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HUMAN RIGHTS TREATIES AND THE
U.S. CONSTITUTION

David Golove*

INTRODUCTION

Much of the focus of this Symposium has been on the exportation of U.S. laws and procedural practices to the rest of the world. I suspect that this focus will seem quite natural to most Americans, who are accustomed to thinking that our legal system, especially our constitutional commitment to fundamental rights, provides a model that other countries would be well advised to emulate. This confident, perhaps arrogant, self-conception as a moral beacon for the rest of the world has deep roots in U.S. history and seems as strong today as it has ever been. In contrast, many Americans are apt to be far less comfortable with the notion that when it comes to justice, we may have something to learn from other nations—that we may benefit from the importation, not just the exportation, of rights. It is just this uncomfortable reversal of roles, however, that I wish to explore. I focus particularly on the bearing of the U.S. Constitution on the importation of international human rights norms. What processes does the Constitution direct Americans to pursue when they seek the incorporation of globally validated human rights norms into domestic law? Is the Constitution cosmopolitan or parochial with respect to rights?

There are, of course, many avenues for the importation of legal concepts from abroad, most of which are unproblematic from a constitutional point of view. For example, the free exchange of ideas across international boundaries, made dramatically easier by new global communications technologies, may influence public opinion, which in turn may lead to legislative initiatives incorporating international norms. Likewise, legislators and regulators increasingly enmeshed in global "epistemic" networks may be directly influenced by their expo-

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sure to global norms. Notwithstanding the skepticism of some judges, courts, too, may be influenced by international norms in their interpretation of domestic law. Perhaps, for example, the development of strong international norms against the juvenile death penalty may influence the United States Supreme Court as it considers how to resolve pending constitutional challenges to this practice, just as some have claimed earlier international norms against racial discrimination influenced the Supreme Court in deciding Brown v. Board of Education.

My focus will not be on these various possibilities, but rather on one specific and particularly important method for incorporating international norms into domestic law—the conclusion of international treaties—and on one specific type of treaty, human rights conventions. Human rights treaties are a potentially spectacular mechanism for the domestic incorporation in bulk of international norms concerning fundamental rights. Upon ratification, if self-executing, they immediately become effective as domestic law to be applied and enforced by courts, and they may regulate areas that would otherwise fall within the sphere of exclusive state legislative authority. Thus, they offer the potential for significant reform of rights practices in the United States and a possible mechanism, short of constitutional amendment, for updating our eighteenth century Bill of Rights. Does the Constitution impose any impediments to the conclusion of human rights treaties? More subtly, does it permit the conclusion of human rights treaties as a means of affecting domestic reform?

Famously, the United States has been and remains ambivalent about human rights treaties. This hesitancy is reflected most dramatically in the slow pace of U.S. ratification of the main human rights instruments and in its insistence, even when finally agreeing to ratify, upon reservations that effectively prevent human rights treaties from

2. 347 U.S. 483 (1954). For a recent discussion of the impact of international norms against racial discrimination and foreign affairs considerations on Brown and federal involvement in the desegregation movement more generally, see Mary L. Dudziak, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000). In the recent decision in Atkins v. Virginia, 122 S. Ct. 2242, 2249 n.21 (2002), the majority cited international norms in upholding an Eighth Amendment challenge to the imposition of the death penalty on mentally retarded defendants, but provoked a heated rebuke from Chief Justice William Rehnquist and Justice Antonin Scalia. See id. at 2254 (Rehnquist, C.J., dissenting); id. at 2264 (Scalia, J., dissenting).
having any impact upon domestic law. We are decidedly skeptical as a nation about international law as a source of norms for improving our domestic rights practices.

This reticence is not only political. From the dawn of the human rights era at the end of World War II, and indeed even before, opposition to human rights treaties in the United States has been fueled by powerful rhetorical claims that they are unconstitutional. The main lines of attack have focused on the claims that human rights are per se not an appropriate subject for international agreements and, even more fiercely, that treaties protecting human rights impermissibly intrude upon the sphere of legislative authority reserved to the states by the Tenth Amendment. By now, these are old debates, and many may have believed, perhaps over-optimistically, that claims of these kinds had been finally put to rest. Constitutional doubts, however, have persisted and, indeed, in recent years have re-emerged with renewed vigor. Recent trends in Supreme Court decisions, moreover, give new fodder to those who wish to revive old, seemingly discredited arguments.

Mercifully, I do not intend simply to rehash these old vitriolic debates. The arguments pressed so vigorously by opponents fail to offer a serious challenge to the constitutionality of human rights treaties and merit no elaborate reply. It should be clear that there are no general constitutional obstacles to U.S. ratification of human rights treaties, although particular provisions might raise difficulties under the Bill of Rights (e.g., provisions concerning hate speech). Nevertheless, the persistence of constitutional objections is itself a fact in need of explanation. It is possible, of course, that these objections are really just political opposition masquerading in the form of constitutional argument. For present purposes, however, I wish to put that


explanation aside and instead explore the possibility that there is at least some arguably *bona fide* constitutional concern, not yet articulated by the opponents themselves, which animates their otherwise implausible objections. My aim is to reconstruct their objections to make them as reasonable as possible and then to consider what limitations, if any, this reconstructed view would impose on human rights treaties.

In pursuit of this goal, I develop two models of the treaty power: the first I call the "strict conception" and the second, the "broad conception." Under the strict conception, it is impermissible for the President and Senate to consider domestic law reform as a reason in favor of concluding a treaty. Thus, an adherent of the strict conception would have grounds for arguing that the President and Senate are without constitutional authority to conclude human rights treaties for the purpose of improving domestic compliance with human rights standards. It is this idea, I claim, that captures the most plausible ground for constitutional objections to human rights treaties rather than the arguments that opponents have long pressed. At the same time, however, even under the strict conception, there are many perfectly constitutional reasons for concluding human rights treaties, and in actual practice, there is little or no reason to believe that the President and Senate have ever been, or will in the foreseeable future, be tempted to ratify human rights treaties for reasons that the strict conception would condemn as impermissible. Thus, whether one holds the strict or broad conception of the treaty power, there is no reasonable basis for doubting, in actual practice, the constitutional validity of human rights treaties.

Part II begins by briefly rehearsing the two principal constitutional objections to human rights treaties that opponents have traditionally put forward, provides an initial explanation for why these claims have been rejected on a doctrinal level, and considers the ways in which recent Supreme Court opinions have helped fuel the call to revisit these long-rejected positions. Part III then develops the strict and broad conceptions of the treaty power, exploring the differences between constitution-making, law-making, and treaty-making. I attempt to show how the opponents' traditional constitutional objections are unpersuasive in terms of either of these larger theories of the treaty power. At the same time, I elaborate on the related but somewhat different limitations on the treaty power that the two mod-

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8. See *infra* notes 14-35 and accompanying text.
9. See *infra* notes 36-61 and accompanying text.
els entail. In the process, I briefly sketch some of the reasons why I favor the broad conception. Part IV considers the implications of the two models for possible limitations on human rights treaties.10 What reasons for concluding human rights treaties qualify as genuine foreign policy reasons? What reasons do these models rule out, and what reasons do they regard as permissible? Part V then considers whether there is any reason to believe that even the strict conception sheds any doubt on the constitutionality of human rights treaties in actual U.S. practice and concludes that there is not.11 Finally, Part VI offers some concluding remarks. I note that notwithstanding my conclusions about the constitutionality of human rights treaties under both conceptions, there is in fact a deep tension between the ideals of human rights treaties and the constitutional process values that underlie the strict conception.12 I consider the significance of this tension for the long-run character of U.S. participation in human rights regimes.

As a preliminary matter, I should emphasize two points. First, nothing in my analysis is intended to suggest that judicial review is, or should be, available to enforce the kinds of limitations on the treaty power that the two conceptions entail. Rather, presidents and senates properly consider the limitations I discuss as they conduct the treaty-making process, but for reasons that will become evident, these limitations are of a sort that courts are particularly ill-suited to enforce. Beyond this caution, I leave the question of judicial review for another day. Second, I speak throughout about human rights treaties as a general type. Of course, there are many different kinds of treaties that might arguably fall under that general heading, and my discussion may apply more to some kinds than to others. In using the term, I have in mind the major human rights conventions that followed the Universal Declaration of Human Rights and that remain controversial as a constitutional matter even today.13

II. TRADITIONAL CONSTITUTIONAL OBJECTIONS TO HUMAN RIGHTS TREATIES

Constitutional objections to human rights treaties stretch back as far as the very idea of such treaties. Nearly one hundred years ago,
provisions in the Treaty of Versailles affirming universal minimum labor standards, creating the International Labor Organization, and prompting a series of labor conventions\(^\text{14}\) (perhaps the first systematic human rights treaties in the modern sense) provoked heated constitutional debate highly reminiscent of later constitutional controversies.\(^\text{15}\)

Indeed, this pattern was present much earlier, dating back to the earliest period in U.S. history. The very first “human rights” provisions in any treaty of the United States are arguably found in the 1783 Treaty of Peace with Great Britain,\(^\text{16}\) in which the British insisted that the United States agree, as the price of independence, to take no further reprisals against Loyalists (those citizens who had sided with the King in the Revolutionary War).\(^\text{17}\) Enraged opponents of the Treaty “attack[ed] the right of Congress to make such a stipulation, and arraign[ed] the impudence of Great-Britain in attempting to make terms for our own subjects.”\(^\text{18}\) In response, Alexander Hamilton replied scathingly that their arguments were “only successful in betraying their narrowness and ignorance.”\(^\text{19}\)


\(^{19}\) Id. See also ALEXANDER HAMILTON, Second Letter from Phocion (Apr. 1784), in 3 THE PAPERS OF ALEXANDER HAMILTON supra note 18 at 530, 539 (noting that one ground of objection to Article VI “was that it would have been improper to have stipulated for [the Loyalists] at all, if they were not aliens” and that “I have shown in my former letter, that a stipulation for subjects, in similar circumstances, has been far from unprecedented”). Similarly, in the North Carolina Ratifying Convention, James Iredell noted that while the power to make treaties could “never be supposed to include a right to establish a foreign religion among ourselves,” a treaty might nevertheless ensure the “toleration of others.” 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, 194 (1891) (statement of James Iredell, July 30, 1788). Presumably, he had in mind the potential concerns of foreign nations about the treatment of co-religionists in the United States by the state or federal
Of course, human rights treaties became a source of sustained constitutional controversy only after World War II with the birth of the modern human rights era, inaugurated most importantly by the Universal Declaration of Human Rights, the Genocide Convention, and the two covenants designed to implement the former in binding treaty fashion. In response to these treaties, conservatives argued, much as had earlier opponents in 1783 and 1920, that they were unconstitutional on two principal grounds. First, they claimed that the subject matter of human rights treaties was simply and categorically beyond the scope of the treaty power. Making a global challenge to the very notion of human rights treaties, they emphasized that human rights deal with the relationship between a state and its own citizens, and they contended that the whole subject of human rights in the United States was therefore appropriately a matter of concern only to ourselves and not to other nations. This argument sounded largely in the separation of powers, the main claim being that Congress, with the participation of the House, properly regulates domestic rights, not the President and Senate alone. Their second argument sounded strictly in federalism. Somewhat more narrowly, but no less vigorously, they insisted that human rights treaties seek to deal with matters over which Congress itself has no jurisdiction and which under the Tenth Amendment are exclusively reserved to the states. If Congress could not regulate such matters—here, they principally had racial segregation in mind—then the President and Senate could not, they claimed, make a treaty that did.

