankruptcies.’”<sup>172</sup>

### C. Katz’s *Alternative Analytical Framework: The Hamiltonian Approach*

Lurking in the footnotes of the *Katz* opinion is another framework that supports the Court’s decision, even though the majority did not expressly rely upon it.<sup>173</sup> This alternative framework, which is based on Alexander Hamilton’s writings in *The Federalist*, is closely related to *Katz*’s intent-based framework

164. *Id.* at 363.

165. *Id.* at 368–69 (citing Kurt H. Nadelmann, *On the Origin of the Bankruptcy Clause*, 1 AM. J. LEGAL HIST. 215, 216–17, 219 (1957); Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 527–28 (1996)).

166. *Id.* at 369.

167. *Id.*

168. *Id.* at 373–78.

169. *Id.* at 374.

170. *Id.*

171. *Id.* at 375.

172. *Id.* at 377.

173. *See id.* at 376 n.13.

in that it relies on historical understandings and inferences about the Framers' intent. But the Hamiltonian approach also stands independently—and may be even more persuasive—because it relies on textual and functional analysis in addition to historical understandings.

In *The Federalist No. 81*, Hamilton sought to assuage fears that the proposed Constitution would subject states to a barrage of private suits:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal.<sup>174</sup>

The first part of this passage, regarding consent, has stood prominently in the Supreme Court's jurisprudence for the proposition that the states are inherently immune from unconsented private suits.<sup>175</sup> But the Court's state sovereign immunity cases have not addressed the latter part of Hamilton's passage—whether the states surrendered their immunity in the plan of the Convention. This, according to *Katz*, is the key question in analyzing whether a particular constitutional power can subject states to suit. While the *Katz* Court answered this question by looking principally to the Framers' intent, Hamilton himself provided a framework for analyzing each constitutional power.

In the same passage in *The Federalist No. 81*, Hamilton referred to an earlier essay, *The Federalist No. 32*, to determine the circumstances in which states have surrendered their immunity.<sup>176</sup> In that essay, Hamilton explained three situations where the plan of the Convention alienates state sovereignty: first, “where the Constitution in express terms granted an exclusive authority to the Union”; second, “where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority”; and third, “where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.”<sup>177</sup> About the third category, Hamilton was careful to explain that even if the exercise of a particular power by both state and federal governments occasionally results in inexpedient clashes of policy, there is not necessarily “direct contradiction and repugnancy in point of constitutional authority.”<sup>178</sup>

---

174. THE FEDERALIST NO. 81, *supra* note 28 at 455–56 (Alexander Hamilton).

175. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 716–17 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 634 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934).

176. THE FEDERALIST NO. 81, *supra* note 28 at 456 (Alexander Hamilton) (“The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here.”).

177. THE FEDERALIST NO. 32, *supra* note 28, at 198 (Alexander Hamilton).

178. *Id.*

Only where there is a constitutional *inability* of both sovereigns to exercise the power will there be “direct contradiction and repugnancy”—and therefore an alienation of state sovereignty—under category three.<sup>179</sup>

As an example of a power that does not imply an alienation of state sovereignty under category three, Hamilton cited taxation.<sup>180</sup> Even if it is “possible that a tax might be laid on a particular article by a State which might render it *inexpedient* that a further tax should be laid on the same article by the Union,” he wrote, “it would not imply a constitutional inability to impose a further tax.”<sup>181</sup> In other words, though it may sometimes be inefficient, state and federal governments can exercise the taxation power over the same items. Therefore, there is no “immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty.”<sup>182</sup>

In contrast, as an example of where there *is* “an immediate constitutional repugnancy” in the concurrent exercise of state and federal power, Hamilton cited Congress’s power “[t]o establish an UNIFORM RULE of naturalization.”<sup>183</sup> If states exercised any control over rules of naturalization, then there could be no uniform national rule—a result that would be in direct conflict with the Constitution’s express grant of power to Congress to establish a uniform rule.<sup>184</sup> Because of the incompatibility of state and federal control over naturalization, Congress’s power to establish a uniform rule necessarily implies an alienation of state sovereignty.<sup>185</sup>

Hamilton’s three categories in *The Federalist No. 32* were based on the Constitution’s text and the nature of the power in question: Hamilton relied on the text in determining whether federal authority is expressly exclusive under categories one and two,<sup>186</sup> and he relied on the nature of the power conferred by a particular clause to determine whether the power to establish uniform rules necessarily implies a surrender of state sovereign immunity under category three.<sup>187</sup>

179. *Id.* (“It is not, however, a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty.”); *see also id.* at 200–01.

180. *Id.* at 198–200.

181. *Id.* at 200.

182. *Id.* at 200–01.

183. *Id.* at 199; *see* U.S. CONST. art. I, § 8, cl. 4.

184. THE FEDERALIST NO. 32, *supra* note 28, at 199 (Alexander Hamilton) (“[The power to establish uniform rules of naturalization] must necessarily be exclusive; because if each state had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE.”); *see also* *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193–94 (1819) (Marshall, C.J.) (“The peculiar terms of the grant certainly deserve notice. Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to *establish* uniform laws on the subject throughout the United States.”).

185. THE FEDERALIST NO. 32, *supra* note 28, at 199 (Alexander Hamilton).

186. *See supra* note 177 and accompanying text.

187. *See supra* notes 180–85 and accompanying text.

Independently of *Katz*'s intent-based approach, Hamilton's approach provides a powerful framework for determining whether a particular grant of power in the Constitution requires that states surrender sovereign immunity. Indeed, Judge Randolph Haines used this framework in an article to argue, before the Court decided *Katz*, that the Bankruptcy Clause implies a surrender of state sovereign immunity.<sup>188</sup> Noting that the power to establish uniform bankruptcy laws appears in the same clause as the power to establish uniform rules of naturalization, Judge Haines concluded that the bankruptcy power fell within Hamilton's third category and therefore must override state sovereign immunity.<sup>189</sup>

While the *Katz* Court did not explicitly rely upon Hamilton's framework, it did cite *The Federalist Nos. 32 and 81* to support its holding.<sup>190</sup> According to the Court, the grant of the power to establish uniform bankruptcy laws means that bankruptcy laws are qualitatively different from federal laws passed under other constitutional provisions.<sup>191</sup> Not only are bankruptcy rules the supreme law of the land, but also they can require that state and private creditors be treated the same for the purposes of bankruptcy proceedings—regardless of state sovereign immunity.<sup>192</sup> Thus, the Court analyzed the Bankruptcy Clause's text and the nature of the uniform bankruptcy power as additional support for the argument that the bankruptcy power overrides state sovereign immunity.

In many ways, Hamilton's framework is more complete than the intent-based approach expressly employed in *Katz*—it captures better the functional reasons for precluding the assertion of sovereign immunity in certain circumstances, while also taking account of the Framers' intent. Either framework, though, yields the same result: the treaty power abrogates state sovereign immunity.

---

188. Randolph J. Haines, *The Uniformity Power: Why Bankruptcy Is Different*, 77 AM. BANKR. L.J. 129 (2003). In his article Judge Haines also presents historical evidence to show that the Framers understood the bankruptcy power to imply a surrender of state sovereign immunity. *See id.* at 145–57, 173–96. The Supreme Court borrowed heavily from this part of Judge Haines's argument to establish one of the most important points in its intent-based reasoning. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 374–75 & n.11 (2006) (citing Judge Haines to establish the significance of Congress granting habeas corpus power to the federal courts in the Bankruptcy Act of 1800).

189. *See Haines, supra* note 188, at 173–74. Because Congress cannot establish rules that apply uniformly to all creditors if states can choose to opt out by asserting sovereign immunity, states must not be able to assert sovereign immunity in suits brought pursuant to bankruptcy laws. *See id.* at 131.

190. *Katz*, 546 U.S. at 376–77 n.13 (“Although our analysis does not rest on the peculiar text of the Bankruptcy Clause as compared to other Clauses of Article I, we observe that, if anything, the mandate to enact ‘uniform’ laws supports the historical evidence showing that the States agreed not to assert their sovereign immunity in proceedings brought pursuant to ‘Laws on the subject of Bankruptcies.’”) (citations omitted) (citing Haines, *supra* note 188, at 158–72; THE FEDERALIST NO. 32, *supra* note 28, at 197–201 (Alexander Hamilton); THE FEDERALIST NO. 81, *supra* note 28 (Alexander Hamilton)).

191. *Katz*, 546 U.S. at 376–77 n.13; *see also Haines, supra* note 188, at 173–74.

192. *Katz*, 546 U.S. at 376–77 n.13.

## III.

WHY THE TREATY POWER ABROGATES STATE SOVEREIGN IMMUNITY:  
APPLYING *KATZ*'S FRAMEWORKS

Both of the analytical frameworks suggested in *Katz*—the historical intent-based approach that the majority expressly adopts and the Hamiltonian approach that the majority acknowledges with approval—support the proposition that the treaty power implies a surrender of state sovereign immunity. The history of the treaty power and the treaties made immediately following the Constitution's ratification show that the Framers intended that state sovereignty would yield to the nation's treaty obligations. Additionally, the Constitution's text and the treaty power's nature imply that states must be amenable to private suits when treaty obligations so require.

*A. The Extension of Katz's Analytical Frameworks Beyond the Bankruptcy Clause*

Before applying *Katz*'s reasoning to the treaty power, it is important to address a potential objection. In reaching the conclusion that the states consented in the plan of the Convention not to assert sovereign immunity in bankruptcy proceedings, the Court emphasized that “[t]he scope of this consent was limited”—it applied only to “proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts.”<sup>193</sup> Thus, it might be argued, the Bankruptcy Clause overrides state sovereign immunity only because of the unique *in rem* nature of bankruptcy.

However, confining *Katz* to the *in rem* nature of bankruptcy misses the point of the Court's reasoning. Whether a bankruptcy proceeding is “necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts” is relevant chiefly for deciding whether that proceeding is properly within the scope of the bankruptcy power, not for deciding whether the bankruptcy power itself overrides state sovereign immunity.<sup>194</sup> It is certainly true that the Court considered the *in rem* nature of bankruptcy relevant to the ultimate question of whether the bankruptcy power overrides state sovereign immunity.<sup>195</sup> However, that was only one consideration in addition to the Court's historical analysis of the bankruptcy power, and the Court expressly refused to base its decision solely on the *in rem* character of the lawsuit at hand.<sup>196</sup> Instead, the Court

---

193. *Id.* at 378.

194. *See id.* (“In ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts.”).

195. *Id.* (“The scope of [the states'] consent [to bankruptcy suits] was limited; the jurisdiction exercised in bankruptcy proceedings was chiefly *in rem*—a narrow jurisdiction that does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction.”).

196. *Id.* at 372 (“[I]t is not necessary to decide whether actions to recover preferential transfers pursuant to § 550(a) are themselves properly characterized as *in rem*. Whatever the appropriate

explained that “[t]he Framers would have understood that laws ‘on the subject of Bankruptcies’ included laws providing, in certain limited respects, for more than simple adjudications of rights in the res,” including in personam suits directed against states.<sup>197</sup>

Thus, the in rem nature of bankruptcy proceedings was not the key to the *Katz* Court’s holding on sovereign immunity. Rather, it was the key to determining whether a law is actually a legitimate use of the power conferred under the Bankruptcy Clause.<sup>198</sup> Whether the Bankruptcy Clause implies a surrender of state sovereign immunity is a separate question that the Court answered using the analytical frameworks discussed above, and that the next Sections will answer.

### B. Applying *Katz*’s Intent-Based Framework

Following the express approach of Justice Stevens’s majority opinion, this Section shows that the Framers intended in the plan of the Convention that the treaty power would trump state sovereign immunity. By looking at (1) the historical backdrop of the treaty power, (2) the reasons the Framers added the treaty power to Article III and the Supremacy Clause, and (3) the treaties made in the new nation’s first years, we can see that the founding generation understood that treaty enforcement severely limited state sovereignty.

#### 1. *The Historical Backdrop of the Treaty Power: Rampant Treaty Violations*

The *Katz* Court found that before the Founders established a unitary bankruptcy power in the Constitution, the states’ “wildly divergent schemes for discharging debtors and their debts” posed a difficulty “peculiar to the American experience.”<sup>199</sup> The Court then used this historical backdrop to understand the purposes behind the Bankruptcy Clause.<sup>200</sup> In the same way, an understanding of the historical backdrop of the treaty power sheds light on its purpose.

---

appellation, those who crafted the Bankruptcy Clause would have understood it to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property.”).

197. *Id.* at 370. As an example of a law providing for more than in rem adjudications, Justice Stevens cited “Congress’s early grant to the federal courts of the power to issue *in personam* writs of habeas corpus directing States to release debtors from state prisons.” *Id.* at 371. Justice Stevens also strongly suggested that the action at issue in the case—an action to compel the state to turn over property—might be an in personam suit against the state. *Id.* at 372. Subsequent commentary has confirmed that the suit in *Katz* was properly characterized as in personam. See Susan E. Hauser, *Necessary Fictions: Bankruptcy Jurisdiction After Hood and Katz*, 82 TUL. L. REV. 1181, 1223–24 (2008).

198. See *Katz*, 546 U.S. at 378 n.15 (“We do not mean to suggest that every law labeled a ‘bankruptcy’ law could, consistent with the Bankruptcy Clause, properly impinge upon state sovereign immunity.”).

199. *Id.* at 365–66.

200. *Id.* at 368–69.

When the delegates to the Constitutional Convention gathered in Philadelphia in 1787, among their principal concerns was finding a way to ensure that the United States honored its obligations under the 1783 Treaty of Peace, which ended the Revolutionary War.<sup>201</sup> Since the treaty was signed, the national government under the Articles of Confederation had been utterly powerless to prevent or remedy rampant violations of the treaty by the states.<sup>202</sup> This inability caused alarm among the Constitution's Framers because of the likelihood that treaty violations would embroil the young and vulnerable country in war.<sup>203</sup> Indeed, protecting national security by preventing and remedying treaty violations was a chief motivation for calling a Constitutional Convention in the first place.<sup>204</sup>

The most commonly violated provisions of the Treaty of Peace concerned debt and confiscated property. Prior to the conclusion of the treaty in 1783, many states had nullified debts owed to British creditors by passing laws reassigning the debts to state treasuries, and then either discharging those debts or making them payable in less valuable state bills of credit.<sup>205</sup> Many states had also confiscated the property of British subjects and loyalists.<sup>206</sup> During negotiations over the Treaty of Peace, Great Britain extracted from the United States several provisions that sought to protect British creditors and estate holders, chief among them articles IV and VI. Article IV of the treaty reversed the states' discharges of debt due to British creditors by providing that "creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted."<sup>207</sup> Article VI prohibited further confiscations of property.<sup>208</sup>

201. See *infra* notes 216–21 and accompanying text; see also Gibbons, *supra* note 35, at 1902; Golove, *supra* note 99, at 1102.

202. See *infra* notes 216–21 and accompanying text.

203. See THE FEDERALIST NO. 3, *supra* note 28, at 42–43 (John Jay) ("The *just* causes of war, for the most part, arise either from violations of treaties or from direct violence. America has already formed treaties with no less than six foreign nations, and all of them, except Prussia, are maritime, and therefore able to annoy and injure us . . ."); Gibbons, *supra* note 35, at 1902; Golove, *supra* note 99, at 1115–16.

204. See Gibbons, *supra* note 35, at 1901–02.

205. See *id.* at 1901; Golove, *supra* note 99, at 1151.

206. See Gibbons, *supra* note 35, at 1901; Golove, *supra* note 99, at 1116–17.

207. Definitive Treaty of Peace Between the United States and His Britannic Majesty, U.S.-Gr. Brit., art. IV, Sept. 3, 1783, 8 Stat. 80 [hereinafter Treaty of Peace]. Although article IV mentions "creditors on either side," the debts were overwhelmingly owed to British creditors. See Gibbons, *supra* note 35, at 1900.

208. Treaty of Peace, *supra* note 207, art. V. As for confiscations that had already been completed by 1783, article V of the treaty provided that Congress would "earnestly recommend it to the legislatures of the respective states, to provide for the restitution of all estates, rights and properties, which have been confiscated, belonging to real British subjects" who had not borne arms against the United States. *Id.* It is unclear why the treaty negotiators agreed only to recommend to the states the restitution of property already confiscated, while they mandated the resuscitation of debts that had been discharged under state law. One commentator has argued that the U.S. negotiators, as a tactic, claimed that Congress lacked power over already confiscated estates in order to extract more favorable terms from the British. See Golove, *supra* note 99, at 1117–22.

Despite the clarity of articles IV and VI, many states refused to comply. Several states imposed additional barriers to the collection of debt, and some continued to confiscate the property of loyalists and British subjects.<sup>209</sup> Southern states in particular resisted compliance with the treaty after learning that the British army had taken thousands of slaves when it evacuated.<sup>210</sup> In response to these violations, Great Britain refused to abide by its own obligations under the treaty, including its promise to evacuate its troops from the Northwest Territory.<sup>211</sup> The continued presence of the British army threatened U.S. security with the outbreak of another war.<sup>212</sup> In response to a lengthy report from John Jay—then the Secretary of Foreign Affairs for the Confederation—detailing the states’ transgressions and Great Britain’s resulting grievances,<sup>213</sup> the Confederation Congress passed a resolution urging states to repeal any laws inconsistent with the Treaty of Peace.<sup>214</sup> Still, several states, especially Virginia, continued to resist.<sup>215</sup>

The Framers at the Constitutional Convention in Philadelphia were well aware of the states’ rampant treaty violations and the consequent threats to the nation’s security. Indeed, there was near consensus on the need for the new Constitution to ensure treaty compliance by the states. For example, in his remarks opening the main business of the Convention, Edmund Randolph listed the defects of the Articles of Confederation.<sup>216</sup> At the top of his list was the inability of Congress to prevent war by punishing the states’ infractions of treaties.<sup>217</sup> Without this enforcement power, he explained, the “particular states might by their conduct provoke war without controul.”<sup>218</sup> Later in the Convention, James Madison echoed Randolph’s concern that treaty violations would “involve us in the calamities of foreign wars.”<sup>219</sup> Madison observed that “[t]he tendency of the States to these violations has been manifested in sundry instances,” leading the United States’ treaty partners to file numerous complaints with Congress.<sup>220</sup> While those foreign powers had thus far restrained themselves from declaring war, Madison warned that they would not do so forever, and so he urged the Convention to adopt a Constitution that would bring the states into line: “A rupture with other powers is among the

---

209. See Gibbons, *supra* note 35, at 1901 (citing SAMUEL FLAGG BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES 72 (1967)).

210. *Id.*

211. *Id.* at 1902.

212. *Id.*; Golove, *supra* note 99, at 1116.

213. See 4 SECRET JOURNALS OF THE ACTS AND PROCEEDINGS OF CONGRESS 285–86 (1821).

214. Golove, *supra* note 99, at 1126–27.

215. *Id.*

216. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 18–19 (Max Farrand ed., 1911).

217. *Id.*

218. *Id.* at 19.

219. *Id.* at 316.