These arguments faced a number of formidable doctrinal and practical objections. As to the separation of powers argument, the text of the Constitution itself places no subject matter limits on the scope of the treaty power, and hence, any limits must be implicit. The Framers, painfully aware of the great delicacy of conducting the nation's foreign

governments. Should such a concern arise, he was asserting, the President and Senate could make a binding treaty promise that their rights would be respected.


21. The argument might also be understood as being rooted in some even more general notion of the non-delegability of sovereignty. Regardless of the domestic procedure employed, it might be claimed, it is unconstitutional for the United States to bind itself in a treaty to comply with standards applicable to the treatment of its own citizens. Although something like this notion may indeed underlie the opponents' constitutional objections to human rights treaties, I do not pursue the argument here. So far as I am aware, opponents have not actually defended this claim, even if they have vaguely alluded to it at times. I am perplexed, moreover, as to where one would look for its grounding in constitutional text, precedent, or theory.

22. See Kaufman, supra note 4.
affairs and fully cognizant of the evolving character of international relations, expressly disclaimed any intention to limit the flexibility of the President and Senate or narrowly to constrain them into making only the kinds of treaties with which the Framers were themselves most familiar.\(^2\) Moreover, from the beginning, it has been widely acknowledged, and the Supreme Court has affirmed on numerous occasions, that the scope of the treaty power is very broad, extending, in a typical formulation, to any subject appropriate for negotiation and agreement among states.\(^2\) Functional considerations also led ineluctably in the same direction. Many important kinds of treaties regulate the ways in which states treat their own citizens (e.g., treaties dealing with narcotics, weapons, the environment, trade, and many others), making it difficult for critics of human rights treaties to articulate persuasive grounds for distinguishing the treaties they opposed from those which were, and are, widely regarded as essential. In any case, and perhaps most importantly, once human rights treaties became an accepted part of international practice, it was hardly tenable to claim that the subject matter scope of the treaty power was not broad enough to cover treaties that might engage significant foreign policy interests of the United States. The critics were simply stubbornly conflating their strong political opposition to human rights treaties with misconceived claims about the constitutional capacities, or incapacities, of the nation in the conduct of its foreign affairs.

The federalism objection, although perhaps somewhat more arguable, faced an even steeper uphill battle, not least because of the Supreme Court's 1920 decision in Missouri v. Holland.\(^2\) Not only did Missouri uphold a treaty that, like human rights treaties, regulated the relationship between the United States and its citizens (i.e., migratory bird hunting seasons), it famously held that the treaty power is a separate and independent power delegated to the national government and that it is not limited to those subjects falling within the scope of the enumerated legislative powers granted to Congress. If a treaty advances the national interests of the United States, it is valid irrespective of whether Congress under some other head of power, like the commerce power, otherwise has legislative authority over the subject. Thus, treaties may properly touch on subjects that, as a purely legislative matter, are reserved to the states. Moreover, this ruling is strongly


\(^2\) See, e.g., Geofroy v. Riggs, 133 U.S. 258, 266-67 (1889); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924).

\(^2\) 252 U.S. 416 (1920). For extended discussion of Missouri, see Golove, supra note 23.
supported by both textual and historical considerations. Although always controversial, the ruling in Missouri is consistent with both the original understanding of the treaty power and with the dominant understandings throughout most of U.S. history.26

Given the weakness of their legal position, it is perhaps not surprising that critics in the 1950s, rather than resting principally on existing constitutional law, launched a vigorous, but ultimately unsuccessful, campaign to amend the Constitution. The so-called Bricker Amendment took many forms, but in most versions it contained provisions explicitly excepting human rights treaties from the scope of the treaty power or overruling the doctrine of Missouri v. Holland or both.27 At one point, the Senate came within a single vote of adopting Senator Bricker's proposed amendment, although by that time, in the face of the determined opposition of President Eisenhower, the amendment proposal no longer contained either of the two provisions that would have affected human rights treaties.28 Even after the failure of Bricker and notwithstanding the Supreme Court's explicit reaffirmation of Missouri v. Holland at the height of the controversy,29 critics still persisted for a time in their constitutional claims. Ultimately, however, the issue finally appeared to be settled.30

Until recently, that is, when new trends in Supreme Court decisions emboldened opponents to revisit these apparently settled constitutional controversies. This reaction is understandable, if misguided. The Court has shown an increased willingness to refuse deference to the political branches,31 an increased activism in enforcing separation of powers principles,32 and most dramatically, an increased commitment to the judicial enforcement of federalism limits on the scope of federal powers.33 I will not dwell on these developments here, except

26. See Golove, supra note 23.
27. Duane Tananbaum's treatment of the Bricker Amendment controversy is by far the best. See TANANBAUM, supra note 4.
28. See id. at 138-81, 225.
29. See Reid v. Covert, 354 U.S. 1, 17-18 (1957). See also TANANBAUM, supra note 4, at 213.
30. See supra note 5 and accompanying text.
33. See, e.g., Garrett, 531 U.S. at 356 (striking down provision of the Americans with Disabilities Act as in excess of Congress's powers under Section 5 of the Fourteenth Amendment); Morrison, 529 U.S. at 598 (striking down Violence Against Women Act as in excess of Congress's powers under the Commerce Clause and Section 5 of the Fourteenth Amendment); Printz v. United States, 521 U.S. 898 (1997) (striking down Brady Gun Control Act on ground
to point out that in the last category are not only the Court's recent commerce power cases, which have for the first time in over a half century pulled back on the scope of congressional authority, but also the Court's cases narrowly construing Section 5 of the Fourteenth Amendment. These latter cases are particularly pertinent here because they deal precisely with the scope of Congress's legislative powers to define and enforce fundamental rights on the national level. The Court, in fact, has treated Section 5 much like a human rights treaty in which the states granted the national government limited powers to enforce fundamental rights. In the Court's view, Section 5 is not a grant of authority to Congress to define the scope of fundamental rights protection in the United States in light of changing circumstances and values, but rather a narrow grant of authority to enforce only those (increasingly limited) rights that the Court itself (applying an increasingly originalist methodology) finds protected by the substantive terms of the Fourteenth Amendment. Under the Court's current jurisprudence, Congress may only enforce those rights which have an appropriate relation to the regulation of commerce or which the Court itself finds constitutionally guaranteed by the Fourteenth Amendment. Beyond that, rights are a question for the states. That the Court conceives of Congress's powers over fundamental rights in this narrow fashion will certainly embolden those who argue that such treaties are constitutionally problematic, especially along federalism lines.

34. See, e.g., Garrett, 531 U.S. at 356; Morrison, 529 U.S. at 598; Flores, 521 U.S. at 507.
35. I do not want to exaggerate the problem. Notwithstanding the Court's recent commerce power cases, Congress still has extensive authority under that head to protect rights so long as there is a commercial link. Thus, for example, employment discrimination still clearly falls within the scope of the commerce power. Cf. Katzenbach v. McClung, 379 U.S. 294 (1964), and Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (both upholding Title II of the Civil Rights Act of 1964 under the commerce power). It is unclear at this early point in the Court's developing doctrine which human rights fall outside both Congress's commerce and Section 5 powers. Perhaps, in the end, there will be few. In that event, federalism considerations will have only a somewhat remote relevance to human rights treaties.
III. TWO MODELS OF THE TREATY POWER

Thus far, I have explained the implausibility of the opponents' traditional constitutional objections to human rights treaties largely in light of long-established doctrines about the scope of the treaty power. These doctrinal replies, however, are themselves rooted in a larger theory of the treaty power and its role in the overall constitutional structure—indeed, in two related but competing theories, both of which I shall proceed to develop in this part. As we will see, these theories—the strict and broad conceptions of the treaty power—share a common base but also diverge in important respects. The common base provides the theoretical grounding for the breadth of the treaty power as recognized in traditional doctrine and for the holding in Missouri v. Holland. The areas of divergence, in turn, entail different ways of understanding the appropriate constitutional limits on the scope of the treaty power. My hypothesis is that opponents will generally find the strict conception more in accord with their constitutional intuitions, and they may even recognize in it a more compelling reconstruction of their previous unpersuasive constitutional claims. For present purposes, I do not attempt a full defense of either model because my limited aim is to consider the implications of both for human rights treaties. For reasons that are implicit throughout, however, my own view corresponds more closely with the broad than with the narrow conception.

A. SOME PRELIMINARY REMARKS

As a preliminary matter, it may be helpful in elucidating the relationship between the treaty power and the principles of federalism and the separation of powers to observe that the treaty power has a unique dual character that distinguishes it from Congress's enumerated legislative powers. In one aspect, it is similar to Congress's legislative powers. Both are delegations of authority to the national government to create binding domestic norms in certain defined subject matter areas. Thus, the enumerated powers afford Congress jurisdiction to regulate in such fields, among others, as interstate and foreign commerce.\(^36\) The treaty power too is a grant of jurisdiction over a certain subject matter area—broadly speaking, foreign affairs. Indeed, the Framers decided to forego making a general delegation of the foreign affairs power to Congress, preferring instead to lodge that

\(^{36}\) See U.S. Const. art. I, § 8, cl. 3.
power in the President and Senate through the making of treaties.\textsuperscript{37} The treaty power, however, has a second aspect that is of an altogether different character. It is not only a delegation of jurisdiction over a (broadly) defined subject matter area. It is also a separate mode or procedure for creating domestic norms. In this aspect, it is like law-making and constitution-making.\textsuperscript{38} Although all three of these procedures deal with overlapping subject matter, each has distinctive features.

The first aspect of the treaty power helps explain the federalism doctrine of \textit{Missouri v. Holland}.\textsuperscript{39} The treaty power is a separate and additional delegation of subject matter authority to the national government. Hence, it can properly touch on subjects appropriate for treaty-making, even if those subjects do not fall within the subject matter scope of the legislative powers delegated to Congress. The Tenth Amendment\textsuperscript{40} limits the treaty power not by reference to Congress’s enumerated legislative powers but by reference to the nature and purposes of the treaty power itself. The second aspect helps explain from a separation of powers perspective the necessity of ensuring that treaties nevertheless remain within appropriate bounds. The treaty procedure is not a general alternative to the law-making proce-

\textsuperscript{37} Of course, they also granted Congress many more narrowly defined foreign affairs powers, such as, \textit{inter alia}, the power to declare war, regulate foreign commerce, and define “Offenses against the Law of Nations,” to name only a few. \textsc{U.S. Const.} art. I, § 8, cls. 3, 10, 11. The Framers may well have thought that lodging a general foreign affairs power in the national government through the treaty-making power rather than the law-making power would provide additional safeguards against possible abuses of this unavoidably wide-ranging power. Among other things, treaties require super-majority approval, and, by necessitating the involvement of other nations which, via the principle of reciprocity, will be mutually bound, they help to ensure that the foreign affairs reasons for acting are genuine. Nor do I mean to suggest that the treaty power is an umbrella that fully encompasses all of the foreign affairs powers. Even in the late eighteenth century, there were foreign affairs activities that could not be accomplished through treaty, most importantly, war. Conversely, there were some, such as peace, which, at least to the eighteenth century mind, could only be accomplished by treaty. \textit{See infra} note 58.

\textsuperscript{38} Sometimes, treaties create binding domestic norms directly, as with self-executing treaties, and sometimes they create binding domestic norms only indirectly, as with non-self-executing treaties. In the latter case, treaties provide Congress with a new basis for subject matter jurisdiction over the areas covered in the treaties, while at the same time they place Congress under a kind of compulsion (the compulsion of binding international norms) to adopt implementing legislation. \textit{See Henkin, supra} note 3, at 198-204.

As compared to the other two modes listed in the text, treaty-making is also uniquely a procedure for creating binding international norms. It is not, however, entirely unique in this respect. Congressional-executive agreements and sole executive agreements are alternative procedures for creating international norms and, with nuances, for creating domestic law. I leave these complications aside.