220. *Id.*

greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring [such calamities] on the whole.”<sup>221</sup>

Following the Convention, the need to compel state compliance with the nation’s treaty obligations was a prominent topic of the ratification debates. At the Pennsylvania ratifying convention, James Wilson observed that “it is acknowledged on all sides, that many states in the Union have infringed the [Treaty of Peace],” and that unless the United States fully performed its obligations under the treaty, the British army would not leave its posts in the Northwest Territory.<sup>222</sup> At the Virginia convention, Francis Corbin put the situation in starker terms:

Fatal experience has proved that treaties would never be complied with, if their observance depended on the will of the states; and the consequences would be constant war. For if any one state could counteract any treaty, how could the United States avoid hostility with foreign nations? Do not gentlemen see the infinite dangers that would result from it, if a small part of the community could drag the whole confederacy into war?<sup>223</sup>

In similar terms as Corbin, Hamilton urged New Yorkers to support the new Constitution in part to ensure that state treaty violations would not endanger the security of the fragile Union:

The treaties of the United States under the [Articles of Confederation] are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed.<sup>224</sup>

Taken as a whole, the backdrop to the Constitution’s framing and ratification was one where states brazenly violated crucial treaties, especially the Treaty of Peace with Great Britain. The situation was untenable, just as the states’ regulation of bankruptcy was untenable before the Constitution granted Congress the power to unify bankruptcy law.<sup>225</sup> Indeed, the states’ failure to abide by the nation’s treaty obligations not only resulted in injustice to individuals,<sup>226</sup> but also threatened the security and survival of the young

---

221. *Id.*

222. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION: AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 490 (Jonathan Elliot ed., 2d ed. 1996) [hereinafter ELLIOT’S DEBATES].

223. 3 ELLIOT’S DEBATES, *supra* note 222, at 510.

224. THE FEDERALIST NO. 22, *supra* note 28, at 151 (Alexander Hamilton).

225. *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 368–69 (2006).

226. While the threat to national security from treaty violations was the principal focus of the Framers, justice for individuals was also a significant concern. *See* 3 ELLIOT’S DEBATES, *supra* note 222, at 575 (Randolph urging the Virginia convention to ratify the Constitution because it would do justice by making Virginia pay the debts owed to individual creditors); 1 RECORDS OF THE

republic. The Framers' statements at the Convention and the subsequent ratification debates express the clear sense that the new Constitution would have to somehow prevent the states' potentially destructive behavior. How they went about doing so is the subject of the next Section.

## 2. *How the Framers Understood the Constitution Would Solve the Historical Problems with Treaty Compliance*

In *Katz*, the Supreme Court explored how the Framers viewed the Bankruptcy Clause as it was finally worded to address the historical problems with inconsistent bankruptcy laws.<sup>227</sup> The Court then determined that the Framers understood the Bankruptcy Clause to ensure that every state would honor debtors' discharges.<sup>228</sup> Similarly, examining the Framers' explanations for the treaty power's structure in the proposed Constitution shows how they understood the treaty power would address rampant treaty violations by states.

Faced with the prospect that the "infractions of thirteen different legislatures"<sup>229</sup> would threaten the peace and security of the Union, the Framers sought a way to ensure that the states uniformly honored the nation's treaty obligations. Ultimately, the solution the Framers devised to prevent treaty violations was to make treaties the supreme law of the land<sup>230</sup> and to assign federal courts the task of enforcing treaties against both states and private individuals.<sup>231</sup>

By including treaties within the Supremacy Clause, the Framers furthered their goal of uniform treaty compliance in two ways. First, they empowered the federal government to give full effect to treaties without state action. Previously, under the Articles of Confederation, state legislatures had to give effect to treaty provisions, such as article V of the Treaty of Peace providing for restitution of confiscated property.<sup>232</sup> By contrast, under the Constitution, treaties could mandate, rather than recommend, that states comply.<sup>233</sup> Second, supremacy achieved the goal of uniform compliance by overriding any state

---

CONVENTION, *supra* note 216, at 238 (Randolph urging the committee of the whole to agree that the national judiciary should establish "the security of foreigners where treaties are in their favor").

227. 546 U.S. at 368–69.

228. *Id.*

229. THE FEDERALIST NO. 22, *supra* note 28, at 151 (Alexander Hamilton).

230. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.")

231. See U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.")

232. See Treaty of Peace, *supra* note 207, art. V (requiring the United States to encourage, but not mandate, state compliance); SAMUEL B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 34–36 (2d ed. 1916).

233. While the Constitution can mandate compliance, whether a treaty is automatically binding upon ratification depends on whether it is self-executing. See *infra* Part IV.B.

law or constitution that was inconsistent with a treaty.<sup>234</sup> At the time of the Founding, the most glaring examples of inconsistent state laws were those impeding the collection of debts owed to British creditors under article IV of the Treaty of Peace.<sup>235</sup> Making the Treaty of Peace the supreme law of the land ensured that state and federal judges would not recognize the laws of states like Virginia that tried to prevent British creditors from collecting debts in court.

The Framers also guaranteed uniform treaty observance by including treaties within the Article III jurisdiction of federal courts. Doing so first ensured uniform interpretation of treaties—regardless of whether a particular treaty question was addressed in the first instance by a state court or a lower federal court, the U.S. Supreme Court would have the final say. This was a principal concern for the Framers, who feared that inconsistent or erroneous pronouncements by different state high courts would jeopardize security.<sup>236</sup>

Including treaties within the federal courts' jurisdiction ensured not only that treaties would be uniformly interpreted, but also that treaties would be uniformly applied to all actors within the country, including states. In his opening remarks to the federal Convention, Randolph criticized the Articles of Confederation for their inability to punish the states' violations of treaties.<sup>237</sup> Later, during the Virginia ratification debate, he seemed satisfied that the new federal courts would enforce treaties against the states.<sup>238</sup> James Wilson, at the Pennsylvania ratifying convention, was similarly content with federal courts' jurisdiction over treaty questions:

This clause . . . will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure

234. See CRANDALL, *supra* note 232, at 153–54.

235. See *supra* notes 207–15 and accompanying text.

236. For example, Madison explained at the Virginia ratifying convention that because treaty disputes may involve us in controversies with foreign nations, . . . [i]t is necessary . . . that they should be determined in the courts of the general government. There are strong reasons why there should be a Supreme Court to decide such disputes. If, in any case, uniformity be necessary, it must be in the exposition of treaties. The establishment of one revisionary superintending power can alone secure such uniformity.

3 ELLIOT'S DEBATES, *supra* note 222, at 532. In the same vein, John Jay wrote in *The Federalist No. 3* that “[i]t is of high importance to the peace of America that she observe the laws of nations towards all [her treaty partners].” THE FEDERALIST NO. 3, *supra* note 28, at 43 (John Jay). Therefore, “[u]nder the national government, treaties . . . will always be expounded in one sense and executed in the same manner—whereas adjudications on the same points and questions in thirteen states . . . will not always accord or be consistent.” *Id.* Hamilton reiterated the sentiment in *The Federalist No. 22*. See THE FEDERALIST NO. 22, *supra* note 28, at 151 (Alexander Hamilton).

237. 1 RECORDS OF THE CONVENTION, *supra* note 216, at 19.

238. See 3 ELLIOT'S DEBATES, *supra* note 222, at 575. At the convention, Randolph explained that by passing a law in 1785 discharging debts owed to a British subject's heirs, Virginia had “completely confiscated” the heirs' property in direct contravention of the Treaty of Peace (he did not consider a similar confiscation in 1782 to be a violation because it predated the treaty itself). *Id.* Recognizing that holding Virginia accountable for its treaty violations in federal court would be deeply unpopular, Randolph urged the convention not to reject the Constitution just because “it would make us all honest.” *Id.*

[the Treaty of Peace's] performance no longer nominally, for the judges of the United States will be enabled to carry it into effect, let the legislatures of the different states do what they may.<sup>239</sup>

While Randolph, Wilson, and other Framers appeared to agree that including treaties within the Supremacy Clause and Article III would ensure the states' faithful observance of treaties, they did not specifically say whether *individuals* would be able to compel this fidelity by enforcing treaty stipulations against the states in federal court.<sup>240</sup> Whether the Framers understood the treaty power to intrude so deeply into state sovereignty is the subject of the next Section.

### 3. *Treaties Made Immediately Following Ratification*

In *Katz*, the Supreme Court looked to founding-era legislation passed under the auspices of the Bankruptcy Clause to determine whether the bankruptcy power authorized individual suits against the states.<sup>241</sup> Finding that the Bankruptcy Act of 1800 authorized federal courts to release debtors from state prisons—which was a highly unusual intrusion on state sovereignty for that time<sup>242</sup>—the Court concluded that the states must have agreed in the plan of the Convention to cede their immunity from suits authorized under the bankruptcy power.<sup>243</sup> Courts can use the same approach with treaties.

The treaties made immediately following the ratification of the Constitution show that the Framers understood that the nation's treaty obligations subordinated state sovereignty.<sup>244</sup> The very first treaty to come before the Senate for its advice and consent was the Treaty of Fort Harmar, which actually consisted of two nearly identical treaties concluded on January 9, 1789, between the United States and several Indian nations of the Northwest

---

239. 2 ELLIOT'S DEBATES, *supra* note 222, at 490.

240. Wilson could very well have understood individual enforcement to be a likely consequence of extending federal court jurisdiction over treaties. One of the most widely infringed provisions of the Treaty of Peace was article VI, which prohibited the further confiscation of British subjects' property. *See* *Gibbons*, *supra* note 35, at 1901. If Article III of the U.S. Constitution "show[ed] the world" that the federal courts would enforce the peace treaty, then Wilson might have also understood that individuals could seek restitution or compensation from states for the confiscation of property in violation of the treaty. *See* 2 ELLIOT'S DEBATES, *supra* note 222, at 490.

241. *See* *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 373 (2006).

242. *Id.* at 374.

243. *Id.* at 374–78.

244. Delegates to the Virginia ratifying debate disagreed on whether treaties could cede state territory without state consent. Madison insisted that "[t]he power of making treaties does not involve the right of dismembering the Union." 3 ELLIOT'S DEBATES, *supra* note 222, at 50. But as the treaties discussed in this Section show, the Framers' governance under the Constitution suggests that the founding generation believed that treaties could cede territory. Later, in 1890, Justice Field declared that "[i]t would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent." *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890). Again, the practice of the founding generation immediately following ratification belies Justice Field's statement regarding the cession of territory.