\textsuperscript{39} 252 \textsc{U.S.} 416 (1920).

\textsuperscript{40} \textsc{U.S. Const.} amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”)
dure to be used interchangeably with it as the treaty-makers see fit. It permits derogation from the ordinary law-making procedure, but only where the treaty-makers act for reasons that justify the derogation in a particular case. If the boundaries are not respected, the treaty procedure could become a mechanism for undermining the safeguards applicable to the law-making procedure.

These general observations bring out the essential features of the treaty power and its relationship to the fundamental structural principles of the Constitution. With these in mind, I now attempt a more systematic elaboration of the two conceptions of the treaty power and how they understand the role of treaty-making within the constitutional structure. I begin by describing the common base that both conceptions share and then elucidate the important areas of disagreement. Thereafter, I show how both models support traditional doctrine about the broad scope of the treaty power and the ruling in Missouri v. Holland.

B. The Common Base

Both the strict and broad conceptions begin with the observation that the Constitution sets forth three principal mechanisms for the creation of binding norms: constitution-making, law-making, and treaty-making. These procedures have common features and, as noted, overlap in the subject matter to which they apply, but each serves importantly different purposes. Constitution-making (or, looking forward, constitution amending) is the process through which the citizens constitute the organs of government, divide powers among them, and establish fundamental principles to guide and constrain the conduct of government officials, entrenching their decisions on these matters against future legislative acts. Article V of the United States Constitution, in turn, sets forth a complex set of procedures through which the constitution-making power is to be exercised.41

Law-making, in contrast, is the process through which the government promotes the nation's legitimate aims by regulating the conduct of those subject to its jurisdiction.42 In Article I, the Constitution creates "a single, finely wrought and exhaustively considered, [law-mak-
ing] procedure," which includes, among other things, a bicameral legislative body with chambers chosen in accordance with dissimilar principles of representation, a presidential veto, and a two-thirds legislative override. Each of these components of the law-making process were carefully devised to balance competing interests and to assure as far as possible good legislation, governmental respect for the rights of minorities, and democratic accountability.

In contrast, treaty-making is not principally, but only incidentally, a law-creating procedure. It is the process through which the government promotes the nation's legitimate aims by concluding internationally binding agreements or contracts with foreign nations to do or to forebear from doing certain acts. As with all contracts, treaties involve mutual concessions by which each party achieves certain of its aims, but only at the cost of promising to forgo others. Although the subject matters of treaties and legislation overlap, treaties accomplish what legislation cannot: international cooperation by nations not subject to our jurisdiction that promotes our legitimate national aims and that is made possible by the making of internationally binding promises. In rejecting the claim that treaties ought not touch on matters assigned to the legislative authority, either federal or state, Alexander Hamilton early on drew the same distinction:

It is the province of the [treaty-making power] to do what [legislation] cannot do. Congress ... may regulate by law our own Trade and that which foreigners come to carry on with us, but they cannot regulate the Trade which we may go to carry on in foreign countries, they can give to us no rights [and] no privileges there. This must depend on the will and regulation of those countries; and consequently it is the province of the power of Treaty to establish the rule of commercial intercourse between foreign nations and the U[nited] States. The Legislature may regulate our own trade but Treaty only can regulate the mutual Trade between our own and another Country ... .

Though a Treaty may effect what a law can, yet a law cannot effect what a Treaty may. These discriminations are obvious and decisive; and however the operations of a Treaty may in some things resemble that of a law no two ideas are more distinct than that of legislating and that of contracting.

In themselves, then, treaties are not legislative acts but contracts, even though by the Constitution they are declared to be the supreme law of the land and thus operate as laws.

45. Id. at 8-9.
Moreover, treaties have importantly different characteristics than ordinary laws. Most importantly, they are binding under international law. As a result, it may sometimes be more difficult, or may take more time to abrogate treaty obligations than it would to repeal laws. In this respect, treaties are comparable to constitutional provisions. They are designed to limit the flexibility of future legislatures. Finally, treaties are made and approved through a process that diverges from the ordinary legislative process. In treaty-making, the executive has the initiative in the negotiation and ratification phases subject to a powerful senatorial check.\textsuperscript{46} Law-making, in contrast, is a legislature-led function with an executive check. The legislature, of course, includes two Houses, only one of which is involved in the treaty process.\textsuperscript{47}

The purpose of treaties, then, is to enable the national government to make internationally binding promises as a means of obtaining the cooperation of other nations in ways that advance our legitimate national goals and aspirations. Legitimate goals include the advancement of our interests narrowly conceived—for example, our military or security or our economic, political, or diplomatic interests. They also include, more broadly, our aesthetic, moral, and even spiritual aims—most expansively, our aim to promote global justice. In this respect, there is nothing parochial about the treaty power—nothing that defines the national aims that can be pursued in terms of narrow self-interest. Moreover, the cooperation sought may be affirmative aid in achieving national aims, or it may be an entirely negative agreement to forgo the exercise of pressure and influence in a manner that impedes their achievement. Furthermore, it may (and usually does) involve legally binding, and most often reciprocal commitments on the part of other states, but it may sometimes involve less formal but nevertheless important political commitments. But it is precisely and exclusively in this realm—a realm in which the legislative power cannot act—that we find the purpose of the treaty power. In contrast, it is not the object of the treaty power to create an all-purpose alternative

\textsuperscript{46} The Treaty Clause provides: “[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.” U.S. CONST. art. II, § 2, cl. 2.

\textsuperscript{47} I note that congressional-executive agreements complicate this picture. They too are contracts, but they are approved by the whole Congress through the normal legislative process. As a result, the differences between congressional-executive agreements and legislation are of a lesser magnitude. I do not consider here any complications arising from this alternative to the treaty-making process. On the congressional-executive agreement, see Bruce Ackerman & David Golove, \textit{Is NAFTA Constitutional?}, 108 HARV. L. REV. 799 (1995); David M. Golove, \textit{Against Free-Form Formalism}, 73 N.Y.U. L. REV. 1791 (1998).
mode for adopting domestic law as if treaties were interchangeable with legislation. If international cooperation is not necessary or desirable to accomplishing our goals—if all that is at stake is a question of policy about the best norm by which to govern ourselves—it is the law-making procedure that applies.

These fundamental structural considerations yield a *prima facie* definition of the scope of the treaty power: In the language of the traditional formulation, treaties deal with “appropriate subjects of negotiation and agreement among states” when, in return for binding promises on our part, they obtain cooperative benefits, whether affirmative or negative, from other states which advance our legitimate national goals. The breadth of this definition is unavoidable for two reasons. First, treaty-making, not law-making, is the only available method for taking advantage of the possibilities for advancing our national goals that the making of binding promises affords. Second, there is simply no *a priori* way to determine under changing circumstances which of our goals will be significantly advanced—indeed, which can only be accomplished—through international cooperation and, thus, there is no way to define in advance which subjects are appropriate for treaty and which are appropriate for legislation only. What is crucial is that the making of binding promises and the international cooperation it makes possible genuinely promotes those goals and is not merely an excuse for indirectly enacting domestic legislation that could be equally effective in the absence of international cooperation.

In many cases, the national aims that the President and Senate will be seeking to advance will have little or nothing to do with domestic regulation. For example, the purpose of the treaty will be to obtain promises from other states about the manner in which they treat U.S. nationals abroad. This is quintessentially a national aim that a treaty may appropriately seek to advance. In other cases, the purpose of the treaty may instead be more inwardly focused to protect the processes of ordinary domestic legislation from harmful international influences, whether exercised through military or political means or simply

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48. I use the terms “national goals,” “national aims,” “national aspirations,” and “national interests” interchangeably throughout to indicate the breadth of the ends for which the treaty power may be exercised. The term “national interest” has the unfortunate connotation of being limited to narrow self interest to the exclusion of moral concerns. Any such limitation would be contrary to longstanding constitutional understandings, however much it may currently be in vogue among some to think of foreign policy in such terms.

49. For example, consider the provision of the Vienna Convention on Consular Relations at issue in *Breard v. Greene*, 523 U.S. 371 (1998), which requires state parties to notify arrested nationals of other states of their right to consult with their national consular officials.
through the force of market competition. In an extended sense, the purpose of a defensive military alliance may be to safeguard the nation's security so that domestic regulation can proceed without taking into account the demands of enemy states or diverting resources to national defense. A more subtle example might be a treaty establishing global minimum labor standards. By diminishing market competition from abroad, such a treaty may enhance the ability of domestic law-makers to set what they believe to be the appropriate level of domestic protection.\textsuperscript{50} Restraining the effects of harmful activities abroad is likewise a core national aim that treaties may properly seek to further.

In both of these kinds of cases, what makes the treaties justifiable from a constitutional perspective is that the treaty-makers seek cooperative action by other nations to advance legitimate national aims of the United States, in the one case about the manner in which foreign states treat U.S. citizens abroad and in the other about the minimum labor standards to which they will adhere. If, on the contrary, the sole purpose of the President and Senate were to legislate what they believe to be good domestic policy with respect to the treatment of foreign nationals in the United States or with respect to the terms and conditions of employment of domestic workers—and without regard to the benefits that would accrue from the improved treatment of U.S. citizens abroad or from the diminishment of foreign competition—the treaties would constitute unconstitutional usurpations of legislative authority.

Of course, nothing I have said is meant to deny that the President and Senate will sometimes have to make delicate legislative judgments during the treaty-making process. In deciding whether to ratify a treaty, the treaty-makers must weigh the benefits that the treaty will achieve against the costs that it will impose. A critical part of the overall decision calculus requires them to assess the degree of compatibility between the domestic law obligations the treaty entails and the preferred domestic standards. That inquiry, in turn, requires them to determine what the ideal domestic law baseline would be and how far, in a qualitative sense, the domestic obligations of the treaty diverge from it. Certainly, such an inquiry is apt to involve exceedingly complex judgments that are unavoidably legislative in character, but that is simply part and parcel of the treaty process that the Constitution

\textsuperscript{50} Of course, there may be other reasons for ratifying a treaty establishing minimum labor standards that are not captured by concerns about harmful foreign competition. In this sense, such a treaty may be a kind of human rights treaty. I discuss below the reasons for making human rights treaties. \textit{See infra} Part IV.
delegates to the President and Senate. How ought the President and Senate make these complex quasi-legislative judgments, or, to put it somewhat differently, does the Constitution impose any constraints on how the President and Senate are to make these determinations? It is precisely in answering these questions that the strict and broad conceptions of the treaty power diverge.

C. The Strict Conception of the Treaty Power

The strict conception emphasizes the legislative component of the treaty-making process and, relying upon a presumptive constitutional preference for maximizing the congressional role in all legislative judgments, seeks to cabin the legislative discretion of the President and Senate to the maximum extent possible. Admittedly, as noted, the President and Senate must consider the degree of divergence between the treaty obligations and the ideal domestic law baseline in determining the cost of the treaty from the U.S. perspective. According to the strict conception, that is a regrettable, although unavoidable, aspect of treaty-making—regrettable because it means that the President in the first instance, with only subsequent senatorial oversight, will be making judgments about ideal legislative standards rather than Congress.