Territory.<sup>245</sup> Previously, clashes between the Indian nations and settlers in the Northwest Territory had posed a serious threat to the fledgling United States.<sup>246</sup> To bring peace to the frontier, the treaties settled the boundaries between the parties and provided regulations for trade.<sup>247</sup> The United States relinquished all claims to land beyond the established boundary line, with the exception of six square miles around its fort at Oswego.<sup>248</sup>

By reserving the Oswego territory to the United States, the first treaty signed by the United States appears to have infringed upon one of the most sacrosanct attributes of state sovereignty—control over territory. In his report to President Washington, Secretary of War Henry Knox noted that the Oswego reservation was within the territory of New York and “ought to be so explained as to render it conformable to the [C]onstitution of the United States.”<sup>249</sup> It is not clear what Knox meant by explaining the reservation, but the Senate was certainly aware of his report, because the Senate received it along with the treaty.<sup>250</sup> And although the treaty reserved to the United States territory belonging to New York, the Senate approved the treaty in September 1789 without any recorded discussion on its propriety or constitutionality.<sup>251</sup> Only after its ratification did the Senate suggest that the treaty “may be construed to prejudice the claims of the States of Massachusetts and New York.”<sup>252</sup> Upon that suggestion, the Senate resolved to consider the matter at its next session, but no record of any further discussion exists. Thus, it appears that the first treaty ratified under the new Constitution worked a significant intrusion on state sovereignty. That the Washington administration and the Senate were aware of this intrusion but approved the treaty anyway suggests that they understood that the treaty power subordinated state sovereignty.

---

245. Treaty Between the United States and the Wyandots, Delawares, Ottawas, Chippewas, Pottawatimies, and Sacs, Jan. 9, 1789, 7 Stat. 28 [hereinafter Treaty with the Wyandots et al.]; Treaty Between the United States and the Six Nations, Jan. 9, 1789, 7 Stat. 33 [hereinafter Treaty with the Six Nations]. The Senate took up consideration of the treaties on May 25, 1789, less than three months after the first session of the First Congress opened in New York. 1 ANNALS OF CONG. 15–16, 39–40 (1789) (Joseph Gales ed., 1834). At that time, and until 1871, Indian nations were considered separate sovereign entities. See CRANDALL, *supra* note 232, at 134. Therefore, until 1871 there was consensus within the Senate and presidential administrations that agreements with Indian nations would be by treaty, as with agreements with foreign countries. See ROBERT T. DEVLIN, THE TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES 404 (1908); JOSEPH RALSTON HAYDEN, THE SENATE AND TREATIES, 1789–1817: THE DEVELOPMENT OF THE TREATY-MAKING FUNCTIONS OF THE UNITED STATES SENATE DURING THEIR FORMATIVE PERIOD 12 (1920). In fact, until 1795 all the treaties that came before the Senate were with Indian nations. See HAYDEN, *supra*, at 11. Thus, early treaties with Indian tribes are particularly revealing with regard to how founding-era leaders understood the treaty power.

246. See Gibbons, *supra* note 35, at 1902.

247. Treaty with the Wyandots et al., *supra* note 245, at 28, 30.

248. Treaty with the Six Nations, *supra* note 245, at 33–34.

249. See 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 8 (1998).

250. See 1 ANNALS OF CONG., *supra* note 245, at 41.

251. See *id.* at 77.

252. See *id.* at 84.

Later Indian treaties made it clear that the Framers understood the treaty power to override state sovereignty. Almost a year after the Senate ratified the Treaty of Fort Harmar, the United States made a treaty with the Creek Indian Nation for similar reasons—to settle boundaries and prevent further violence.<sup>253</sup> For years leading up to the 1790 treaty, the Creek Nation and the state of Georgia had nearly come to war.<sup>254</sup> The central government under the Articles of Confederation had been powerless to resolve the conflict, but President Washington made the Treaty of New York with the Creeks on August 7, 1790, following the ratification of the Constitution.<sup>255</sup> The treaty outraged the Georgian government—which President Washington had not consulted—because article V of the treaty guaranteed to the Creek Nation a large swath of land that Georgia claimed as its own.<sup>256</sup> Indeed, the legislature of Georgia adopted a resolution protesting the treaty's cession of land to the Creeks as an unconstitutional infringement of the state's sovereignty.<sup>257</sup> In spite of Georgia's protests, the Senate approved the Treaty of New York on August 12, 1790.<sup>258</sup>

Following the Treaty of New York, President Washington once again negotiated and signed a treaty that impinged on Georgia's territorial sovereignty. Relations between Georgia and the Creek Nation improved after the Treaty of New York, but they dissolved again into hostilities in 1793.<sup>259</sup> While many in the Georgia government hoped and prepared for war, representatives of both sides managed to meet and reconcile.<sup>260</sup> In response to Georgia legislature's request, President Washington appointed three commissioners to negotiate a new treaty between the United States and the Creek Nation.<sup>261</sup> On June 29, 1796, the United States and the Creek Nation signed a new treaty at Coleraine, Georgia, that reconfirmed the cession of land to the Creeks in the 1790 Treaty of New York.<sup>262</sup>

Though Georgia once again condemned the new treaty as an invasion of its sovereign rights, Congress and the Washington Administration were unmoved. Although the United States permitted three Georgian state commissioners to attend the treaty negotiations, they filed a protest with their governor claiming that they had been sidelined during the negotiations, that the treaty improperly ceded Georgian land to the United States for the purposes of

---

253. See Treaty of Peace and Friendship Between the United States and the Creek Nation of Indians, Aug. 7, 1790, 7 Stat. 35 [hereinafter Treaty of New York].

254. For a history of the pretreaty conflict between Georgia and the Creek Nation, see ULRICH BONNELL PHILLIPS, *GEORGIA AND STATE RIGHTS* 39–46 (1902).

255. See *id.* at 42.

256. See *id.* at 427; Treaty of New York, *supra* note 253, art. V.

257. 2 AMERICAN STATE PAPERS, *supra* note 249, at 790–91.

258. 1 ANNALS OF CONG., *supra* note 245, at 1036.

259. See PHILLIPS, *supra* note 254, at 44.

260. *Id.* at 45.

261. 1 AMERICAN STATE PAPERS, *supra* note 249, at 560.

262. Treaty of Peace and Friendship Between the United States and the Creek Nation of Indians, June 29, 1796, 7 Stat. 56 [hereinafter Treaty of Coleraine].

establishing trading posts (as in the Treaty of Fort Harmar), and, most importantly, that the treaty trampled on Georgia's sovereignty by ceding its land to the Creek Nation without its consent.<sup>263</sup> While the Senate acceded to the complaint about the trading posts by striking that provision from the treaty, the Georgian commissioners' protest did not otherwise provoke much of a response.<sup>264</sup> Following these events, President Washington proclaimed the ratification of the Treaty of Coleraine on March 18, 1797.<sup>265</sup>

The experiences of the Treaty of Fort Harmar, the Treaty of New York, and the Treaty of Coleraine provide striking evidence that the founding generation understood that the federal government's power to make treaties overrode state sovereignty. In each case, President Washington and the Senate made and approved a treaty that ceded land claimed by a state without ever obtaining that state's consent. And in each case, they did so despite the concerns of some that the treaties violated a fundamental attribute of state sovereignty—territorial integrity. Through these treaties the federal government legitimated the use of its treaty power even when it infringed on state sovereignty.

Because they also infringed on state sovereignty, the early Indian treaties resemble the Bankruptcy Act of 1800, which the Supreme Court cited in *Katz* as evidence that the bankruptcy power implied a surrender of state sovereign immunity.<sup>266</sup> Both the Bankruptcy Act and the early Indian treaties involved an invasion of state sovereignty to accomplish what the Framers deemed an overriding interest. For the Bankruptcy Act, the grant of habeas corpus power was necessary to ensure that federal bankruptcy laws were truly uniform, while for the Indian treaties the cession of territories was necessary to preserve national peace and security. Thus, just as the Framers understood the Bankruptcy Clause to “carry with it the power to subordinate state sovereignty” within the “limited sphere” of bankruptcy, the Framers must also have understood the treaty power to subordinate state sovereignty within the limited sphere of treaty relations.<sup>267</sup> According to the logic of *Katz*, this subordination of state sovereignty suggests that the states “agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought” to enforce treaty-based rights.<sup>268</sup>

---

263. 1 AMERICAN STATE PAPERS, *supra* note 249, at 613–14.

264. See PHILLIPS, *supra* note 254, at 46. It appears that the Senate struck the trading post provision because it agreed with Georgia's complaints; there is no indication that it believed the provision was unconstitutional. See *id.* In this way, the Treaty of Coleraine demonstrated how the Senate protects the interests of the states in the treaty-making process.

265. Treaty of Coleraine, *supra* note 262, at 56.

266. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 374–78 (2006).

267. See *id.* at 377.

268. See *id.*

#### 4. *Summary: The History of the Treaty Power*

The treaty power's history is similar in important respects to *Katz*'s description of the history of the bankruptcy power. The failure of the Articles of Confederation forced the delegates to the Constitutional Convention to address the dysfunctional patchwork of state bankruptcy laws,<sup>269</sup> just as it forced them to address the states' rampant treaty violations.<sup>270</sup> With the Bankruptcy Clause, the Framers sought to fix the untenable bankruptcy scheme by ensuring that bankruptcy rules—and observance of those rules—would be uniform,<sup>271</sup> just as with the treaty power they sought to ensure uniform treaty observance by making treaties the supreme law of the land and by giving federal courts the power to enforce them.<sup>272</sup> And like the earliest bankruptcy legislation—which granted federal courts the power to issue writs of habeas corpus to release debtors from state prison<sup>273</sup>—the first treaties signed in the immediate wake of the Constitution's ratification intruded heavily upon state sovereignty by ceding states' territory without state consent.<sup>274</sup>

It may be objected that the intrusion on state sovereignty inherent in these early treaties is different in kind from the intrusion on state sovereignty inherent in subjecting states to unconsented private causes of action. Certainly, it may seem like a leap of logic to conclude that the power to cede a state's territory also implies the power to force a state to answer a private lawsuit in federal court. But in *Katz*, the key to the Court's analysis of the Bankruptcy Act of 1800 was not how similar the Act's intrusion on state sovereignty was to the intrusion on state sovereignty effected by *Katz*'s lawsuit against the state.<sup>275</sup> Rather, what mattered for the Court was that the Bankruptcy Act demonstrated the degree to which the bankruptcy power was originally understood to subordinate state sovereignty.<sup>276</sup> Because the Court found that the first bankruptcy law enacted following the Constitution's ratification intruded heavily upon state sovereignty without any contemporary objection, it concluded that the Bankruptcy Clause “simply did not contravene the norms this Court has understood the Eleventh Amendment to exemplify.”<sup>277</sup> Likewise,

---

269. *Id.* at 366–69.

270. *See supra* Part III.B.1.

271. *Katz*, 546 U.S. at 369.

272. *See supra* Part III.B.2.

273. *Katz*, 546 U.S. at 374.

274. *See supra* Part III.B.3.

275. Even though the Court characterized the Bankruptcy Act's grant of habeas corpus power as authorizing in personam suits against the states, 546 U.S. at 371, 378 n.14, there is still a significant difference between suits to release debtors from state prison, on the one hand, and suits, like *Katz*'s, to recover monetary assets from state treasuries, on the other.

276. *See id.* at 377 (“As demonstrated by the First Congress' immediate consideration and the Sixth Congress' enactment of a provision granting federal courts the authority to release debtors from state prisons, the power to enact bankruptcy legislation was understood to carry with it the power to subordinate state sovereignty, albeit within a limited sphere.”).

277. *Id.* at 375.

because the first treaties entailed a major intrusion on a sacrosanct attribute of state sovereignty—territorial integrity—without any objection among the Framers, we can conclude that subjecting states to private causes of action to enforce the nation’s treaty obligations would also be consistent with the norms of state sovereign immunity.<sup>278</sup>

### C. *Applying the Hamiltonian Framework to Assess the Treaty Power*

While the intent-based analysis from *Katz* reveals that the Framers intended the nation’s treaty obligations to subordinate state sovereign immunity, the Hamiltonian approach derived from *The Federalist No. 32*—which the *Katz* Court noted with approval—provides independent support for the argument against state immunity. As explained above in Part II.C, Hamilton examined the constitutional text and the nature of the constitutional power in question to determine whether the power fell within one of his three categories of state sovereign alienation: (1) “where the Constitution in express terms granted an exclusive authority to the Union;” (2) “where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority;” and (3) “where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.”<sup>279</sup> Both the Constitution’s text and the treaty power’s nature indicate that the treaty power falls into categories two and three.

#### 1. *The Text of the Constitution and the Treaty Power*

According to the Constitution’s text, the treaty power fits neatly into Hamilton’s second category—Article II expressly grants the President and the Senate the authority to make treaties,<sup>280</sup> while Article I expressly prohibits states from “enter[ing] into any Treaty, Alliance, or Confederation.”<sup>281</sup> However, because Hamilton never explained why category-two powers override the assertion of state sovereign immunity, we are left to guess.

---

278. Legislation and treaties in later generations add further support for the notion that attributes of state sovereignty, including state sovereign immunity, are subordinate to the treaty power. In 1842, Congress granted federal courts the authority to issue writs of habeas corpus to release from state prison any foreign national who was imprisoned for actions that were authorized by a foreign government and valid under the law of nations (which would have included treaties). Act to Provide Further Remedial Justice in the Courts of the United States, ch. 257, 5 Stat. 539, 539–40 (1842). By the latter half of the nineteenth century, it was firmly established that federal courts could issue writs of habeas corpus to release any prisoner held in violation of a treaty. See *Wildenhuis’s Case*, 120 U.S. 1, 11, 17 (1887) (upholding the grant of habeas corpus to release three Belgian nationals imprisoned by New Jersey in violation of a treaty between the United States and Belgium).

279. THE FEDERALIST NO. 32, *supra* note 28, at 198 (Alexander Hamilton).

280. U.S. CONST. art. II, § 2, cl. 2.

281. U.S. CONST. art. I, § 10, cl. 1. The third clause of the same section provides that “[n]o State shall, without the consent of Congress, . . . enter into any Agreement or Compact . . . with a foreign Power.” *Id.* at cl. 3. For a discussion about the difference between treaties and compacts, see *supra* note 77.

The strongest argument that Hamilton's second category alienates state sovereign immunity is that by expressly denying states the ability to make treaties with foreign powers, the Framers intended to eliminate whatever control over international agreements the states previously had.<sup>282</sup> If states could assert sovereign immunity against treaty-based private suits, then they essentially could choose which treaties to observe and which treaties to ignore. Specifically, states could ignore any treaty that requires or implies individual remedies for proscribed government actions.<sup>283</sup> This arrangement would suggest some degree of state authority over treaty making, even though the Framers intended to deny this authority in forming international agreements.<sup>284</sup> Therefore, according to this functional argument, states must be amenable to private suits for violations of treaty-based rights if a treaty so requires.

## 2. *The Nature of the Treaty Power*

Besides the Constitution's text, the very nature of treaties and the treaty-making process suggests that states must not be able to assert their sovereign immunity against suits to enforce treaty obligations. First, because treaties are contracts between two sovereign parties, the subunits of each party must perform the contractual obligations. Second, because the treaty-making process was built to safeguard the states' interest, the assertion of state sovereign immunity is not necessary to protect against abuses of the treaty power. Moreover, allowing states to assert sovereign immunity against suits to enforce treaty obligations would be "totally *contradictory* and *repugnant*"<sup>285</sup> to the authority granted to the federal government to make treaties. This situation, therefore, falls into Hamilton's third category of the alienation of state sovereignty.

---

282. See THE FEDERALIST NO. 42, *supra* note 28, at 264 (James Madison) (explaining how the "plan of the convention" eliminated an exception from the Articles of Confederation "under which treaties might be substantially frustrated by regulations of the States"). For further support that the Framers sought to eliminate any state voice in international agreements, see Part III.A.2.

283. One might argue that states would not be able to ignore such treaties because the United States can always bring suit in federal court to enforce treaty obligations. See, e.g., *United States v. Mississippi*, 380 U.S. 128 (1965) (holding that there is no state sovereign immunity from suits by the federal government). However, as explained below in Part IV, it will rarely be practical for individuals to rely on suits by the United States to vindicate treaty-based rights. Moreover, for treaties that specifically require the availability of individual remedies, proxy suits by the United States may not be sufficient to avoid breach.

284. Note that this is a separate argument from that based on the Supremacy Clause. Under the supremacy argument, states may not ignore treaty obligations because treaties are the supreme law of the land. See Eichhorn, *supra* note 125, at 534. But as explained above in Part I.D.2, the supremacy argument fails to explain why states may exercise immunity against suits based on federal laws passed under the Commerce Clause, which are also supreme. The argument in this Section is based not on the Supremacy Clause, but rather on the textual prohibition on state participation in treaty making.

285. THE FEDERALIST NO. 32, *supra* note 28, at 198 (Alexander Hamilton).

a. *Treaties as Contracts*

During the ratification debates, the Framers frequently described treaties as contracts between sovereigns. At the Pennsylvania convention, James Wilson provided a succinct explanation of the difference between treaties and legislation:

[T]hough the treaties are to have the force of laws, they are in some important respects very different from other acts of legislation. In making laws, our own consent alone is necessary. In forming treaties, the concurrence of another power becomes necessary. Treaties . . . are truly contracts, or compacts, between the different states, nations, or princes, who find it convenient or necessary to enter into them.<sup>286</sup>

Similarly, Hamilton wrote in *The Federalist No. 75*, “[the treaty power’s] objects are CONTRACTS with foreign nations which have the force of law, but derive it from the obligations of good faith. [Treaties] are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.”<sup>287</sup> And in *The Federalist No. 64*, John Jay simply stated that “a treaty is only another name for a bargain.”<sup>288</sup>

If treaties are contracts made by the sovereign on behalf of the entire country, then they must be uniformly binding on the entire country, including its constituent parts. This conception of the treaty power existed long before the drafting of the Constitution and can be found in European treatises on which the Framers relied to define the treaty power’s scope. For example, at the Virginia ratification debate, George Nicholas cited Blackstone’s Commentaries to describe the treaty-making power of the British king—a power that Nicholas equated with the treaty-making power under the Constitution:

It is also the king’s prerogative to make treaties, leagues, and alliances, with foreign states and princes; . . . and then it is binding upon the whole community . . . . Whatever contracts, therefore, he engages in, no other power in the kingdom can legally delay, resist, or annul.<sup>289</sup>

At the South Carolina convention, Charles Cotesworth Pinckney cited the same passage from Blackstone and warned that no foreign nation would agree to treaties with the United States if individual states could violate them.<sup>290</sup>

The common theme of statements like those of Nicholas and Pinckney is that treaties, as contracts with foreign powers, entail obligations and consequences that regular domestic statutes do not. Besides merely violating

---

286. 2 ELLIOT’S DEBATES, *supra* note 222, at 506.

287. THE FEDERALIST NO. 75, *supra* note 28, at 450–51 (Alexander Hamilton).

288. THE FEDERALIST NO. 64, *supra* note 28, at 394 (John Jay).

289. 3 ELLIOT’S DEBATES, *supra* note 222, at 506. It should be noted that George Nicholas did not attend the Constitutional Convention. Nevertheless, his description is an apt example of the Framers’ understanding of international law. James Madison also cited Blackstone’s Commentaries while engaging in the same colloquy on the treaty power. *See id.* at 501.