From the perspective of the strict conception, the crucial question is how the Constitution directs the President and Senate to carry out this task. They are, it claims, to think of themselves as agents of the legislative branch. That means in determining the ideal domestic law baseline, they are not to engage in a wide-ranging discretionary exercise, but rather are to stick as closely as possible to what Congress’s judgment would be were it asked. The closer the domestic obligations of a treaty are to what Congress would view as optimal, the better, and *prima facie*, at least, the President and Senate ought to begin with a presumption that existing federal law, where applicable, provides the appropriate baseline. Even a treaty that accords with Congress’s ideal baseline imposes a non-negligible cost because ratifying the treaty necessarily fetters the legislature’s future autonomy. Any significant divergence from Congress’s ideal must be counted as a substantial, additional loss. At a minimum, whatever the independent policy views of the President or Senate, they may never consider the domestic law standards imposed by a treaty to be an affirmative reason in favor of ratification.51

51. When a treaty deals with a subject that falls within the exclusive legislative authority of the states, it is perhaps arguable that the ideal domestic law baseline should be determined not by Congress’s judgment but by the judgment of the state legislatures. I think that this claim is
To remain plausible, the strict conception cannot be too inflexible about these constraints. Existing federal law, for instance, can realistically only be a starting point in determining Congress’s ideal baseline. There are many reasons why the President and Senate might appropriately conclude that existing law does not express Congress’s optimal position. For example, current law may itself be influenced by considerations that it is the purpose or will be the effect of the treaty to eliminate or modify, as in the example of a treaty setting minimum labor standards or a treaty dealing with a global tragedy of the commons problem. In such cases, the proper baseline may not be existing law at all, but a standard far more difficult to determine. It is also possible that during the course of negotiations the President may learn new facts or be exposed to novel ways of understanding common problems. As a result, he might legitimately conclude that Congress itself, were it exposed to the same information, would prefer a standard that departs from existing law. In any case, the President and Senate cannot simply assume that the entire corpus of existing federal law uniformly reflects contemporary congressional preferences. When existing law does not provide adequate guidance, however, the President and Senate will necessarily be forced to make speculative judgments about congressional preferences.

The difficulties do not end here. After determining Congress’s ideal baseline, the President and Senate will have to decide how Congress would assess the magnitude of the cost of any divergence from the ideal, which the treaty entails. Under the best circumstances, that

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52. In these circumstances, the strict conception will have to specify how to aggregate the views of the House and Senate to determine Congress’s ideal baseline. Presumably, the ideal baseline would be something like the outcome which the legislative process would have yielded had Congress attempted to legislate on the subject. This will mean a privileging of the status quo because each House has a veto over any changes in existing regulation (or non-regulation) in cases of disagreement between them.
too is likely to be an extremely difficult task. Moreover, determining the costs represents only one-half of the balance sheet. In order to make a rational choice about whether to conclude a treaty, the President and Senate will also have to determine how to weigh the value of the cooperative benefits that the treaty will achieve and, under any plausible conception of the treaty power, that evaluation goes to the essence of the discretionary authority that the Constitution delegates to them. In this respect, they cannot be deemed to be agents of the legislative branch, but rather, must be considered as exercising independent discretion. Without a doubt, then, the strict conception imposes an exceedingly complex burden on the treaty-makers. Even if they faithfully attempt to respect congressional policy judgments on matters of domestic law, they will necessarily be making delicate legislative choices.

D. The Broad Conception of the Treaty Power

The crucial point of difference between the two models is that the broad conception rejects the claim that the President and Senate should view themselves as agents of Congress, bound to accept congressional policy judgments as to the compatibility of domestic law treaty obligations with the national interest. Rather, it claims, the treaty-makers properly exercise unfettered policy discretion as to all relevant considerations when they consider whether to conclude a treaty. As we have seen, the broad, no less than the strict, conception recognizes that there must be a genuine foreign policy reason for concluding a treaty (i.e., a treaty that does not advance the nation's legitimate aims and aspirations by facilitating international cooperative activity is unconstitutional). Concluding a treaty without regard for any such benefits, and only to supersede existing domestic law, would be an abuse of constitutional form. Under the broad view, however, when the treaty-makers believe that a treaty does in fact achieve sig-

53. The specification problem would be far more complex in this context. The two Houses may assess the magnitude of the cost differently, and there is no status quo position to resort to in cases of disagreement. For present purposes, I assume that it would be possible to find an adequate solution to the specification problem and that it would be something like the middle point between the views of the median members of each House. A more restrictive alternative would be to follow the view of the House of Representatives when its assessment of the costs is higher than that of the Senate. When the Senate's assessment is higher, there is no need to be concerned about the agency relationship. The Senate is directly represented in the process. Indeed, the Senate will judge the magnitude of the costs, not by reference to the views of its median member, but by reference to the views of the member falling at the one-third plus one position, thus providing an even stronger safeguard. Presumably, in most cases, the views of the member at the one-third plus one position will be more conservative in regard to the treaty than the views of the median member of the House.
significant cooperative benefits, they properly exercise independent policy making discretion in evaluating the overall costs and benefits of ratification. They are under no obligation to consider how Congress as a whole would assess the costs (or benefits) associated with accepting the domestic law obligations that the treaty would impose, and nothing in the Constitution enjoins them from counting changes in domestic law as an affirmative benefit of ratification.

There are a number of compelling reasons that support the broad conception in rejecting the rigid version of the separation of powers that underlies the strict conception. To begin, the broad conception dismisses the notion that there is a free-floating constitutional preference for Congress to make all legislative judgments in all contexts. The treaty context is precisely one in which the Constitution has assigned a kind of legislative authority to the President and Senate, and there is simply no basis in the Constitution itself for declaring this assignment to be a matter of regret. The strict conception unjustifiably seeks to impose limits on the discretion of the treaty-makers that are nowhere stated or clearly implied in the text and are without strong normative grounding. The President is the only official in the federal government elected by all the people, and he exercises significant quasi-legislative discretion in many areas, involving both domestic and foreign policy. In the area of foreign affairs, as “sole organ” of the nation, he determines much of the foreign policy of the United States entirely on his own authority. In contrast, in the treaty context, his discretionary powers are far more circumscribed. The President can conclude treaties only with the consent of two-thirds of the Senate, an exacting form of legislative scrutiny that does not apply in any other context.

Furthermore, the strict conception tends to exaggerate the differences between the law-making and treaty-making processes. Although, admittedly, they differ in some significant respects, the legislature is nevertheless intimately involved in both. Legislation requires the approval of simple majorities in both Houses of Congress; while treaties require the approval of a two-thirds super-majority in one House. As James Madison put it, “a concurrence of two-thirds at least is made necessary, as a substitute or compensation for the other branch of the legislature, which, on certain occasions, could not be conveniently a party to the transaction.” Thus, although the treaty and law-making processes differ, the differences do not justify impos-

ing extraordinary limits not found in the constitutional text on the scope of the policy discretion that the President and Senate may exercise. Moreover, as a practical matter, the two-thirds rule has proved to be a far more effective safeguard than the simple majority rule applicable to legislation. Indeed, there are strong grounds for believing that the two-thirds rule goes too far, giving minority interests the ability to impede important U.S. foreign policy interests. At least so long as the two-thirds procedural safeguard is in place—ensuring that treaties garner a high degree of consensus before they can be approved—there is no need to consider further burdening the treaty-makers with new nontextual constraints.

There are still further reasons to reject the strict conception's approach. Even the strict conception acknowledges the great complexity of the burden that it imposes on the President and Senate in attempting to ascertain and follow congressional policy judgments on matters of domestic law. That complexity, however, argues strongly against the whole approach. It is self-defeating to impose requirements that, predictably, will prove impossible to satisfy. Even when the President and Senate are attempting to do so in good faith, they will often find it extremely difficult, if not impossible, to comply with the constraints of the strict conception. For example, how are they to determine what Congress's judgment would be when Congress has not yet expressed its view, has done so only sometime in the past, or when the treaty would itself bring about changes that may be relevant to the legislative judgment? How can they assess what the congressional reaction would be were Congress exposed to the wide diversity of experiences and viewpoints the President encountered during the extended

56. Rejecting Madison's view, an adherent of the strict conception might reply that the law-making and treaty-making powers should not be so easily collapsed. The exclusion of the House is not simply a technicality for which the addition of one-sixth of the Senate serves as full compensation. In treaty-making, it is the executive, not the Senate that has the initiative. The executive makes countless policy choices during the negotiation phase that the Senate, even with the in terrorem effect of the two-thirds rule, has only limited capacity to influence. The veto is a blunt instrument for many purposes. Thus, executive led law-making through treaty raises a potential democracy deficit. All the more so, because treaties are binding under international law and thus limit the future flexibility of the legislature in ways that ordinary legislation does not. In response, an adherent of the broad view would concede that there are significant differences between the law-making and treaty-making processes, but deny that they are so significant as to warrant restricting the discretion of the President and Senate in the manner that the strict conception does.

57. The two-thirds rule has quite plausibly been dubbed the "fatal defect" in the Framers' design. DENNA F. FLEMING, THE UNITED STATES AND THE WORLD COURT 156 (1945). There are many excellent treatments of the history of Senate obstruction of U.S. foreign policy. See, e.g., DENNA F. FLEMING, THE TREATY VETO OF THE AMERICAN SENATE (1930). For discussion and citations, see Ackerman & Golove, supra note 47, at 861-62.
negotiating process leading to the treaty? How can they determine how Congress would assess the weight of any divergence from its ideal domestic law baseline? Given the difficulties, it is far more sensible to simply abandon the effort to deem the President and Senate mere agents of Congress and to acknowledge that they will inevitably exercise independent legislative judgment.

All the more so because the incentive structure that the Constitution creates will strongly encourage the treaty-makers to take into account all of the relevant policy considerations without paying close attention to the kind of artificial boundaries that the strict conception imposes. The subtleties of the strict conception's division of labor will be lost on citizens who will insist that the President and Senate make the right choice, not the choice that some complicated calculus combining the views of the treaty-makers and Congress would yield. Instead of imposing unrealistic demands on the President and Senate of this sort, the Constitution imposes a strict procedural safeguard against abuses of the treaty power. If two-thirds of the Senate concurs in the President's policy judgment, there is no longer a powerful reason to be concerned about whether the House of Representatives might, in some unusual case, happen to disagree.

E. Assessing the Traditional Doctrinal Objections to Human Rights Treaties Under the Strict and Broad Conceptions

I will not make any further attempt here to adjudicate between the two conceptions of the treaty power because, as noted, my aim is to consider the implications of both for human rights treaties. Before turning to that question, however, it is worth considering briefly how the two conceptions provide solid theoretical grounding for the breadth of the treaty power as recognized in traditional doctrine and for the ruling in Missouri v. Holland and, thus, undermine the separation of powers and federalism objections that opponents have traditionally raised against human rights treaties.

As we have seen, the central claim upon which both conceptions agree is that the core and unique function of treaty-making, as distinguished from law-making, is to enable the national government to make contracts with foreign nations. By making internationally binding promises, the nation can obtain the cooperation of foreign nations in ways that advance our legitimate aims and aspirations. Thus, the scope of the treaty power is determined by its nature and purpose: it extends to any subject matter in relation to which the making of internationally binding promises helps secure cooperative behavior by other nations advancing our legitimate national aims. No further sub-
ject matter limits can be specified because it is impossible to anticipate the respects in which cooperative international behavior may become important to achieving our purposes. Nor does the Constitution itself unwisely attempt any such specification. Once we recognize the difference between legislating and contracting, we can see why the principles of the separation of powers do not place any subject matter limits on the scope of the treaty power. Treaty-making and law-making are two different modes for advancing national goals that will often deal with the same subject matter. One does not imply a subject matter limit upon the other. 58

Perhaps, though, even if the separation of powers does not place limits on the subject matter of treaties, the principles of federalism do. Here again both conceptions concur in rejecting any such claim. The Constitution divides law-making power between the federal and state governments, famously denying the former any general power to regulate for the general welfare. In contrast, for compelling reasons that the Framers believed were both overriding and obvious, the Constitution lodges the whole treaty power in the federal government and explicitly excludes the states from making treaties on their own. 59 By centralizing the treaty power in the federal government, the Constitution creates an asymmetrical federal structure: the law-making power is divided, with the federal government having only limited legislative jurisdiction, but the treaty power is vested exclusively in the federal government, with the states being entirely excluded. Even when the subject matter of a treaty falls within their exclusive legislative jurisdiction, the states are thus incapable of pursuing on their own behalf the benefits that can be achieved through the making of binding international agreements. In the law-making realm, when the federal government is denied jurisdiction to legislate on a particular subject, the states may regulate in its stead. 60 As a result, there is no law-making

58. It is an interesting question whether there are some subjects reserved exclusively to the treaty power about which Congress may not legislate. It was once thought that war could be ended only by a treaty of peace and not by congressional resolution. That view has been rejected. See, e.g., Chandler P. Anderson, United States Congressional Peace Resolution, 14 AM. J. INT'L L. 384, 385 (1920); Edward S. Corwin, The Power of Congress to Declare Peace, 18 MICH. L. REV. 669, 669 (1920); John M. Mathews, The Termination of War, 19 MICH. L. REV. 819, 827-33 (1921).