290. 4 ELLIOT’S DEBATES, *supra* note 222, at 278.

the supreme law of the land, a treaty breach also implicates the entire country in an international offense, with lasting consequences for relations with foreign powers.<sup>291</sup> Therefore, it is paramount that “no other power” in the country “delay, resist, or annul” the treaties entered into by the federal government.

The vital importance of uniform treaty observance makes treaty obligations closely analogous to the uniform rules of naturalization that Alexander Hamilton cited in *The Federalist* as a circumstance where the states surrendered their sovereign immunity in the plan of the Convention.<sup>292</sup> Because treaties are binding commitments that the federal government makes to foreign nations on behalf of the United States as a single unit, their observance must be uniform throughout the country.<sup>293</sup> If states could choose which treaty obligations to meet, treaty observance would not be uniform, just as rules of naturalization would not be uniform if states could make their own or refuse to abide by Congress’s enacted rules. Using the words of Hamilton, being able to counteract the nation’s international commitments would not be a mere “inconvenience in the exercise of powers,” but would rather be “an immediate constitutional repugnancy.”<sup>294</sup> In other words, it is not logically tenable for the President and the Senate to have the constitutional authority to bind the nation by treaty, while the states can ignore treaty obligations by asserting their sovereign immunity against suits enforcing those obligations.<sup>295</sup> Therefore, in agreeing in the plan of the Convention to be constituent parts of a union with treaty-making power, the states must have agreed not to assert their sovereign immunity against suits brought to enforce the nation’s treaty obligations.<sup>296</sup>

*b. The Political Safeguards of the Treaty-Making Process*

Although the states agreed to be subject to suits enforcing treaty obligations, political safeguards in the treaty-making process ensure that states can protect their interests. Unlike federal statutes—which normally require only a simple majority in both Houses followed by the President’s signature—

---

291. *See id.* at 279 (“[W]e do not enter into treaties as separate states, but as united states; and all the members of the Union are answerable for the breach of a treaty by any one of them.”).

292. *See* THE FEDERALIST NO. 32, *supra* note 28, at 194 (Alexander Hamilton).

293. The same might just as easily be said of legislation regulating commerce—there would be little point in Congress establishing national commercial laws if states can assert their sovereign immunity to avoid abiding by them. However, what makes treaties different from domestic legislation is the contractual commitment of the entire United States, as a whole, to another foreign nation. The existence of this promise makes uniform observance paramount.

294. *See* THE FEDERALIST NO. 32, *supra* note 28, at 200 (Alexander Hamilton).

295. Judge Haines made a similar argument with regard to the bankruptcy power. If Congress has the authority to pass uniform rules on the subject of bankruptcies, then the states must not be able to avoid application of those rules by asserting sovereign immunity. *See Haines, supra* note 188, at 131.

296. That few treaties at the time of the Founding conferred individual rights does not take away from this treaties-as-contract argument. As mentioned previously, many of the Framers appeared to have contemplated—though they did not explicitly say—that individual creditors could bring suit to enforce the United States’ obligations under the Treaty of Peace. *See supra* notes 238, 240.

treaties always require the concurrence of the President and two-thirds of the Senate.<sup>297</sup> This higher vote threshold in the Senate has two implications for state sovereign immunity.

First, the two-thirds vote requirement renders the assertion of state sovereign immunity unnecessary because it adequately safeguards the states' interests against the abuse of the broad treaty-making power.<sup>298</sup> The Framers understood and accepted that the treaty power is necessarily far-reaching. As Randolph explained at the Virginia ratifying convention, an unlimited number of challenges may arise in international affairs, and so the treaty power must be correspondingly broad to address them.<sup>299</sup> At the same time, however, members of the founding generation recognized the potential for abuse of such a broad power.<sup>300</sup> To resolve these competing considerations, the Framers structured the treaty-making process to protect states by requiring a two-thirds vote threshold in the Senate.

The two-thirds vote requirement serves as a structural safeguard because the Senate functions as the bastion of state interests.<sup>301</sup> As the Framers' statements at the Convention and ratifying debates show, the Framers considered the Senate the states' representative in the federal government because each state had an equal number of senators and, at that time, state legislatures appointed senators.<sup>302</sup> Therefore, any attempt to impinge state sovereignty using the treaty power would not pass the Senate without the approval of a supermajority of the states' representatives. The experience of the Treaty of Coleraine, discussed previously, illustrates this point.<sup>303</sup> When the

---

297. U.S. CONST. art. II, § 2, cl. 2.

298. This structural safeguard argument comes from Professor Vázquez, who deems it one of the strongest arguments in favor of allowing private treaty-based suits against states. *See* Vázquez, *supra* note 110, at 726–28. Professor Vázquez ultimately argues against treaty-based abrogation of sovereign immunity, but in doing so he does not offer a specific rebuttal of this structural argument. Rather, he counters the structural argument with his general claim that because the Supremacy Clause applies to treaties and laws equally, state sovereign immunity doctrine should apply equally as well. *See id.* at 733.

299. 3 ELLIOT'S DEBATES, *supra* note 222, at 363 (“The various contingencies which may form the object of treaties, are, in the nature of things, incapable of definition. The government ought to have power to provide for every contingency.”). Similarly, Madison said at the same debate that the treaty power must be left broad and undefined in order to handle any contingency that might arise. *Id.* at 514–15.

300. George Mason acknowledged that the treaty-making power is “one of the greatest acts of sovereignty,” but opposed ratification because he believed the Constitution did not guard the treaty power enough. *Id.* at 507.

301. *See* Vázquez, *supra* note 110, at 728.

302. For examples of Framers' statements that the Senate represents the interests of the state, see 4 ELLIOT'S DEBATES, *supra* note 222, at 119–20 (William Davie); *id.* at 125–27 (James Iredell); THE FEDERALIST NO. 64, *supra* note 28, at 395 (John Jay); THE FEDERALIST NO. 66, *supra* note 28, at 404 (Alexander Hamilton); 2 RECORDS OF THE CONVENTION, *supra* note 216, at 392 (James Madison). Though the Seventeenth Amendment diluted state legislatures' control over the composition of the Senate, the states' equal suffrage combined with the two-thirds vote requirement protects against the use of the treaty power to harm state interests. Vázquez, *supra* note 110, at 722.

303. *See supra* Part III.B.3.

Georgia state commissioners protested the United States' reservation of state land for U.S. trading posts, the Senate struck the offending provision from the treaty.<sup>304</sup> In this way, the political process worked for the state—the Senate safeguarded Georgia's interests. The implication of this structural safeguard is that the state sovereign immunity doctrine is not necessary to protect the states' dignity or interests.<sup>305</sup>

*D. Summary of the Treaty Power Under the Hamiltonian Approach*

Following the intent-based approach used by the Supreme Court in *Katz*, the historical evidence supports the view that in the plan of the Convention the states surrendered their sovereign immunity to treaty-based suits. Faced with the threat to the national well-being posed by the states' rampant treaty violations, the Framers made treaties the supreme law of the land and gave federal courts the jurisdiction to enforce them. Just how much the Constitution subordinated state sovereignty is evident in the earliest treaties passed following ratification. These treaties infringed on a fundamental attribute of state sovereignty by ceding state territory without state consent. This suggests that under the plan of the Convention, the nation's treaty obligations significantly subordinated state sovereignty, which supports the proposition that states cannot assert sovereign immunity against treaty-based suits.

Following the analytical approach laid out in *The Federalist No. 32*, the text of the Constitution, the structure of the treaty-making process, and the nature of the treaty power also imply that states must not be able to assert their immunity to treaty-based suits. The Constitution's text, which allocates the treaty power to the federal government and denies it to the states, fits perfectly into the second category of state sovereignty alienation described in *The Federalist No. 32*. The treaty-making process's structure provides a procedural safeguard against abuse of the treaty power—making the sovereign-immunity defense unnecessary—which, in turn, justifies making states amenable to suit for treaty-based rights. And finally, because treaties are contracts between national sovereigns, each sovereign's constituent parts must uniformly observe them. Therefore, states cannot selectively observe treaties by asserting their sovereign immunity to treaty-based suits.

#### IV.

##### SIGNIFICANCE AND QUESTIONS OF APPLICATION

No matter which analytical framework is used, a finding that the states surrendered their sovereign immunity in treaty-enforcement suits would have

---

304. See PHILLIPS, *supra* note 254, at 46.

305. For more on political process theories, see generally Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); 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).

significant impacts on the rights-remedies gap and the conduct of U.S. diplomacy. However, such a finding would not necessarily mean that individuals would be able to sue states for every violation of a treaty. This Part explains the practical significance of subjecting states to treaty-based suits, as well as the threshold matters that every plaintiff must address before bringing a treaty-based suit.

*A. Practical Significance of Subjecting States to Treaty-Based Suits*

*1. Closing the Rights-Remedies Gap*

The most immediate implication of subjecting states to private treaty-based suits is that in many instances individuals could vindicate otherwise unenforceable treaty-based rights. Many treaties confer rights upon individuals, and those individuals can sometimes employ one or both of two recognized remedies to enforce those rights. But in many circumstances, the recognized avenues for relief are closed off. In those situations, if states can violate treaty rights and then assert immunity to suit, then individuals will have no remedy for rights violations.

One potential avenue to relieve treaty-based rights violations is a prospective injunction under *Ex parte Young*.<sup>306</sup> The *Young* doctrine holds that individuals can sometimes sue state officers in their official capacities to enjoin them from violating their rights under the Constitution or federal law.<sup>307</sup> However, the availability of an *Ex parte Young* injunction is not always clear-cut. Generally, the Supreme Court upholds *Ex parte Young* injunctions only if they are *prospective* in nature (i.e., they seek to enjoin only future misconduct), while holding that suits seeking equitable relief to remedy past wrongs are generally impermissible.<sup>308</sup> But this prospective-retrospective distinction has broken down in some cases. For example, in *Milliken v. Bradley*, the Court upheld an injunction even though it required state expenditures to remedy past, as opposed to prospective, racial discrimination.<sup>309</sup> And in *Idaho v. Coeur d'Alene Tribe of Idaho*, the Court struck down a negative injunction seeking purely prospective relief.<sup>310</sup> Thus, it is not always clear whether an *Ex parte*

---

306. See Berman et al., *supra* note 102, at 1095; Vázquez, *supra* note 110, at 734–36.

307. *Ex parte Young*, 209 U.S. 123, 160 (1908). Actually, as Justice Peckham points out in his opinion in *Ex parte Young*, federal court jurisdiction over suits to enjoin state officials from violating federal law had been recognized as early as the Court's decision in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). 209 U.S. at 196. Nevertheless, *Ex parte Young* came to stand for the principle that individuals may sue state officials in their official capacity for injunctive relief.