59. The states are permitted, with the consent of Congress, to make “[a]greement[s] and [c]ompact[s].” Historical reasons overwhelmingly suggest, however, that this power was intended to open only a narrow door, and states have only sought to use it to deal with minor concerns that arise between bordering states and provinces of a purely non-political character. See Golove, supra note 23, at 1095-97 n.52.

60. Except, that is, in the few cases where the Constitution denies a particular power both to the federal and the state governments. Compare, e.g., U.S. CONST. art. 1, § 9, cl. 5 (prohibiting
gap, which might, by default, jeopardize the national welfare. In contrast, in the treaty context, if the federal government were incapable of making a treaty containing concessions on matters within exclusive state legislative authority, then the United States as a whole would be denied the contracting power in an entire class of cases. There would be a gap, leaving both the national and state governments incapable of exercising one of the crucial modes for advancing national aims and potentially jeopardizing national interests of the highest order. The very same reasons that explain why Congress’s legislative powers do not imply a limit on the subject matter of treaties also explain why the legislative powers of the states likewise imply no limitation. The treaty power must be lodged somewhere. Perhaps, like the legislative power, it could have been divided between the federal and state governments. Instead, the Constitution delegates the power exclusively to the federal government. As a result, in treaty-making, the legislative powers of the states are irrelevant. The treaty power extends to any subject in relation to which the making of internationally binding promises advances the legitimate aims of the nation.\textsuperscript{61}

Of course, the Framers were not insensitive to the ways in which treaties could impact congressional and state regulation. To mitigate these concerns, they created a uniquely powerful procedural safeguard to protect against improvident exercises of the treaty power. The Constitution assigns the advice and consent power to the Senate, the body in which the states are equally represented and in which their interests were expected to be most assiduously protected, and it fortifies minority interests in the Senate by giving them a treaty veto. One can legitimately question whether creating this safeguard was itself improvident, given the balance of considerations at stake. As long as it is in place, however, it renders concerns about the legislative authority of Congress and the states largely moot.

IV. \textbf{HUMAN RIGHTS TREATIES UNDER THE STRICT AND BROAD CONCEPTIONS OF THE TREATY POWER}

I now turn to applying the two models of the treaty power to human rights treaties. As we shall see, the broad conception imposes only minimal restrictions on the President and Senate as they consider human rights treaties. The strict conception, in contrast, imposes

\textsuperscript{61} There are also powerful historical reasons supporting the holding in Missouri v. Holland, but I leave those aside here, where my focus is on more conceptual and normative considerations. I treat the whole subject of Missouri at great length in Golove, \textit{supra} note 23.
somewhat more significant constraints. Even under the strict conception, there are many perfectly constitutional reasons for concluding human rights treaties, but at the same time, that conception rules out other reasons and renders the status of still others uncertain. In this part, I consider various reasons for making human rights treaties and analyze how they fare under the constraints of both the strict and broad conceptions. In Part V, I consider whether there is any reason to believe that the actual human rights treaty practices of the United States have ever contravened the limits of either of the two models. I conclude that there is no such reason and that even the arguable constitutional limitations of the strict conception have been scrupulously respected. Thus, under either of the two models, there is no genuine basis for continuing constitutional controversy. The real debate is strictly political and ought to be recognized as such.

A. The Strict and Broad Conceptions Applied to Human Rights Treaties: Introductory Remarks

As we have seen, both the strict and broad conceptions concur in rejecting any categorical subject matter limits on treaties beyond the requirement that a treaty advance legitimate national aims by obtaining the cooperation of other nations. Limitations on the treaty power are to be found not in such categorical limits, but rather in the kinds of reasons that may legitimately support the decision of the President and Senate to ratify. Moreover, both conceptions also agree upon a minimum standard: treaties may not be made solely to achieve changes in domestic law, without regard to the cooperative benefits that the treaty will obtain. If there are no substantial bona fide foreign policy reasons for concluding a treaty—if cooperative benefits are irrelevant to the treaty-makers and reforming domestic law is their only concern—then the Constitution prohibits the President and Senate from deciding to ratify.

To this extent, then, the two conceptions agree. The strict conception, however, goes further. It holds not only that the reform of domestic law is not alone sufficient to justify concluding a treaty, but also that, even in combination with bona fide foreign policy reasons, the President and Senate may never consider the content of the domestic law obligations of a treaty as affording an affirmative reason for ratification. The domestic law obligations must always count as a cost merely in virtue of the fact that they limit the future flexibility of the legislature. Moreover, insofar as they also diverge from the ideal do-

62. See infra Part V.
mestic law baseline as conceived by Congress, the treaty-makers are bound to consider them as imposing additional costs. Thus, even where a treaty serves a *bona fide* foreign policy purpose, it is unconstitutional for the President and Senate to consider its potential to reform domestic law as part of their reason for ratification.

There are, of course, many reasons why the United States might ratify human rights treaties. Because the reasons for concluding such treaties will always be multiple, and because some of those reasons will almost certainly be *bona fide* foreign policy reasons, the broad view, as a practical matter, places only minimal constraints on the President and Senate. The strict conception, however, has more potential bite because of its insistence that only *bona fide* foreign policy reasons be considered in favor of a treaty. That renders all other reasons impermissible even when considered in combination with clearly valid reasons. I divide the types of reasons for concluding human rights treaties into the following four categories: those pertaining to traditional foreign policy interests, those pertaining to human rights practices abroad, those pertaining to human rights practices at home, and those pertaining to global community and global process values. Admittedly, it is somewhat artificial to categorize the various reasons in this way. In practice, reasons may fall into more than one category or defy my categories all together. I offer my scheme to help clarify analysis, leaving aside complications that may arise in practical application. As to each of the reasons postulated, I consider the role they may legitimately play, under both the strict and broad conceptions, in the deliberations of the President and Senate as they consider whether to conclude a human rights treaty.

**B. Traditional Foreign Policy Reasons for Concluding Human Rights Treaties**

There are many traditional foreign policy reasons for entering human rights treaties that are entirely unproblematic from the perspective of both conceptions of the treaty power. Without attempting to offer an exhaustive list or to take account of the specifics of the various human rights treaties to which the United States might become a party, they include arguments of the following kinds: the United States has compelling national interests in promoting respect for human rights standards by other nations because nations that violate fundamental human rights tend to be more aggressive externally and unstable internally and, thus, undermine international peace and security; because the humanitarian and economic disasters that frequently accompany regimes that systematically violate human rights
have, and will continue, to force us to make substantial financial and even military commitments when conflicts erupt; because regimes of this sort do not make good trading partners and disrupt the flow of international commerce; and because our international standing and reputation, and consequently our capacity to influence other states on a range of foreign policy concerns (e.g., the global anti-terrorism coalition), may depend in part on our willingness to show moral leadership on global human rights. Furthermore, participating in human rights treaty regimes is an important means of promoting respect for human rights standards because ratification affords the United States access to the procedural mechanisms created by the treaty to encourage respect for human rights in other countries (and enables the United States to have greater influence over the direction in which human rights standards develop); strengthens the conventions by making participation more universal and by lending them the pre-eminent influence of the United States; and encourages other states to join. Perhaps most importantly, ratifying human rights treaties bolsters the reputation and influence of the United States in promoting human rights and in other fields by demonstrating its good faith and willingness to undertake reciprocal obligations and its respect for the views of other nations.

My aim here is not to assess the force of these and similar arguments in fact, but only to consider whether, in form, they offer bona fide foreign policy reasons for ratifying human rights treaties. It seems evident that they do under both conceptions of the treaty power. The purpose of concluding a human rights treaty, and thereby undertaking domestic human rights obligations, would be to promote human rights abroad and thus U.S. national aims, inter alia, in global stability and international commerce and, further, to bolster the nation’s reputation and ability to influence events more generally. These are undoubtedly the kind of foreign policy reasons that pass scrutiny under either conception. Nor does the mere fact that the treaty alters existing laws—even state laws in areas that are within the exclusive sphere of state legislative authority—pose a constitutional obstacle. Although, under the strict conception, alterations in domestic laws will have to be counted as a cost in the overall decision calculus; there is no question that the treaty-makers may override federal and state laws as a means to achieving important national ends.

It is also worth noting how the strict conception tends to support the constitutionality, although not the wisdom, of the so-called reservations, understandings, and declarations (RUDs) that the Senate has typically attached as conditions to its consent to human rights treaties.
The evident aim of the RUDs is to minimize—indeed, to eliminate altogether—any impact that human rights treaties will have on existing domestic law. The RUDs accomplish this goal in three ways. First, they make substantive reservations to conform the treaty to existing domestic law, for example, in regard to the death penalty or the treatment of juvenile offenders. Second, they explicitly declare that the treaty is non-self-executing and thus cannot be relied upon in U.S. courts as the basis for substantive rights. Finally, they include a federalism understanding that seeks, somewhat ambiguously, to disclaim federal responsibility for implementing treaty norms in areas ordinarily subject to state legislative authority. Of course, nothing in the Constitution requires the RUDs. Nevertheless, their evident aim is to lower the cost of the treaties as far as possible while still achieving foreign policy benefits from ratification. It is surely true that the RUDs go a long way toward undermining the traditional foreign policy benefits that the United States is likely to receive, and, for this reason, they are in my view quite unwise, even putting aside the wider damage they may do by making the United States appear hypocritical. Nevertheless, from within the strict conception, at least, they are efforts to achieve the legitimate foreign policy benefits of the treaties, while minimizing what that conception insists must be viewed as costs in terms of altering existing domestic law. 63

C. Reasons Pertaining to Human Rights Practices Abroad: Cosmopolitan Moral Concern

Another potentially important reason for concluding human rights treaties is rooted in a kind of cosmopolitanism—call it cosmopolitanism of moral concern. Nothing in the Constitution prevents the national government, as a general matter, from pursuing an enlightened foreign policy based, in part, on a concern for the welfare of others not part of the national political community and more broadly for the realization of global justice. For example, appropriations for foreign aid, even if motivated only by a concern for the well-being of others, still serve in the language of Article I the “general [w]elfare” 64 and are perfectly constitutional. Likewise, exercises of the war power are constitutional even when undertaken solely to uphold the rights of people

63. For a critical account of the RUDs, see Louis Henkin, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 Am. J. Int'l L. 341 (1995). For a sympathetic account, see Curtis A. Bradley & Jack L. Goldsmith, Treaties, Human Rights, and Conditional Consent, 149 U. Pa. L. Rev. 399 (2000). For citations to the many articles criticizing the RUDs and in some cases calling into question their constitutionality, see Bradley & Goldsmith, supra, at 401 n.4.

64. U.S. Const. art. I. § 8, cl. 1.
Nor is there anything suspect under either conception of the treaty power about the President and Senate seeking, through the treaty mechanism, to advance the moral aspirations of the nation in ensuring respect for the fundamental rights of persons throughout the globe.

It is worth considering more closely how the strict conception of the treaty power would apply to this kind of reason for concluding human rights treaties. Begin with the most favorable case from the U.S. perspective, a human rights treaty with standards entirely in accord with existing federal law. The cost of such a treaty, as conceived by the strict conception, would be low. Domestic law would be unaffected and the treaty would, from the perspective of the United States, amount to an exportation of domestic laws and values to other parts of the world. Since moral concern for the welfare of others is a legitimate end for the President and Senate to pursue, the treaty would fall squarely within the scope of the treaty power: the President and Senate would be agreeing to make (low cost) international commitments for the purpose of securing reciprocal commitments by other states and those latter commitments, in turn, would further the foreign policy goal of helping to secure the well-being of foreign nationals. The President and Senate would not be seeking in any respect to regulate domestically beyond whatever was necessary (in this case very little) to secure the desired cooperation of other states.

Now consider a slightly more mixed case. Imagine that the same treaty contains provisions which conflict with existing law, and suppose further that the President and Senate decide, nevertheless, to ratify the treaty. Although they would have preferred that the treaty provisions be entirely consistent with existing law and view any divergence as a cost, they believe that overall the treaty will have a significant impact on promoting compliance with human rights standards by other nations and thus serve important moral goals of the United States. In their view, the gains to those moral aims outweigh the

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65. For example, the constitutional status of President Bush's intervention in Somalia in no way hinged on whether he explained his reason for intervening as purely humanitarian or also invoked a strategic or economic interest of the United States that was threatened by the chaotic situation in the country. Thus, the lives of U.S. soldiers can constitutionally be put at risk to advance the moral goals of the nation.

66. The only cost would be that the treaty would limit future flexibility, in effect locking in existing standards. In most cases, that would probably be a relatively low cost.

67. The President and Senate may believe that there is no benefit to the nation's moral interest in the treatment of foreign nationals in those provisions which conflict with domestic law or, alternatively, that there may be some benefit because the provisions, though not optimal, are second best from a moral point of view. Either way, they would have preferred that the treaty incorporate equivalents to domestic standards.
costs of the treaty in imposing domestic standards inconsistent in some respects with existing law.

Even under the strict conception, these reasons for ratifying the treaty are perfectly proper. The only difference from the first version, in fact, is that the cost of the treaty is higher because some provisions conflict with domestic law. As a result, the treaty will impose less than optimal domestic legal norms from the perspective of the strict conception. To be sure, the President and Senate will have to evaluate how high this cost is and then weigh that cost against the benefits to be gained from the commitments of other nations. Under the strict conception, as we have seen, they must weigh the cost by reference to what they believe Congress's judgment would be if it were asked. Although anticipating Congress's preferences will certainly be difficult and may involve highly speculative judgments, the strict conception obliges the treaty-makers to do their best whenever a treaty requires a change in domestic law. Assuming that they comply with this obligation, the President and Senate will be, as required by the strict conception, making international commitments affecting domestic law purely as a means of securing beneficial commitments by other nations.

It is possible to imagine a more difficult case from the perspective of the strict conception, although one which is unlikely to arise often in practice. Suppose, as before, that the treaty conflicts in some respects with existing federal law. Now, however, suppose that the President and Senate, rather than viewing the conflicting provisions in a negative light, instead believe the conflicting provisions are superior from a moral perspective to the corresponding provisions in domestic law. To simplify, imagine that the treaty has only one provision, a provision prohibiting discrimination on the basis of sexual orientation and stipulate further that this provision is in conflict with federal law, which permits such discrimination. Although strained as a practical matter, suppose still further that the President and two-thirds of the Senate believe that discrimination on the basis of sexual orientation is a violation of fundamental human rights but a majority in the House disagrees. Believing that it is in the moral interests of the nation to discourage sexual orientation discrimination on a global basis, the President and Senate decide to ratify the treaty. The unavoidable consequence, of course, is that federal law is overridden. Although the President and Senate recognize that altering domestic law is a cost to be weighed in accordance with how Congress would weigh it, they nevertheless conclude that the cost is outweighed by the moral benefits of a world (outside the United States) free from such discrimination.
This result certainly may seem peculiar and, were it ever to occur in practice, it would undoubtedly raise suspicions in the minds of opponents. Given that the treaty-makers embraced the substantive norm of non-discrimination, could they have properly weighed the cost of imposing a contrary domestic standard? Suspicions, however, do not make the treaty unconstitutional, and so long as the President and Senate in good faith weigh the cost as Congress would have weighed it, the treaty is constitutional even under the strict conception.

D. Reasons Pertaining to the Reform of Human Rights Practices at Home

1. Human Rights Treaties as Good Norms

As we have seen, under both conceptions, traditional foreign policy and cosmopolitan moral reasons for entering human rights treaties clearly qualify as foreign policy reasons. Equally as clear, there are classes of reasons that do not qualify as foreign policy reasons under either conception. Nevertheless, it is in regard to these reasons that the sharpest differences between the strict and broad conceptions emerge.

I have in mind reasons of the following type: The United States should ratify human rights treaties (or some human rights treaties) because they provide better—that is, more just—norms than current domestic law provides. This is a straightforward reason for importing international norms for purposes of domestic reform, but it does not qualify under either conception as a foreign policy reason for concluding a treaty. Foreign policy reasons involve an element of international cooperation. A reason for making a treaty is a foreign policy reason only if it seeks to induce the cooperation of other nations in advancing our national aims. If the sole reason for entering into a human rights treaty were that the United States and its citizens would be better off being regulated domestically in accordance with the norms specified in the treaty than in accordance with existing law, then there would be no foreign policy reason for ratification. Were the President and Senate to do so, they would be acting unconstitutionally.

The analysis is the same for other reasons of a similar type: it might be claimed, for example, that the fact that human rights treaties have been widely endorsed by states, inter-governmental, supranational and non-governmental organizations, and persons all over the world is strong epistemic evidence that the norms they contain are true or just-

68. For the difficulty of making that assessment, see supra note 53 and accompanying text.
tified from a moral point of view. Given this widespread endorse-
ment, it might then be claimed that inconsistent domestic norms are
false or not justified (or are less justified) from a moral point of view,
and therefore, that the United States should ratify the treaty. Under
both conceptions of the treaty power, however, the answer is the
same. Whether the treaty-makers endorse norms for domestic appli-
cation because upon independent inquiry they have concluded that
they are correct or because they hold an epistemic theory under which
defERENCE to the views of others in certain circumstances is warranted,
they are not acting for foreign policy reasons.

The two conceptions of the treaty power, however, disagree in this
crucial respect: Under the broad view, so long as there is a significant
foreign policy reason for ratification, the President and Senate are
free to consider all relevant policy considerations, including the argu-
ment that ratification will result in improved human rights practices at
home. There is no prohibition on counting the domestic law reforms
that the treaty would affect as a further affirmative reason for ratifica-
tion. In contrast, under the strict conception, the desire to reform do-
mestic human rights practices is never a permissible reason for
favoring ratification, even when considered in combination with other
genuine foreign policy reasons. It may well be true that some human
rights treaties are, all things considered, superior from the perspective
of justice to existing domestic law or that a decent respect for the
opinions of humankind compels us to so conclude. Nevertheless,
under the strict conception, that is a reason—maybe a powerful rea-
son—for changing domestic law, either by constitutional amendment
or through legislation, but not for concluding a treaty.

To the charge that this construction of the treaty power makes the
Constitution unduly parochial, the reply from the strict conception
would be that the Constitution in no way limits anyone from relying
upon a cosmopolitan epistemic moral theory in advocating domestic
legal changes. It is perfectly appropriate to seek to amend the Consti-
tution or to adopt laws that implement the substantive provisions of
human rights treaties. Perhaps, a decent respect requires us to do so.
Certainly, nothing in the Constitution or laws imposes an impediment
to our showing, as our ancestors did over two hundred years ago, a
decent respect for the opinions of others. Treaties, however, are an
inappropriate mechanism for achieving these ends. The sole function
of the treaty is to obtain international cooperation through the mak-
ing of binding promises.
2. Systematic Democratic Failures and Minority Rights

Notwithstanding what has been said thus far, it is not clear that all reasons having to do with the reform of domestic rights practices fail to qualify as genuine foreign policy reasons under the two conceptions. Consider the following reason, which focuses on the problem in democratic systems of majoritarian excesses and minority rights. The United States, it might be argued, should ratify certain human rights treaties because they constitute a precommitment strategy or hedge against breakdowns in democratic processes that lead to violations of minority rights. Of course, the United States already has a number of institutions in place to guard against democratic breakdowns of this kind, not the least of which is the practice of judicial review. Nevertheless, given certain structural features of democratic systems, even these institutions are not fully adequate to prevent systematic violations. This inadequacy might be most obviously evident in times of perceived national emergency. At those moments, courts, for example, are unlikely to challenge legislative and executive actions even if those actions unjustifiably restrict rights—consider in this regard Korematsu v. United States69 or President George W. Bush’s proposed use of military tribunals to try persons suspected of involvement in international terrorism. The problem, however, is arguably much wider. Like other domestic political institutions, courts are not immune from the prejudices and biases pervasive in society, and so even with the best intentions, they will sometimes fail to protect the rights of minorities adequately. Here is where human rights treaties fit in: They establish international mechanisms for monitoring national compliance with basic human rights norms and for applying pressure to nations when they fail to live up to their basic human rights commitments.70 It is the recognition that for structural reasons domestic institutions will sometimes fail to uphold the rights of minorities even when, in accordance with the nation’s own fundamental values, they should, and the expectation that the institutional regime created by a

69. 323 U.S. 214 (1944).
70. The monitoring mechanisms might be of many different sorts, as we see in existing human rights treaty regimes. Most expansively, they could include an international court with the power to interpret and apply the treaty authoritatively. For example, the European Court of Human Rights has this power under the European Convention on Human Rights. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.
human rights treaty will help to correct these errors, that provides the justification for ratifying the treaty.\textsuperscript{71}

It adds to the initial plausibility of this argument to note that recent political science research suggests similar forms of reasoning provide the best explanation for why many democratic states, in fact, choose to ratify human rights treaties. The states most prone to ratify human rights treaties are less stable and newly emerging democracies. These states perceive human rights treaty regimes, and the institutional mechanisms that they create, as a means for helping to lock-in democratic rights against the possibility of future attack from the left or the right.\textsuperscript{72} To be sure, the concerns of these regimes are of a quite different, and more dramatic, sort than the concerns that underlie the minority rights argument as I have constructed it. Both, however, are concerned about the dangers of internal governmental failures leading to the violations of human rights and both seek the support of international human rights institutions to lessen the dangers.\textsuperscript{73}

As so understood, does this view offer a genuine foreign policy reason for concluding a human rights treaty? The answer, I think, is arguable. On the negative side, it would be emphasized that the very purpose of ratifying the treaty would be to lock-in human rights standards that would, or at least might, override existing or future domestic laws. From this perspective, such a reason for ratification would amount to nothing more than using the treaty form to accomplish purely domestic legislative ends. Indeed, the only element of international cooperation involved would be obtaining the aid of foreign nations in enforcing the very domestic law norms that the treaty imposes. Such a reason for ratifying a human rights treaty, it might be argued, would no more qualify as a foreign policy reason than would ratifying a treaty because it imposes desirable antitrust law norms and provides for their enforcement through an international process. Even

\textsuperscript{71} For an approach to human rights treaties that is rooted in a similar argument, see Eyal Benvenisti, \textit{Margin of Appreciation, Consensus, and Universal Standards}, 31 N.Y.U. J. INT'L L. & Pol. 843 (1999).