308. See *Edelman v. Jordan*, 415 U.S. 651, 666–67 (1974) (denying equitable restitution because it was retrospective in nature).

309. 433 U.S. 267 (1977) (upholding a district court's order for the provision of educational programs to remedy past discrimination, despite the requirement that the state pay for half the cost of the programs).

310. 521 U.S. 261 (1997). The plaintiffs, a federally recognized Indian tribe, sought an injunction prohibiting Idaho state officials from interfering in the tribe's ownership interest in lands

*Young* injunction is available to remedy the violation of federal rights, including rights conferred by treaty.

Even if an individual seeking to vindicate treaty-based rights could fashion an *Ex parte Young* injunction that is acceptable to the Court that individual may frequently be unable to show standing to seek that relief. For example, in *Los Angeles v. Lyons*, the Supreme Court held that plaintiffs seeking prospective relief under *Ex parte Young* must show that the injunction is likely to redress the injury caused by the state officer's misconduct.<sup>311</sup> If the rights violation occurred in the past and is complete, then the plaintiff cannot obtain an injunction unless he or she can show a "real and immediate threat" his or her rights will be violated again and that the requested injunction will prevent the injury caused by that violation.<sup>312</sup>

For example, imagine that a state's police officers are routinely violating the rights of foreign detainees under the Vienna Convention to consult with their consular officials.<sup>313</sup> If a former detainee who suffered a violation of his or her Vienna Convention rights seeks an injunction to enforce compliance with the treaty, a court will deny the plaintiff standing to sue unless he or she can show a real and immediate threat that his or her rights under the treaty will be violated again.<sup>314</sup> Such a showing is burdensome and often impossible, even where the plaintiff's rights have already been violated and even where the state officers frequently violate other individuals' rights in the same way.<sup>315</sup> Indeed, upon similar facts as this hypothetical, the Supreme Court has held that a

---

submerged beneath Lake Coeur d'Alene. *Id.* at 265. Despite the purely negative nature of the injunction—the plaintiffs sought only to keep state officials from interfering with their claimed ownership interest in the submerged lands, and did not seek any other affirmative action on the part of the officials—a splintered Court held that the suit was barred by state sovereign immunity. *Id.* at 281. The Court concluded that even though the tribe sought an injunction against state officials, the suit was the functional equivalent of a quiet title action against the state “in that substantially all benefits of ownership and control [of the submerged lands] would shift from the State to the Tribe.” *Id.* at 282. But, as the dissent vigorously objected, there was little difference between the tribe's suit and a classic *Ex parte Young* suit, calling into question whether future suits for prospective injunctions would similarly be struck down. *See id.* at 298 (Souter, J., dissenting).

311. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983) (denying standing to seek an injunction preventing the use of police chokeholds because the plaintiff could not show a “real and immediate” threat that the police would stop him, apply the chokehold, and cause unconsciousness as they already had in the past).

312. *See id.*

313. This hypothetical does not take much imagination. Just look to the discussion of *Avena* in the Introduction.

314. *See Lyons*, 461 U.S. at 105–06.

315. *See id.* at 105 (“The additional allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties.”).

completed violation of the Vienna Convention does not continually affect the former detainee, and therefore a prospective injunction is not available.<sup>316</sup>

With *Ex parte Young* relief unavailable in many instances, the only other currently recognized option for treaty-based violations is for plaintiffs to sue state officers in their individual capacities for damages under 42 U.S.C. § 1983.<sup>317</sup> However, damages suits against individual officers face their own hurdle—official immunity. Absolute official immunity shields judges, legislators, and prosecutors for actions taken within the scope of their official duties.<sup>318</sup> In addition, qualified immunity shields officers exercising discretionary functions if their conduct does not violate clearly established rights of which a reasonable person would have known.<sup>319</sup> Thus, unless a court finds that an officer violated a right that is clearly established under the Constitution or federal law, the plaintiff will not be able to seek damages against that officer.

The limitations on *Ex parte Young* injunctive relief combined with the hurdle of official immunity can leave plaintiffs with no remedy against state officers—in either their individual or official capacities—for violations of treaty rights.<sup>320</sup> The only remaining remedy for a plaintiff, therefore, would be to sue the state itself for either injunctive relief or damages—an option that would be available only if the Supreme Court recognized that treaty-based suits require states to surrender sovereign immunity.<sup>321</sup>

---

316. *Breard v. Greene*, 523 U.S. 371, 377–78 (1998). One difference between *Breard* and the hypothetical is that in *Breard* the detainee’s home country, Paraguay, brought suit on his behalf. For the purposes of determining whether a Vienna Convention violation has continuing effects, however, *Breard* is instructive.

317. Section 1983 authorizes a private cause of action at law, suit in equity, or “other proper proceeding for redress” for deprivations of federal rights by persons acting under color of state law. 42 U.S.C. § 1983 (2006); *see also* *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974), *abrogated on other grounds by* *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

318. *Harlow*, 457 U.S. at 807.

319. *Id.*

320. In circumstances where a municipality has violated treaty-based rights, a plaintiff could obtain monetary relief without having to clear the hurdle of qualified immunity. *See* *Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (holding that a municipality may not assert the defense of qualified immunity); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978) (holding that municipalities may be liable under § 1983). However, obtaining relief under *Monell* presents its own hurdle—plaintiffs must show that the violation resulted from an official custom or policy of the municipality. *Monell*, 436 U.S. at 691. Local governments may not be held liable under § 1983 under a respondeat superior theory. *Id.*

321. Moreover, for those who place a high value on state sovereignty as well as state accountability, damages suits directly against the state may be even better than injunctions against state officials under *Ex parte Young*. Indeed, *Ex parte Young* injunctions that require ongoing court supervision can be even more invasive of state sovereignty than simple damages suits. I thank Professor Fred Smith for this insight.

Recognizing these difficulties, the Vienna Convention demonstrates the importance of direct treaty-based suits against states.<sup>322</sup> As already mentioned, the Supreme Court has refused to grant prospective relief when a state violates Vienna Convention rights because such violations do not have a “continuing effect.”<sup>323</sup> This leaves two options for remedying the violation—individual capacity suits against state officers and direct suits against the state. But if the individual officer is shielded by official immunity, then the only option left is a direct suit against the state.<sup>324</sup> In the Vienna Convention context, only nominal damages would likely be available, but if the court can award prevailing plaintiffs attorneys’ fees, plaintiffs’ attorneys will have sufficient incentive to bring suit, thereby helping to ensure state compliance with the treaty.

## 2. *Promoting U.S. Foreign Policy Interests Through Treaty-Based Suits*

As the Framers noted frequently during the Constitutional Convention and the subsequent ratification debates, the nation’s ability to comply fully with treaty obligations is vital to the national interest.<sup>325</sup> At the time of the Founding, failure to comply with treaties might have caused war, imperiling the young republic’s hard-fought independence.<sup>326</sup> Today, although the international community does not recognize treaty violations as a legitimate cause for war, treaty compliance is essential to international security.<sup>327</sup> As the Supreme Court noted in *Medellín v. Texas*, the United States has a compelling interest in complying with its treaty obligations to ensure that our treaty partners will reciprocate.<sup>328</sup> Treaty compliance also affirms the U.S. commitment to the rule of international law and enhances U.S. credibility in treaty negotiations.<sup>329</sup> Therefore, because the prospect of treaty-based suits would tend to deter state violations of treaties, recognizing that the treaty power overrides state sovereign immunity would substantially strengthen U.S. interests abroad.

Since treaty compliance is important for individual rights and U.S. international interests, one might argue that private suits to enforce treaty obligations against the states are not necessary because the United States can enforce those obligations itself. State sovereign immunity does not bar suits by

---

322. For an overview of the requirements of the Vienna Convention, see *supra* note 3. Article 36 of the treaty demands that “full effect be given” to these rights. Vienna Convention, *supra* note 3, art. 36.

323. See *Breard v. Greene*, 523 U.S. 371, 378 (1998).

324. See *supra* note 10. The Vienna Convention provides a useful illustration for understanding why direct suits against states can provide an important avenue of relief where courts have recognized a judicially enforceable treaty-based right.

325. See *supra* Part III.A.1.

326. See *supra* Part III.A.1.

327. See U.N. Charter art. 2, para. 4 (prohibiting all members from using force or threat of force against any state). The only exceptions to the U.N. Charter’s blanket prohibition on the use of force is self-defense, U.N. Charter art. 51, and Security Council authorization, U.N. Charter art. 42.

328. *Medellín v. Texas*, 552 U.S. 491, 524 (2008).

329. See *id.*; Menell, *supra* note 30, at 1449.

the United States,<sup>330</sup> and so the United States can theoretically sue states both to vindicate individuals' rights on their behalf and to assert the United States' interest in ensuring uniform compliance with its treaty obligations.<sup>331</sup> Professors Berman, Reese, and Young have noted, however, that practical and political barriers make U.S. lawsuits insufficient to enforce certain domestic statutes.<sup>332</sup> They cite Professor Jonathan Siegel for the proposition that “[l]ack of resources, partiality toward states, or disagreement with particular lawsuits could lead federal officials not to sue, rendering the remedial mechanism ineffective.”<sup>333</sup> However, the professors argue that U.S. lawsuits may work for foreign treaty rights holders.<sup>334</sup> Their rationales for this claim, however, are not convincing.