\textsuperscript{72} For this view, see Andrew Moravcsik, \textit{The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe}, 54 INT'L Org. 217 (2000).

\textsuperscript{73} For another example, consider the guaranty treaties concluded during the early part of the twentieth century that the United States entered into with Central American countries. These treaties provided mutual guarantees against governments coming to power through unconstitutional means. \textit{See, e.g.}, Karsten Nowrot & Emily W. Schabacker, \textit{The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone}, 14 AM. U. INT'L L. REV. 321. 394-95 (1998). Likewise, the Santiago Commitment to Democracy of the OAS and subsequent amendments to the OAS Charter are contemporary versions of the same approach. \textit{See, e.g.}, Ellen L. Lutz, \textit{Strengthening Core Values in the Americas: Regional Commitment to Democracy and the Protection of Human Rights}, 19 HOUS. J. INT'L L. 643 (1997).
if obtaining international enforcement of domestic law might be a foreign policy purpose in some circumstances, altering undesirable domestic law norms via treaty is not. It is an illegitimate bootstrap to claim that adding international enforcement to a treaty concluded to reform domestic law converts the desire to reform domestic law into a genuine foreign policy purpose.

The contrary view would begin by emphasizing the element of genuine international cooperation such a treaty would involve. An important national aim—the achievement of domestic justice—cannot be fully realized, it would be argued, without the help of other nations. What is needed is the creation of an international body with authority to monitor and enforce compliance with a set of human rights standards, and this task in turn can only be accomplished through the making of mutually binding promises. The United States would commit itself to aid in the creation and support of an international body charged with monitoring the compliance of member nations with the treaty’s human rights standards. In return, other nations would agree to help create and support the body as well and to enable it to monitor U.S. compliance. Far from superfluous, the treaty would be essential to the effectiveness of this scheme. It does not simply provide an excuse for the President and Senate to make domestic law, but rather enables the United States to obtain the cooperation of other nations in ensuring that domestic justice is realized.

It might be further argued that, in any case, the aim to prevent violations of minority rights at home does qualify as a genuine foreign policy reason in this limited context. First, it would be wrong to characterize the argument for ratification as resting upon the claim that domestic law reform in general qualifies as a foreign policy purpose. Rather, it qualifies only in a particular context involving a uniquely international component. The argument for ratification is that domestic institutions have structural characteristics that predictably cause them to fail to respect minority rights and that this systemic failing can most effectively be mitigated by establishing human rights standards at the international law level. It is the necessity for external oversight, created by structural failings that cannot be corrected at the domestic level alone, that justifies the treaty, and since only the treaty-makers, not Congress, are in a position to seek a solution to the minority rights problem at the international level, for them to do so is precisely to seek to advance a foreign policy purpose. Second, it might be claimed that it is a mistake to characterize the treaty-makers as seeking to impose domestic standards that conflict with the ideal domestic law baseline. Although it is true that the treaty standards may conflict
with existing or future legislative acts, the President and Senate would be acting on the supposition that those conflicting laws are the outcome of a flawed process and are not representative of the democratic will properly conceived. They would be acting, in this sense, to ensure the better realization of the democratic will than may otherwise be possible because of inherent flaws in the domestic democratic processes.

It is noteworthy that in the past there have been many occasions when treaties have offered potential solutions for systemic failures in the law-making process. Tariff treaties, for example, were thought to offer the advantage of suppressing domestic protectionist log-rolling that impeded Congress from setting the most advantageous tariff levels through domestic legislation. Similar considerations underlie the so-called "fast track" procedure for approving international trade agreements.74 More recently, Professors John McGinnis and Mark Movsesian have argued that one important reason in support of participation in the World Trade Organization is that the General Agreement on Tarriffs and Trade (GATT) provide incentives that empower public-regarding, and disempower rent-seeking, domestic interest groups and, thus, result in better domestic policy.75 President Roosevelt structured Chapter VII of the United Nations Charter, especially Article 43, to make it possible to avoid the necessity for obtaining congressional authorization for the use of U.S. troops every time the Security Council mandated an enforcement action. Past experience had shown the grave difficulties of obtaining congressional support for the use of force even in the most compelling circumstances.76

I will not attempt to resolve the question whether a human rights treaty aimed at preventing systemic violations of minority rights at home can ever qualify as a foreign policy purpose. For now, I simply want to suggest that there are arguments on both sides. It seems likely that the conflicting normative underpinnings for the strict and broad conceptions will lead in different directions in resolving this question as well. If one believes that there is a strong constitutional preference for domestic law to be determined only by the Congress and never by the President and Senate through the treaty process,

then the negative view will likely seem more attractive. On the other hand, if one concurs with the less rigid separation of powers approach of the broad conception, then the affirmative view may well seem more persuasive. In any case, if the affirmative view were correct, it would mean that the treaty-makers would be acting constitutionally in concluding a treaty for the purpose of protecting minority rights under either conception of the treaty power. If not, considerations of this kind could still legitimately be taken into account under the broad conception so long as there was also a significant foreign policy reason for concluding the treaty. In contrast, such considerations would be impermissible altogether under the strict conception.

E. Reasons Rooted in Global Community and Global Process Values

I now briefly consider reasons that are highly speculative from a political perspective but, nevertheless, may have force at some point, if not today. These reasons are rooted alternately in a conception of a global moral community and in a conception of a global legislative process.

1. The Idea of Mutual Commitment and Moral Community

Another reason for concluding human rights treaties is an application on the global level of the idea of mutual commitment and moral community. The idea would be something like this: Human rights treaties are like marriage vows, a kind of ritual of mutual commitment for the purpose of forming a larger moral community. Ratifying the treaty would thus serve the spiritual interests of the nation in being recognized as a member of the moral community of humankind. Like the spiritual community of marriage, the moral community of humankind, it might be claimed, has deep intrinsic value. Simply incorporating international standards into domestic law through legislation, moreover, would be insufficient. Recognition as a full member in good standing would depend upon the willingness to make a mutual commitment in the form of a treaty. From the perspective of the global community, ratifying the treaty evidences the depth of a nation's commitment as well as its willingness to cede the wider community some supervisory authority over domestic practices to ensure, among other things, uniformity in the interpretation of global norms. Under this approach, even though the treaty might contain standards that diverge from domestic law in certain respects, the aim of ratification would not be to reform domestic practices but to obtain membership. Admittedly, however, like wedding vows, the standards the
treaties impose, even when inconsistent with domestic law, might ultimately be seen more as grounds for celebration than for regret.

Would such an argument for concluding a human rights treaty qualify as a foreign policy reason? The answer would appear to be yes under both conceptions. Spiritual interests are as entitled to recognition as other national interests, and the aim of ratification would be to obtain the cooperation of other states, here in mutually recognizing the United States as a member in good standing of a larger moral community. To be sure, the wider the divergence between domestic laws and values and the treaty norms, the less plausible the idea of a moral community would be. This suggests the importance of one of the fundamental objects of human rights treaties. Human rights treaties are designed, at least in part, to provoke widespread debate and discussion in each nation and hopefully to set in motion a learning process through which domestic groups and persons come widely to embrace the international standards set forth in the treaty. If the process works as hoped, the next step may come naturally: a desire to enter into the global moral community envisioned by the treaty by signaling the nation's commitment to widely shared human rights norms.

2. Recognition of Global Process Values

A related reason for concluding a human rights treaty might be as follows: The United States should ratify a human rights convention because the procedures involved in its drafting and adoption not only demonstrate a widespread global consensus, but also constitute the moral equivalent of a global legislative process. Just as a citizen of a democratic state has a moral duty to comply with the laws adopted through legitimate law-making processes, so too does a state have a moral duty to ratify a treaty that has achieved a certain degree of support in the international community (or perhaps, alternatively, in the community of liberal democratic states). Thus, ratification would be justified because of the moral interests of the nation in carrying out its duties as a member of the global community participating in a global legislative process. This justification gives one construction to the Jeffersonian ideal of paying decent respect to the opinions of mankind.

This reason, too, seems to qualify as a legitimate foreign policy reason under both conceptions. The discharge of the nation's moral duties is certainly a legitimate national interest, and where that can only be accomplished by ratifying a treaty, doing so surely serves a foreign policy purpose. Consider, for example, a failure to provide adequate protection for the safety of the citizens of another nation. Suppose
further that in seeking compensation for the wrongful act, the other nation proposes a treaty that specifies the manner in which the United States will in the future protect that nation's citizens when in the United States. Even if the only reason for making the treaty from the perspective of the United States is to discharge its moral obligation to compensate for its wrongful conduct, there can be no doubt that the treaty serves a legitimate foreign policy purpose and would be constitutional under either conception of the treaty power. The same applies to a human rights treaty. Whether the nation is under a moral duty to ratify is a (controversial) question for the treaty-makers to decide. If they believe that there is such a duty, then their acting to carry out that duty serves a foreign policy purpose. Paying decent respect to the opinions of mankind is a foreign policy purpose.

V. THE BEARING OF THE TWO CONCEPTIONS ON THE CONSTITUTIONALITY OF THE ACTUAL HUMAN RIGHTS TREATY PRACTICES OF THE UNITED STATES

We have now gone through a lengthy exercise in considering the kinds of reasons for making human rights treaties that qualify as legitimate foreign policy reasons under the two conceptions. We have also seen how under the broad conception, so long as there is a significant foreign policy reason for concluding a treaty, the President and Senate may take into account any consideration that they believe is relevant, including non-foreign policy reasons. There are, of course, many important foreign policy reasons for concluding human rights treaties, and it is almost inconceivable that a case would arise where there was not a substantial foreign policy reason among the mix of reasons motivating the President and Senate to ratify. As a result, the broad conception, in practice, imposes only very limited constraints on the conclusion of human rights treaties. Surely, the actions of the President and Senate in relation to human rights treaties have never breached those limited constraints.

Does the conduct of the President and Senate appear in a different light under the strict conception? Emphatically, the answer is no. The theoretical constraints of the strict view are certainly stronger. The President and Senate may only consider foreign policy reasons in favor of ratification; all other reasons are impermissible. Yet, given a combination of the scope and importance of the reasons that qualify, longstanding and entrenched U.S. political traditions, and the two-thirds rule, there is little reason to fear that the President and Senate will disregard even the more exacting requirements of the strict conception. Indeed, all the historical evidence is to the contrary.
I will not attempt a comprehensive survey of the historic attitudes of presidents and senates towards human rights treaties. Their traditional reluctance to ratify human rights treaties is well known, as is their persistent determination to preserve existing domestic law and practices from being overridden even by those human rights treaties that they have eventually decided to ratify.\textsuperscript{77} It is worthwhile to consider briefly, however, the attitudes expressed by the President and Senate when they did finally approve the International Covenant on Civil and Political Rights, probably the single most important human rights treaty to which the United States has become a party. What emerges clearly is that the reasons which impelled them to ratify fell squarely within the categories of traditional foreign policy and cosmopolitan moral reasons—reasons which unambiguously qualify as foreign policy reasons under either conception of the treaty power. Far from seeking to reform domestic human rights practices, moreover, they made absolutely clear in word and in deed that they viewed any respects in which the treaty might override domestic law as costs that were to be avoided. These costs were, in fact, assiduously avoided. Furthermore, the other kinds of reasons which I have postulated—the concern to prevent majoritarian violations of minority rights, to signal a commitment to a global moral community, or to discharge moral duties arising from a global legislative process—were so exotic from a political point of view as not to merit even a mention.