The trio argues that suits by the United States to enforce the treaty rights of foreign plaintiffs would be an effective tool to enforce treaty obligations because the number of suits “may be sufficiently small enough to minimize resource concerns” and because “political incentives to provide a remedy may be particularly high.”<sup>335</sup> It is not at all clear, however, that there are sufficient political incentives motivating the U.S. government to bring suits against the states on behalf of foreign plaintiffs.<sup>336</sup> The trio argues that “important domestic constituencies” would provide the necessary political support for such lawsuits.<sup>337</sup> But at the same time, they imply that these same domestic constituents could not motivate the U.S. government to bring suits on *their* behalf.<sup>338</sup> One wonders how domestic right holders have the clout to ensure the U.S. government's protection of foreign plaintiffs, but lack the clout to ensure protection of their own. Thus, it appears that the same practical and political obstacles to U.S. government lawsuits apply to the treaty context as they do to the statutory context, making individual suits against states all the more important.

---

330. *United States v. Mississippi*, 380 U.S. 128, 140–41 (1965).

331. Berman et al., *supra* note 102, at 1116.

332. *Id.* at 1117.

333. *Id.* (quoting Jonathan R. Siegel, *Congress's Power to Authorize Suits Against States*, 68 GEO. WASH. L. REV. 44, 73 (1999)).

334. *Id.* at 1117, 1194.

335. *Id.* at 1194.

336. Indeed, the political incentives and federalism interests likely weigh against U.S. enforcement lawsuits. *See* Hathaway et al., *supra* note 10, at 104 (“The key drawback to using [lawsuits by the federal government to enforce treaty obligations] is that it places the federal government in an adversarial position vis-à-vis a state or local government. That is not only politically challenging, but also can be corrosive of the cooperative federal arrangement that is an essential element of the United States's political landscape.”).

337. Berman et al., *supra* note 102, at 1194 n.713.

338. *Id.* at 1117.

### B. *Threshold Questions and Application*

As with any suit in federal court, suits against states to enforce treaties must meet certain thresholds in order to proceed. First, the plaintiff must show that the terms of a treaty in question actually confer a judicially enforceable right, either explicitly or impliedly. This is essentially a task of statutory interpretation and is easily performed in the treaty context.<sup>339</sup> Second, as with any suit in federal court, the plaintiff must demonstrate Article III standing to bring the suit against the state. These are familiar thresholds in federal litigation that can be applied to the treaty context.<sup>340</sup>

A threshold question unique to the treaty context, by contrast, is whether the treaty in question is self-executing, and if not, whether Congress passed legislation necessary to implement it. A self-executing treaty is effective as soon as it is ratified, while a non-self-executing treaty requires additional legislation—passed by both Houses and signed by the President—before it can take effect.<sup>341</sup> Treaty self-execution is a subject of rich debate but is beyond the scope of this Comment. For the purposes of state amenability to a treaty-based suit, it is sufficient to understand that an individual could bring suit against a state only for violating a treaty that is in effect, whether by self-execution or implementing legislation.

Another question of application unique to the treaty context is whether states should be subject to private suits for violations of congressional-executive agreements as well as formal treaties. Unlike formal treaties, which are international agreements that the President and two-thirds of the Senate must approve, congressional-executive agreements are international agreements made in the same way as regular legislation—by majority approval in both Houses followed by the President's signature.<sup>342</sup> In the last few decades, the number of international commitments made in the form of congressional-executive agreements has grown.<sup>343</sup> Again, the debate over the propriety of

---

339. See *Mora v. New York*, 524 F.3d 183, 193 (2d Cir. 2008); *Jogi v. Voges*, 480 F.3d 822, 832 (7th Cir. 2007); see also Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1083–84 (1992). In a recent article, Professor Hathaway and her co-authors show that since World War II, the Supreme Court has become increasingly resistant to recognizing treaty-based private causes of action. See Hathaway et al., *supra* note 10, at 63–76. Indeed, what was once a presumption in favor of implying treaty-based private causes of action has morphed (thanks in part to a footnote in *Medellin*) into a presumption *against* implying such causes of action. *Id.* at 70–76. Nevertheless, Professor Hathaway and her coauthors provide a convincing argument that even if courts do not recognize that a particular treaty establishes a private cause of action, they may still allow individuals to enforce their treaty rights by using § 1983 to supply the cause of action. *Id.* at 78–80.

340. See Hathaway et al., *supra* note 10, at 78–80.

341. For more on self-executing and non-self-executing treaties, see *supra* note 7.

342. For more on congressional-executive agreements, see DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* (3d ed. 2010).

343. See Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1287 (2008). A major example of a congressional-executive agreement that appears to confer rights on individuals is the Agreement on

congressional-executive agreements is rich and instructive, but such debate is outside of the scope of this Comment.<sup>344</sup> However, because of the sheer volume of congressional-executive agreements, for present purposes it is important to consider whether any of the arguments in favor of the treaty power overriding state sovereign immunity apply as well to congressional-executive agreements.

*Katz*'s intent-based approach cannot be applied to congressional-executive agreements to override state sovereignty, because it appears the Framers did not contemplate international agreements made in that manner. However, we can consider whether the Hamiltonian approach applies as well to congressional-executive agreements. Because of the lower Senate vote threshold for congressional-executive agreements, the structural-safeguards argument of Part III.B.2 does not apply.<sup>345</sup> By contrast, the argument based on the contract-like nature of treaties does apply. Like treaties, congressional-executive agreements are contracts between sovereigns requiring uniform compliance throughout the country.<sup>346</sup> Indeed, the Vienna Convention on the Law of Treaties defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."<sup>347</sup> In other words, in the international arena congressional-executive agreements are binding contracts, just like treaties. Therefore, a state must not be able to cause a contractual breach by asserting sovereign immunity to avoid compliance.

Another practical question is whether a treaty must clearly state that it seeks to subject states to private lawsuits. In the Section 5 abrogation context, Congress must make an unequivocally clear statement in any enforcement legislation that it intends to abrogate state sovereign immunity.<sup>348</sup> But in the treaty context, such a clear statement would not be necessary. In *Katz*, the Court found that the clear statement question is irrelevant in considering whether the states surrendered their sovereign immunity.<sup>349</sup> Because the

---

Trade-Related Aspects of Intellectual Property, Apr. 15, 1994, 1869 U.N.T.S. 299, also known as "TRIPS." Even though TRIPS is not an Article II treaty, it is the subject of much of the scholarship discussed in Part I.D.

344. For an overview of this debate, see Hathaway, *supra* note 343, at 1244–48.

345. *Cf.* David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1988–95 (2003) (arguing that because congressional-executive agreements do not have the same safeguards as treaties, they should be subject to the same federalism-based subject-matter limitations as ordinary legislation). It might be said that with the concurrence of the House of Representatives, an additional safeguard makes up for the lower Senate vote threshold. However, with its proportional representation, the House does not represent the interests of the states in the same way that the Senate was designed to do. *See supra* Part III.B.2.

346. *See supra* Part III.B.3.

347. Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331.

348. *Quern v. Jordan*, 440 U.S. 332, 343–45 (1979).

349. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006) ("The relevant question is not whether Congress has 'abrogated' States' immunity in proceedings to recover preferential

question in the treaty context is whether the states have already consented to treaty-based private suits, it does not matter whether a particular treaty was specifically intended to override state sovereign immunity. The creation of the right is enough.

A final question of application is the extent that states surrender immunity. In *Katz*, the Court emphasized, “We do not mean to suggest that every law labeled a ‘bankruptcy’ law could, consistent with the Bankruptcy Clause, properly impinge upon state sovereign immunity.”<sup>350</sup> The states surrendered their sovereign immunity to suits only in proceedings brought under laws properly within the scope of the Bankruptcy Clause—in other words, “proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts.”<sup>351</sup> Likewise, in the treaty context, states surrendered their immunity only to the extent necessary to comply with the nation’s treaty obligations. Therefore, a state should be subject to suit only if asserting its immunity would deprive an individual of a remedy for the breach of his or her rights under the treaty.

#### CONCLUSION

The Supreme Court’s decision in *Central Virginia Community College v. Katz* opened a door to new possibilities in sovereign immunity analysis. By taking a clause-specific approach, the Court suggested that other enumerated powers in the Constitution imply a surrender of state sovereign immunity from individuals’ suits. However, the Court did not say whether *Katz* applied to provisions besides the Bankruptcy Clause, leaving the doctrine somewhat ambiguous. At the same time, the full scope of the treaty power has not been defined, despite its clear implications for state sovereignty. Therefore, the treaty power is perhaps the ideal candidate for *Katz* analysis.

The history of the treaty power suggests that the Framers understood that the nation’s treaty obligations subordinated state sovereign immunity. Against a backdrop of rampant state treaty violations and faced with the possibility of war, the Framers sought to ensure uniform state compliance with treaties by making them the supreme law of the land and granting federal courts the jurisdiction to enforce treaty obligations against the states. Later, following ratification, the earliest treaties intruded deeply into state sovereignty—one required the cession of state territory without the state’s consent. That the Washington administration and the Senate did not consider these intrusions on state sovereignty to exceed the treaty power suggests that the treaty power can override the most fundamental attributes of state sovereignty, including immunity to suit. In addition to the historical evidence of the Framers’ intent,

---

transfers. . . . The question, rather, is whether Congress’ determination that States should be amenable to such proceedings is within the scope of its power to enact ‘Laws on the subject of Bankruptcies.’”).

350. *Id.* at 378 n.15.

351. *Id.* at 378.

the text of the Constitution, the structure of the treaty-making process, and the nature of the treaty power all suggest that states must not be immune from treaty-based private suits.

At base, *Katz* recognizes that though we treat states in some ways as sovereign entities, they constitute a single nation. Being a Union means that state sovereignty must sometimes yield. In perhaps no other context does that make more sense than in the Union's obligations to foreign powers.