Thus, for example, in a 1991 letter to the Senate written in the immediate aftermath of the Cold War, President George Bush urged ratification of the Covenant in order to aid U.S. efforts to promote democracy and the rule of law abroad, especially in the Soviet Union and Eastern Europe.\textsuperscript{78} Emphasizing the importance of “ratification of the [Covenant] at this moment in history,” he argued that ratification “would underscore our natural commitment to fostering democratic values” and be part of an effort “to assist those in other countries who are now working to make the transition to pluralist democracies.”\textsuperscript{79} It would also “strengthen our ability to influence the development of appropriate human rights principles in the international community.”\textsuperscript{80} These reasons clearly sound in a combination of traditional foreign policy and cosmopolitan moral reasons. Likewise, the report

\textsuperscript{77} See Kaufman, supra note 4; Tananbaum, supra note 4.


\textsuperscript{79} Id. reprinted in 31 I.L.M. 648, 660 (1992).

\textsuperscript{80} Id. reprinted in 31 I.L.M. 648, 660 (1992).
of the Senate Foreign Relations Committee recommending approval amplifies on the same themes. According to the Committee,

In view of the leading role that the United States plays in the international struggle for human rights, the absence of U.S. ratification of the Covenant is conspicuous and, in the view of many, hypocritical. The Committee believes that ratification will remove doubts about the seriousness of the U.S. commitment to human rights and strengthen the impact of U.S. efforts in the human rights field.81

Like President Bush, the Committee also explicitly invoked the end of the Cold War and the importance of encouraging the ongoing transitions to democracy in the Soviet Union and the former Eastern Bloc, underscoring the urgency of “ratifying the Covenant at this time.”82

Perhaps even more revealing was the Committee’s attitude toward domestic reform as a reason for ratification. It noted that, “some private groups and individuals in the human rights field” had argued “that U.S. law should be brought into conformance with international human rights standards in those areas where the international standards are superior.”83 The Committee agreed that there might well be areas in which “it may be appropriate and necessary to question whether changes in U.S. law should be made to bring the United States into full compliance at the international level.”84 Nevertheless, the Committee’s response was unequivocal: “[T]he Committee anticipates that changes in U.S. law in these areas will occur through the normal legislative process.”85 In pursuance of this view, moreover, the Committee proceeded to endorse a lengthy series of RUDs, recommended by the President and ultimately adopted by the Senate, the purpose of which was to ensure that ratification of the Covenant would not make a single change in U.S. domestic law.86 In addition, the RUDs included an explicit declaration making the Covenant non-self-executing as an insurance policy against any unanticipated judicial interpretation of Covenant language that might result in the overriding of an existing domestic law.87

Of course, as we have seen, nothing in either the strict or broad construction of the treaty power required the President and Senate to ensure that the Covenant did not override domestic law. Doing so clearly prejudiced the foreign policy goals of ratification, indeed, ar-

guably undermined them altogether. Moreover, the Committee itself expressed sympathy with the substance of domestic law reforms that the treaty would have effected. Under these circumstances, the treaty-maker’s insistence on the RUDs is a dramatic demonstration of the degree to which the President and Senate are committed to avoiding the use of treaties as a mechanism to reform domestic law, not only rejecting domestic reform as an affirmative reason for ratification, but also declining to permit the overriding of domestic law even when it is a necessary cost to achieve important foreign policy benefits, and the treaty standards accord with their own substantive views.

Given this history and the powerful safeguard of the two-thirds rule, it is difficult to understand the persistence of worries about the constitutionality of human rights treaties. At the height of the Bricker Amendment controversy, the State Department famously assured opponents that "[t]reaties are not to be used as a device for the purpose of effecting internal social changes or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern." Whether this statement reflected an endorsement of the strict or broad conception of the treaty power makes little difference here. Nothing in the conduct of presidents and senators since then has given opponents a basis for legitimate concern that the constraints imposed by either conception have been or will soon be violated. The question of whether to ratify human rights treaties is a political question committed to the discretion of the President and Senate. Since only core foreign policy reasons are likely to play any substantial role in deliberations about whether to ratify or not, and since overriding domestic law will be considered a heavy cost, there is simply no constitutional issue to be addressed. Continued objections on constitutional grounds can only raise the suspicion that they are politically motivated attacks assuming the form of constitutional arguments.

VI. Conclusion

The main implications of my analysis can be summarized briefly. An examination of the function of treaty-making within the constitutional structure yields a definition of the scope of the treaty power: A treaty falls within the scope of the treaty power if it serves a substantial foreign policy purpose, which means that concluding the treaty will secure cooperative activities by other nations that advance the

legitimate aims and aspirations of the United States. There are no categorical subject matter limitations on the scope of the treaty power, and the division of legislative jurisdiction between the federal and state governments implies none. Under the broad conception, a treaty falls within the treaty power so long as it serves a substantial foreign policy purpose, but the treaty-makers, in deciding whether to ratify, may take into account not only foreign policy benefits, but any other non-foreign policy benefits that the treaty may achieve. In contrast, under the strict conception, the President and Senate may only consider foreign policy benefits; to consider any non-foreign policy benefits would be unconstitutional. Indeed, any respect in which the treaty imposes domestic law obligations that diverge from the ideal domestic law baseline must be counted as a cost, the magnitude of which is to be determined by reference to the judgment that Congress would make, if asked.

Applying these principles to human rights treaties yields a set of further implications. There are many foreign policy reasons for concluding human rights treaties. These include traditional foreign policy reasons arising from the military, economic, and political interests of the United States in its relations with other nations. They also include cosmopolitan moral concern to secure respect for the rights of persons living in other countries. Furthermore, beyond these core foreign policy reasons, there are several additional reasons of a more exotic character. Among these are the aim to further the spiritual aspirations of the nation to be a member in good standing of a global moral community and the aim to discharge the moral duties of the nation to comply with global legislative processes of which we are a part. A more arguable reason is to seek the aid of the international community in preventing violations of minority rights at home that result from systematic structural failures of the democratic system. There are also a number of non-foreign policy reasons for concluding human rights treaties. Most prominent is the view that the standards that they prescribe are superior to (some of) the existing standards in domestic law. This view might be supported by an independent moral evaluation of the relevant standards or might derive from an epistemic theory that holds that the processes for adoption of the treaty norms, and the widespread global consensus that they reflect, provide grounds for recognizing their superiority.

Under the broad conception, the President and Senate may not conclude a human rights treaty solely for non-foreign policy reasons. Rather, they must believe that the treaty would advance substantial foreign policy purposes. So long as there are substantial foreign policy
benefits, however, they are perfectly free to consider as well the non-
foreign policy benefits that will accrue from ratification. As a result,
in practice the broad conception places only minimal constraints on
the treaty-makers. Human rights treaties clearly further many impor-
tant foreign policy purposes, and it is virtually unimaginable that the
President and Senate would ever act solely to advance non-foreign
policy purposes. Under the broad conception, then, the United States
can almost always constitutionally enter into treaties at least in part to
import global human rights standards. In contrast, under the strict
conception the treaty-makers may only consider foreign policy, and
never non-foreign policy reasons, for concluding human rights trea-
ties. Any divergence from what Congress would judge to be the ideal
domestic law baseline must count as a cost and never a benefit of rati-
fication. For a combination of historical, ideological, and structural
reasons, the President and Senate in practice have not, and are not
likely anytime soon, to consider anything but core foreign policy rea-
sons for concluding human rights treaties. Indeed, they often go far
beyond the requirements of the strict conception and simply refuse to
permit any changes in domestic law to be effected by human rights
treaties, even at the expense of undermining important foreign policy
benefits that the treaties would otherwise achieve. Thus, whether one
applies the broad or strict conception, human rights treaties in actual
U.S. practice pose no real constitutional concerns. The debate over
their ratification is, or at least should be, purely political.

Yet, it would be a serious mistake to think that the differences be-
tween the two conceptions are unimportant. I began this Article by
asking two questions: What processes does the Constitution direct
Americans to pursue when they seek the incorporation of globally val-
iddated human rights norms into domestic law, and is the Constitution
cosmopolitan or parochial with respect to rights? We are now in a
position to see how the answers to these questions depend on whether
one holds the broad or strict conception of the treaty power and, fur-
ther, how the choice of conception may impact upon the character of
U.S. participation in global human rights regimes in the future. Whether changes in political views in the United States will make pos-
sible a more embracing attitude towards human rights treaties is itself
not entirely unrelated to whether the broad or strict conception
prevails in practice.

As we have seen, neither conception renders the Constitution paro-
chial in the sense that it makes U.S. participation in human rights con-
ventions per se unconstitutional. The broad conception, however, is
cosmopolitan in a much wider sense. Although international coopera-
tion remains a touchstone for invocation of the treaty power, the broad conception is entirely open to cosmopolitan perspectives. So long as there is a substantial foreign policy purpose, the President and Senate may legitimately assume the role of the moral conscience for the nation and, by ratifying the treaty, affirmatively embrace international standards even when they conflict with existing domestic practices. The Constitution thus permits citizens to look to the treaty-making process as a mechanism for importing international human rights norms into domestic law. In contrast, the strict conception is distinctly anti-cosmopolitan in this crucial respect. It flatly rejects the notion that treaties are appropriate mechanisms for improving domestic law and conceives the treaty process as solely concerned with foreign policy. Reform-minded citizens, it holds, should direct their efforts to the appropriate legislative body and refrain from pressing their schemes on the President and Senate.

The significance of the strict conception in this respect should not be underestimated. There is a deep and potentially irreconcilable tension between the constitutional process values that the strict conception claims underlie the treaty-making power and the cosmopolitan aims of human rights treaties. Consider the ideal that human rights treaties seek to embody: Although negotiated and ratified by states, they present themselves, as it were, as the view from nowhere giving voice to the demands of humanity upon its rulers. They constitute a model Bill of Rights with global pretensions, specifying the minimum rights persons hold merely in virtue of their status as human persons. All states, they implicitly demand, ought to ratify them because the standards they promulgate embody universal moral principles that apply to all countries irrespective of differences in culture, traditions, or social, political, and economic conditions. To be sure, this description presents an idealized picture, and human rights treaties have other less high-minded purposes as well. Still, the idealized portrait expresses the main ideal of the treaties. As one international tribunal, perhaps over stridently, has remarked:

Modern human rights treaties . . . are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States . . . . The Convention must be seen for what in reality it is; a multilateral legal instrument or framework enabling States to make binding
unilateral commitments not to violate the human rights of individuals within their jurisdiction.89

Viewed in this light, the cosmopolitan ideals of human rights treaties directly clash with the constitutional ideals of the strict conception. The core foreign policy reasons that the strict conception recognizes as legitimate—traditional military, economic, and political concerns and the desire to export the nation’s values—have little or nothing to do with the ideals that the treaty expresses—the demand for recognition of the truth of the treaty’s model code of rights even, or perhaps especially, insofar as it diverges from existing domestic law. Indeed, from the perspective of the treaty, these core foreign policy reasons are highly problematic as grounds for ratification—constituting either a real politque concern for the nation’s strategic or economic interests or a perhaps well-meaning effort to impose its own values on weaker, more dependent nations. It is undoubtedly this discontinuity between motivation and ideal in actual practice that has made U.S. attitudes towards human rights treaties appear to be so hypocritical to much of the rest of the world.90 It only makes matters worse to realize that, in the view of the strict conception, there are deep constitutional underpinnings for the apparent hypocrisy.

Human rights treaties, then, are constitutional. So long as the strict conception holds sway in practice, even if not in theory, however, their very claim to embody universally valid rights will likely persist in provoking constitutional objections and U.S. participation will be episodic, hesitant, and half-hearted at best. This suggests the urgent need to confront the merits of the strict conception and advance alternative conceptions. However modestly, I have attempted to begin that process today.

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